THE JAMMU & KASHMIR UNIVERSITY
LIBRARY.

DATE LOANED

Class No. [redacted] Book No. [redacted]

Vol. _____ Copy _____

Accession No. [redacted]

1480

JAMMU & KASHMIR UNIVERSITY
LIBRARY.

DATE LOAND

Class No. _____ Book No _____

Vol. _____ Copy _____

Accession No. _____

THE JAMMU & KASHMIR UNIVERSITY
LIBRARY.

DATE LOANED

Class No. [redacted] Book No. [redacted]

Vol. _____ Copy _____

Accession No. [redacted]

THE INDIAN DECISIONS, NEW SERIES.

BOMBAY, VOL. IX.

THE JAMMU & KASHMIR UNIVERSITY
LIBRARY.

DATE LOANED

Class No. [redacted] Book No. [redacted]

Vol. _____ Copy _____

Accession No. [redacted]

THE

INDIAN DECISIONS

(NEW SERIES)

Being a re-print of all the Decisions of the Privy Council on appeals from India and of the various High Courts and other Superior Courts in India reported both in the official and non-official reports from 1875

EDITED BY

THE LAWYER'S COMPANION OFFICE

TRICHINOPOLY AND MADRAS

DONATED
BY
SHRI AMAR N TH RAINA
(1910-1[illegible]
Former Advocate General,
Jammu and Kashmir.

BOMBAY, VOL. IX

(1893—1894)

I. L. R., 17 and 18 BOMBAY

PUBLISHED BY

T. A. VENKASAWMY ROW

AND

T. S. KRISHNASAWMY ROW

Proprietors The Law Printing House and The Lawyer's Companion Office
Trichinopoly and Madras

1915

[*Copyright Registered.*]

PRINTED AT
THE LAW PRINTING HOUSE
MOUNT ROAD, MADRAS.

ACC. NO 17833
Dated 16.1.84

JUDGES OF THE HIGH COURT OF BOMBAY DURING 1893-1894.

Chief Justices :

HON'BLE SIR. CHARLES SARGENT, KT.
„ MR. L. H. BAYLEY (*Ag.*).

Puisne Judges :

HON'BLE MR. L. H. BAYLEY.
„ „ JOHN JARDINE.
„ „ H. J. PARSONS.
„ „ K. T. TELANG.
„ „ C. F. FARRAN.
„ „ E. T. CANDY.
„ „ M. G. RANADE.
„ „ E. M. H. FULTON (*Ag.*).
„ „ M. H. STARLING (*Ag.*).

Advocate-General :

HON'BLE MR. B. LANG.

Legal Remembrancer :

HON'BLE MR. H. BATTY.

THE JAMMU & KASHMIR UNIVERSITY
LIBRARY.

DATE LOANED

Class No. [redacted] Book No. [redacted]

Vol. _____ Copy _____

Accession No. [redacted]

REFERENCE TABLE FOR FINDING THE PAGES OF THIS VOLUME WHERE THE CASES FROM THE ORIGINAL VOLUMES MAY BE FOUND.

Indian Law Reports, Bombay Series, Vol. XVII.

Pages of 17 Bom.	Pages of this volume	Pages of 17 Bom.	Pages of this volume.
1 (P.C.)	... 1	271 ...	... 177
6 ...	... 4	289 ...	... 188
14 ...	... 10	293 ...	... 191
23 ...	... 15	299 ...	... 195
29 ...	... 19	303 ...	... 198
32 ...	... 21	307 ...	... 200
35 ...	... 23	313 ...	... 204
41 ...	... 27	334 ...	... 217
42 ...	... 28	341 (P.C.)	... 222
45 ...	... 30	351 ...	... 228
49 ...	... 32	357 ...	... 232
54 ...	... 36	362 ...	... 235
56 ...	... 38	365 . .	... 238
62 ...	... 41	369 ...	... 240
94 ...	... 62	375 ...	... 244
100 ...	... 66	384 ...	... 250
106 (F.B.)	... 70	388 ...	... 253
114 ...	... 75	394 ...	... 256
127 ...	... 83	398 ...	... 259
129 ...	... 84	400 ...	... 260
146 ...	... 95	407 ...	... 265
154 ...	... 100	413 ...	... 269
162 ...	... 106	417 ...	... 272
164 ...	... 107	422 ...	... 275
169 ...	... 110	425 ...	... 277
173 ...	... 113	428 ...	... 279
184 ...	... 120	431 (P.C.)	... 281
197 ...	... 129	457 ...	... 297
224 ...	... 146	466 ...	... 303
227 ...	... 148	469 ...	... 305
228 ...	... 150	472 ...	... 307
230 ...	... 151	475 ...	... 309
232 ...	... 152	485 ...	... 315
235 ...	... 154	486 ...	... 316
260 (F.B.)	... 170	503 ...	... 327

I. L. R., BOMBAY SERIES, VOL. XVII—(*Concluded.*)

Pages of **17 Bom.**	Pages of this volume.	Pages of **17 Bom.**	Pages of this volume.
507 ...	... 329	662 ...	... 434
510 ...	... 331	672 ...	... 440
512 ...	... 333	674 ...	... 442
514 ...	... 335	677 ...	... 444
520 ...	... 338	681 ...	... 447
547 ...	... 358	684 (F.B.)	... 448
555 ...	... 363	686 ...	... 450
560 ...	... 366	687 (F.B.)	... 451
562 ...	... 368	689 ...	... 452
566 ...	... 370	690 (F B.)	... 453
570 ...	... 373	711 ...	... 466
573 ...	... 374	718 ...	... 471
581 ...	... 380	723 ...	... 474
584 ...	... 382	731 ...	... 479
600 ...	... 393	733 ...	... 481
620 N.	... 406	735 ...	... 482
624 (F.B.)	... 409	736 ...	... 483
626 ...	... 410	741 ...	... 487
629 ...	... 412	745 ...	... 489
631 ...	... 414	748 ...	... 491
637 ...	... 418	755 ...	... 496
645 ...	... 423	758 ...	... 498
648 ...	... 425	771 ...	... 506
657 ...	... 431	772 ...	... 507

Indian Law Reports, Bombay Series, Vol. XVIII.

Pages of **18 Bom.**	Pages of this volume.	Pages of **18 Bom.**	Pages of this volume.
1 ...	... 509	61 ...	... 549
7 ...	... 513	65 ..	... 552
13 ...	... 518	66 ...	... 553
19 ...	... 521	84 ...	... 564
22 ...	... 523	86 ...	... 566
35 ...	... 532	92 ...	... 570
37 ...	... 533	97 ...	... 573
40 ...	... 536	98 ...	... 574
43 ...	... 537	100 ...	... 575
46 ...	... 539	103 ...	... 577
48 ...	... 540	107 ...	.. 580
51 ...	... 542	109 ...	... 581
59 ...	... 548	110 ...	... 582

I. L. R., BOMBAY SERIES, VOL. XVIII—(*Continued*).

Pages of 18 Bom.	Pages of this volume.
115 ...	... 585
119 ...	... 588
133 ...	... 597
136 ...	... 599
141 ...	... 602
142 ...	... 603
144 ...	... 604
147 ...	... 607
152 ...	... 610
160 ...	... 615
175 (F.B.)	... 625
177 ...	... 626
184 ...	... 631
189 ...	... 634
197 ...	... 639
203 ...	... 643
205 ...	... 644
207 ...	... 646
209 ...	... 647
212 ...	... 649
216 ...	... 652
221 ...	... 655
224 ...	... 657
227 ...	... 659
231 ...	... 662
237 ...	... 666
241 ...	... 669
244 ...	... 671
250 ...	... 675
256 ...	... 679
260 ...	... 681
263 ...	... 684
283 ...	... 696
290 ...	... 701
294 (P.C.)	... 704
299 ...	... 707
315 ...	... 718
316 ...	... 719
319 ...	... 721
327 ...	... 726
332 ...	... 729
337 ...	... 733
342 ...	... 736
347 ...	... 739
348 ...	... 740
355 (F.B.)	... 745
364 ...	... 750
366 ...	... 751
368 ...	... 753
369 ...	... 754
372 ...	... 756
375 ...	... 758
377 (F.B.)	... 759
380 (F.B.)	... 761
382 ...	... 763
387 ...	... 766
389 ...	... 768
394 ...	... 771
396 ...	... 772
400 ...	... 775
401 ...	... 776
428 ...	... 794
429 ...	... 795
433 ...	... 798
440 ...	... 802
442 ...	... 803
444 ...	... 805
449 ...	... 808
452 ...	... 810
454 ...	... 812
456 ...	... 813
458 ...	... 815
464 ...	... 819
468 ...	... 822
474 ...	... 825
495 ...	... 839
505 ...	... 845
507 ...	... 847
513 ...	... 851
516 ...	... 853
520 ...	... 855
522 ...	... 857
525 ...	... 859
534 ...	... 865

I. L. R., BOMBAY SERIES, Vol. XVIII—*(Concluded)*.

Pages of 18 Bom.	Pages of this volume.
537 ...	... 867
542 ...	... 870
546 (F.B.)	... 873
547 ...	... 874
551 ...	... 876
570 ...	... 889
581 ...	... 896
586 ...	... 899
591 ...	... 903
594 ...	... 905
597 ...	... 907
603 ...	... 911
606 ...	... 913
608 ...	... 914
611 ...	... 916
614 ...	... 918
616 ...	... 920
631 ...	... 929
636 ...	... 933
670 ...	... 955
679 ...	... 962
684 ...	... 965
688 ...	... 968
690 ...	... 969
693 ...	... 971
696 ...	... 973
699 ...	... 975
702 ...	... 977
717 ...	... 987
721 ...	... 990
734 ...	... 998
737 ...	... 1000
739 ...	... 1002
745 ...	... 1006
748 ...	... 1008
749 ...	... 1009
751 ...	... 1010
752 ...	... 1011
755 ...	... 1013
758 ...	... 1015

Other Reports.

Pages of the Reports.	Pages of this volume.
Law Reports, Indian Appeals, Vol. XIX.	
170 ...	... 1
Law Reports, Indian Appeals, Vol. XX.	
1 ...	... 222
50 ...	... 281
Law Reports, Indian Appeals, Vol. XXI.	
13 ...	... 704
Saraswati's P.C. Judgments, Vol. VI.	
52 ...	... 281
238 ...	... 1
256 ...	... 222
396 ...	... 704
Indian Jurist, Vol. XVII.	
40 ...	... 222
100 ...	... 281
Chitty's Bombay Small Cause Court References.	
320 ...	... 84
336 ...	... 4
345 ...	... 100
363 ...	... 256
367 ...	... 297
375 ...	... 434
409 ...	... 889

INDIAN DECISIONS, NEW SERIES.

BOMBAY—Vol. IX.

NAMES OF CASES FOUND IN THIS VOLUME.

PAGE

A

Aba v. Parvatrao, 18 B 46 ... 539
Abaji Gangadhar v. Mukta, 18 B 688 ... 968
Abdul Gafur v. Nizamudin, 17 B 1 (P C) = 19 I A 170 = 6 Sar P C J 238 ... 1
Abu Bakar Saiba v. Venkataramana Vishveshar, 18 B 107 ... 580
Advocate General of Bombay v. Bai Punjabai, 18 B 551 ... 876
———————————v. Moulvi Abdul Kadur Jitaker, 18 B 401 ... 776
Ahmed bin Shaik Essa Khaliffa v. Shaik Essa bin Khaliffa, 17 B 657 ... 431
——————————————— v. ———————————————, 18 B 495 ... 839
Ajibal Narasinha Hegde v. Shirekoli Timapa Hegde, 17 B 629 ... 412
Alter Caufman v. Government of Bombay, 18 B 636 ... 933
Aminabi v. Sidu, 17 B 547 ... 358
Anandrao Vithal Varadi v. Budra Malla Purkha Dholla, 17 B 384 ... 250
Annaji Dattatraya v. Chandrabai, 17 B 503 ... 327
Antaji Keshav Tambe, *In re*, 18 B 670 ... 955
Appa v. Sadu, 18 B 752 ... 1011

B

Babaji v. Krishna, 18 B 372 ... 756
Baba Kakaji Shet Shimpi v. Nassaruddin, 18 B 103 ... 577
Badische Aniline and Soda Fabrik v. Maneckji Shapurji Katrak, 17 B 584 ... 382
Bai Chandaba v. Kuver Saheb Bapu Saheb, 18 B 464 ... 819
—— Harkor v. Bai Shangar, 18 B 375 ... 758
—— Kanku v. Shiva Toya, 17 B 624 (F B) ... 409
—— Ugri v. Patel Purshottam Bhudar, 17 B 400 ... 260
—— Varunda Lakshmi v. Bai Mane Gavri, 18 B 207 ... 646
Balaji Ganesh v. Sakharam Parashram Angal, 17 B 555 ... 363
Balmakundas Atmaram v. Moti Narayan, 18 B 444 ... 805
Balvant Ganesh v. Nana Chintamon, 18 B 209 ... 647
Bapu v. Mahadaji Vasudeo, 18 B 348 ... 740
Barot Parshotam Kalu v. Bai Muli, 18 B 749 ... 1009
Baya Bai v. Sarasvatibai, 17 B 686 ... 450
Bhagvan v. Kesur Kuverji, 17 B 428 ... 279
Bhagvantrai Munshi v. Mehta Bajurao, 18 B 40 ... 536
Bhaskar Purshotam v. Sarasvatibai, 17 B 486 ... 316
Bhasker Tatya Shet v. Vijalal Nathu, 17 B 512 ... 333
Bhimbhai v. Ishwardas Jugjivan Das, 18 B 152 ... 610
Bhogilal v. Amritlal, 17 B 173 ... 113
Bhukhandas Vijbhukandas v. Lallubhai Kashidas, 17 B 562 ... 368
Bombay, Baroda and Central India Railway Company v. Jacob Elias Sassoon, 18 B 231 ... 662
———, Burmah Trading Corporation, Limited v. Yorke Smith, 17 B 197 ... 129
Byramji Jehangir Lamna v. Ratnagar Jamsetji Ratnagar, 18 B 1 ... 509

PAGE

C

Callianji Harjivan v. Narsi Tricum, 18 B 702 ... 977
Chandra Naik v. Bahina Bai, 17 B 362 ... 235
Chenbasapa v. Lakshman Ramchandra, 18 B 369 ... 754
Chhotalal Chhaganlal v. Dalsukhram Hargovindas, 17 B 472 ... 307
——— Govindram v. Mathur Kevalram, 18 B 591 ... 903
Chimnaji v. Sakharam, 17 B 365 ... 238
Chinto v. Janki, 18 B 51 ... 542
Chunilal Mancharam v. Manishankar Atmaram, 18 B 616 ... 920
——— Vithaldas v. Fulchand, 18 B 160 ... 615
Collector of Kanara v. Rambhat, 18 B 454 ... 812
Cooverji Hirji v. Dewsey Bhoga, 17 B 718 ... 471
Cursetji Jehangir Khambatta v. Crowder, 18 B 299 ... 707

D

Dadabhai Dajibhai v. Diogo Saldanha, 18 B 43 ... 537
Dadabhoy Dajibhoy Baria v. Pestonji Merwanji Barucha, 17 B 457 = Chitty's S C C R 367 ... 297
Dagdu v. Panchamsing Gangaram, 17 B 375 ... 244
Daji Nilkanth Nagarkar v. Ganpatrao Nilkanth Nagarkar, 17 B 224 ... 146
Damodardas Maneklal v. Uttamram Maneklal, 17 B 271 ... 177
Damodar Gopal Dikshit v. Chintaman Balkrishna Karve, 17 B 42 ... 28
Dattatraya v. Rahimtulla Nurmahomed Khoja, 18 B 456 ... 813
———-- Rayajipai v. Shridhar Narayanpai, 17 B 736 ... 483
Dave Liladhar Kashiram v. Bai Parvati, 18 B 608 ... 914
Dawood Durvesh v. Vullubhdas Purshotam, 18 B 227 ... 659
Dawubai Haji Khan Hubib Khan, *In the matter of the will of*, 18 B 237 ... 666
Dayabhai Lallubhai v. Gopalji Dayabhai, 18 B 141 ... 602
Desai Motilal Mangalji v. Desai Parshotam Nandlal, 18 B 92 ... 570
De Souza Devino v. Secretary of State for India in Council, 18 B 319 ... 721
Devji, *In re*, 18 B 581 ... 896
Devshankar Naranbhai v. Motiram Jageshvar, 18 B 136 ... 599
Dhondiba Krishnaji v. Municipal Commissioner of the City of Bombay, 17 B 307 ... 200
Dodhu v. Madhavrao Narayan Gadre, 18 B 110 ... 582

F

Faki Gulam Mohidin v. Sajnak, 18 B 244 ... 671
Fardunji Aspandiarji v. Navajbai, 17 B 689 ... 452
Fatechand Harchand v. Kisan, 18 B 614 ... 918
Foolibai v. Rampratab Samratrai, 17 B 466 ... 303
Framji Bhicaji v. Mohansing Dhansing, 18 B 263 ... 684
——— Dorabji Ghaswala v. Adarji Dorabji Ghaswala, 18 B 337 ... 733
——— Manekji Punjaji v. Secretary of State for India in Council, 17 B 154 = Chitty's S C C R 345 ... 100

G

Gadadhar Bhat v. Chandrabhaga Bai, 17 B 690 (**F B**) ... 453
Ganesdas Ramnarayan v. Lachminarayan, 18 B 570 = Chitty's S C C R 409 ... 889
Gangadhar Hari Karkare v. Morbhat Purohit, 18 B 525 ... 859
Gangadharrao Venkatesh v. Shidramappa Balapa Desai, 18 B 586 ... 899
Ganpatram Jebhai v. Ranchhod Haribhai, 17 B 645 ... 423
Gauskha v. Abdul Ropkha, 17 B 162 ... 106
Gavrishankar Parabhuram v. Atmaram Rajaram, 18 B 611 ... 916
Ghanasham Nilkant Nadkarni v. Moroba Ramchandra Pai, 18 B 474 ... 825

		PAGE
Ghela Ichharam v. Sankalchand Jetha, 18 B 597	...	907
Girdhar Damodar v. Kassigar Hiragar, 17 B 662=Chitty's S C C R 375	...	434
Giriapa v. Ningapa, 17 B 100	...	66
Gitabai v. Balaji Keshav Shastri Nagarkar, 17 B 232	...	152
Gojabai v. Shrimant Shahajirao Maloji Raje Bhosle, 17 B 114	...	75
Gopal Krishna Paraohure v. Sakhojirav, 18 B 133	...	597
——-- Purshotam v. Bai Divali, 18 B 241	...	669
Goswami Shri Girdharji Maharaj Shri Govindraiji Maharaj Tikait v. Madhowdas Premji, 17 B 600	...	393
——— ——— 108 Shri Girdhariji Maharaj v. Shri Govardhanlalji Girdhariji Maharaj, 18 B 290	...	701
——— ——— v. ——— ———		
18 B 294 (P C)=21 I A 13=6 Sar P C J 396	...	704
Govardhandas Goculdas Tejpal v. Municipal Commissioner, 17 B 394=Chitty's S C C R 363	...	256
Govind Balvant Shivnekar v. Lakshman, 18 B 522	...	857
——— Sitaram v. Bapuji Mahadeo, 18 B 516	...	853
——— Venkaji Kulkarni v. Sadashiv Bharma Shet, 17 B 771	...	506
Gowri v. Vigneshvar, 17 B 49	...	32
Gulabdas Bhaidas, *In re*, 17 B 672	...	440
Gulabsingji v. Lakshman Singji, 18 B 100	...	575
Gurunath Shrinivas Desai v. Chenbasappa, 18 B 745	...	1006
H		
Hajrat Akramnissa Begam v. Valiulnissa Begam, 18 B 429	...	795
Hanmanta Kolaji v. Mahadev Kondaji, 18 B 513	...	851
Hari Balkrishna Joglekar v. Naro Moreshvar Joglekar, 18 B 342	...	736
Harishanker Jebhai v. Naran Karsan, 18 B 260	...	681
Himatram v. Khushal Jethiram Gujar, 18 B 98	...	574
Hirabai v. Dhunjibhoy Bomanji, 17 B 146	...	95
Hira Chand Harjivan Das v. Kasturchand Kasidas, 18 B 224	...	657
Hormarji Ardesir Hormarji, *In the matter of*, 17 B 313	...	204
——— ——— ———, 17 B 334	...	217
Hormasji Manekji Dadachanji v. Keshav Purshotam, 18 B 13	...	518
I		
Irangowda v. Seshapa, 17 B 772	...	507
J		
Jafferbhoy Ludhabhoy Chattoo v. Thomas D. Charlesworth, 17 B 520	...	338
Jagannath Brakhbhau v. Sassoon, 18 B 606	...	913
Jankibai v. Mahadev, 18 B 147	...	607
Javermal v. Nazir of the District Court of Poona, 18 B 748	...	1008
Jijaji Pratapji Raje v. Balkrishna Mahadeo, 17 B 169	...	110
Jijibhoy Muncherji Jijibhoy v. Byramji Jijibhoy, 18 B 189	...	634
Joharmal v. Tejram Jagrup, 17 B 235	...	154
K		
Kachar Ala Chela v. Sha Oghadbhai Thakarshi, 17 B 35	...	23
Kadappa v. Martanda, 17 B 227	...	148
Kalian Moti v. Pathubhai Faljibhai, 17 B 289	...	188
Kanji Bavla v. Arjun Shamji, 18 B 115	...	585
Kashinath Ballal v. Ganpatrao Amriteshvar Joshi, 18 B 696	...	973
——— ——Trimbak Joshi v. Duming Zuran, 17 B 228	...	150
Kasturchand Bahiravdas v. Sagarmal Shriram, 17 B 413	...	269
Kathiawar Trading Company, Limited v. Virchand Dipchand, 18 B 119	...	588
Kazi Sujandin v. Madhavdas, 18 B 693	...	971
Kedari v. Gajai, 18 B 690	...	969

		PAGE
Keshavlal Girdharlal v. Bai Parvati, 18 B 327	...	726
Keshav Pandurang v. Vinayak Hari, 18 B 355 (F B)	...	745
Khusrubai Nasarvanji v. Hormajsha Phirozsha, 17 B 637	...	418
Krishna Bai v. Khangowda, 18 B 197	...	639
Krishnaji v. Vithu, 18 B 505	...	845
——— v. Wamanaji, 18 B 144	...	604
——— Narayan Pokshe v. Municipality of Tasgaon, 18 B 547	...	874
—— Ramchandra v. Antaji Pandurang, 18 B 256	...	679
Krishnarau Trimbak Hasabnis v. Shankarrav Vinayak Hasabnis, 17 B 164	...	107
Krishna Velji Marwadi v. Bhau Mansaram, 18 B 61	...	549
L		
Lakmia, *In re*, 18 B 400	...	775
Lakshman v. Vithu, 18 B 221	...	655
Lalitagar Keshargar v. Bai Suraji, 18 B 316	...	719
Lallubhai Vajeram v. Bai Magangavri, 18 B 59	...	548
Lalu Gagal v. Bai Motan Bibi, 17 B 631	...	414
Lilladhar Jairam Narranji v. George Wreford, 17 B 62	...	41
Lomba Gomaji v. Vishvanath Amrit Tilvankar, 18 B 86	...	566
M		
Mahadaji v. Joti, 17 B 425	...	277
Mahadu v. Lakshman, 17 B 681	...	447
Mahalavu v. Kusaji, 18 B 739	...	1002
Malichand Dharamchand v. Dalsukhram Hargovindas, 17 B 469	...	305
Manaku v. Sitaram Atmaram Vagh, 18 B 142	...	603
Mancharam Pranjivan v. Bai Mahali, 18 B 315	...	718
Manilal v. Bai Tara, 17 B 398	...	259
———Rewadat v. Bai Rewa, 17 B 758	...	498
Manjunath Mangeshaya Baindur v. Mangesh Sheshagiriappa Gokarnkar, 18 B 546 (F B)	...	873
Morarji Cullianji v. Nenbhai, 17 B 351	...	228
Motilal Bechardass v. Ghellabhai Hariram, 17 B 6=Chitty's S C C R 336	...	4
—— Kashibai v. Nana, 18 B 35	...	532
—— Prannath v. Bai Kashi, 17 B 45	...	30
Mukta v. Dada, 18 B 216	...	652
Mukund Harshet v. Haridas Khemji, 17 B 23	...	15
Muncherji Furdoonji Mehta v. Noor Mahomedbhoy Jairajbhoy Pirbhoy, 17 B 711	...	466
Municipal Commissioner for the City of Bombay v. Syed Abdul Huk Kurmalker, 18 B 184	...	631
Municipality of Ahmedabad v. Jumna Punja, 17 B 731	...	479
N		
Nabab Mir Sayad Alamkhan v. Yasinkhan, 17 B 755	...	496
Nagesh v. Gururao, 17 B 303	...	198
Nagusha v. Municipality of Sholapur, 18 B 19	...	521
Naik Parsotam Ghela v. Gandrap Fatelal Gokuldas, 17 B 745	...	489
Namdev v. Ramchandra Gomaji Marwadi, 18 B 37	...	533
Nandram Duluram v. Nemchand Jadavchand, 17 B 357	...	232
Narayan Dasappa v. Ali Saiba, 18 B 603	...	911
——— Lakshman v. Bapu, 17 B 741	...	497
Natheka v. Abdul Alli, 18 B 449	...	808
Nathu v. Budhu, 18 B 537	...	867
Navalchand Nemchand v. Amichand Tolakchand, 18 B 734	...	998

PAGE

O

Oriental Loan Association, Limited v. George Pelham Hatch, 17 B 735 ... 482

P

Padmanabh Bombshenvi v. Khemu Komar Naik, 18 B 684 ... 965
Parshotam Vishnu v. Nana Prayag, 18 B 109 ... 581
Parvati v. Ganpatrao Balal, 18 B 177 ... 626
——— Shankar Durga Shankar v. Bai Naval, 17 B 733 ... 481
Patel Naranji Morarji v. Haridas Navalram, 18 B 458 ... 815
Pitambar Mancharam v. Ishvar Jaduram, 17 B 230 ... 151
Pitamberdas v. Jambusar Town Municipality, 17 B 510 ... 331
Pralhad Lakshmanrav Nikane v. Vithu, 17 B 687 (**F B**) ... 451
Premji Trikumdas, *In re*, 17 B 514 ... 335
Pundlik v. Achut, 18 B 84 ... 564
Purshottam Vaman Soman v. Kashidas Jeychandshet, 17 B 677 ... 444

Q

Queen-Empress v. Babaji, 17 B 127 ... 83
——————— v. Balkrishna Vithal, 17 B 573 ... 374
——————— v. Bana Punja, 17 B 260 (**F B**) ... 170
——————— v. Bhinia, 17 B 485 ... 315
——————— v. Bostan, 17 B 626 ... 410
——————— v. Dansang Dada, 18 B 751 ... 1010
——————— v. Kahanji, 18 B 758 ... 1015
——————— v. Kanji Bhimji, 17 B 184 ... 120
——————— v. Khoda Uma, 17 B 369 ... 240
——————— v. Kutrapa, 18 B 440 ... 802
——————— v. Mugapa, 18 B 377 (**F B**) ... 759
——————— v. Pherozsha Pestonji, 18 B 442 ... 803
——————— v. Pirio Kalio, 18 B 428 ... 794
——————— v. Raiji Daji, 18 B 380 (**F B**) ... 761
——————— v. Sadanand Narayan, 18 B 364 ... 750
——————— v. Sadashiv Atmaram, 18 B 205 ... 644
——————— v. Shidgauda, 18 B 97 ... 573
——————— v. Sita, 18 B 212 ... 649

R

Rachawa v. Shivayogapa, 18 B 679 ... 962
Rahimbhoy Habibbhoy v. Charles Agnew Turner, 17 B 341 (**P C**) = 20 I A 1 = 6 Sar P C J 256 = 17 Ind Jur 40 ... 222
Raisett Chandmull Hamirmull v. Great Indian Peninsula Railway Company, 17 B 723 ... 474
Ramacharya v. Anantacharya, 18 B 389 ... 768
Rambhat v. Bababhat, 18 B 250 ... 675
Ramchandra Narayan Mantri v. Anant, 18 B 433 ... 798
Ram Dayal Saligram v. Nurhurry Balkrishna, 18 B 368 ... 753
Ramkrishna Moreshwar v. Ramabai, 17 B 29 ... 19
Ram Tukoji v. Gopal Dhondi, 17 B 54 ... 36
Ranchordass Amthabhai v. Maneklal Gordhandass, 17 B 648 ... 425
———— Nathubhoy v. Bhagubhai Parmanandas, 18 B 394 ... 771
Ratanlal Rangildas, *In re*, 17 B 748 ... 491
Ratulal Rangildas v. Vrijbhukhan Parabhu, 17 B 684 (**F B**) ... 448
Rayachand Mayachand v. Sultan Rahimbhoy, 18 B 347 ... 739
Roshanlal v. Lachmi Narayan, 17 B 507 ... 329
Roulet v. Fetterle, 18 B 717 ... 987
Rozario v. Ingles, 18 B 468 ... 822

PAGE

S

Sakhalchand Rikhawdas v. Velchand Gujar, 18 B 203 ... 643
Sardarsingji v. Ganpatsangji, 17 B 56 ... 38
Savalaram v. Genu, 18 B 387 ... 766
Sayad Shahu v. Hajrija Begam, 17 B 560 ... 366
Secretary of State for India v. Balvant Ramchandra Natu, 17 B 422 ... 275
——— ——— ——— — v. Sheth Jeshingbhai Hathisang, 17 B 407 ... 265
——— ——— ——— v. Jethabhai Kalidas, 17 B 293 ... 191
Shantappa Chedambaraya v. Subrao Ramchandra Yellapur, 18 B 175 (F B) ... 625
Shekh Adam Isufbhai v. Jamnadas Ranchordas, 17 B 94 ... 62
———Sultan Sani v. Shekh Ajmodin, 17 B 431 (P C) = 20 I A 50 = 6 Sar P C J 52 = 17 Ind Jur 100 ... 281
Shiddapa v. Irava, 18 B 737 ... 1000
Shivlal Kalidas v. Jumaklal Nathaiji Desai, 18 B 542 ... 870
Shridhar Ballal Kelkar v. Chintaman Sadashiv Mehendale, 18 B 396 ... 772
Shri Dhundiraj Ganesh Dev v. Ganesh, 18 B 721 ... 990
Shriman Goswami Shri 108 Shri Govardhanlalji Girdhar Lalji v. Goswami Shri Girdharlalji Govindraiji, 17 B 620 Note ... 406
Sidu v. Bali, 17 B 32 ... 21
Smith v. Ludha Ghella Damodar, 17 B 129 = Chitty's S C C R 320 ... 84
Soiru Padmanabh Rangappa v. Narayanrao, 18 B 520 ... 855
Sorabji Cawasji Polishwala v. Buchoobai, 18 B 366 ... 751
Succaram Morarji Shetay v. Kalidas Kaliaji, 18 B 631 ... 929
Sundar Malhar Patel v. Bapuji Shridhar, 18 B 755 ... 1013
Swamirao v. Collector of Dharwar, 17 B 299 ... 195
——— v. Padapa, 18 B 22 ... 523

T

Tanudin v. Pandu, 18 B 699 ... 975
Tippanna v. Southern Maratha Railway Company, 17 B 417 ... 272
Tribhovandas Jekisandas v. Krishnaram Kuberram, 16 B 283 ... 696
Tribhuvandas Ruttonji Mody v. Gangadas Tricumji, 18 B 7 ... 513
Trikam Madhav Shet v. Hirji Harjivan Shet, 18 B 332 ... 729

U

Umarkhan Mahamadkhan Deshmukh v. Salekhan, 17 B 106 (F B) ... 70

V

Vallabdas Hirachand v. Krishnabai, 17 B 566 ... 370
Vassonji Tricumji & Co v. Southern Maratha Railway Company, 17 B 14 ... 10
Venkaji Shridhar v. Vishnu Babaji Beri, 18 B 534 ... 865
Venkatesh Khando v. Chanapgavda, 17 B 674 ... 442
Vinayakrao Dhundiraj v. Narotam Anandji, 17 B 581 ... 380
Virbaiji v. Wadia Mills Co., 18 B 65 ... 552
Virchand Lalchand v. Kumaji, 18 B 48 ... 540
Vishnu v. Rango Ganesh Purandare, 18 B 382 ... 763
Vishvanath Bhikaji v. Dhondappa, 17 B 475 ... 309
Vithalbowa v. Narayan Daji Thite, 18 B 507 ... 847
Vithal Hari Athavle v. Govind Vasudeo Thosar, 17 B 41 ... 27
Vithalrao v. Vaghoji, 17 B 570 ... 373
Vithoba v. Esat, 18 B 594 ... 905

Y

Yellawa v. Bhimangavda, 18 B 452 ... 810
Yeshwadabai and Gopikabai v. Ramchandra Tukaram, 18 B 66 ... 553
Yeshwant Bhagwant Phatarpakar v. Shankar Ramchandra Phatarpakar, 17 B 388 ... 253

THE
INDIAN DECISIONS
NEW SERIES.
BOMBAY—VOL. IX.

I.L.R., 17 BOMBAY.

17 B. 1 (P.C.) = 19 I.A. 170 = 6 Sar. P.C.J. 238.

PRIVY COUNCIL.

PRESENT:

Lords Watson and Morris, Sir R. Couch, Lord Shand.

[*On appeal from the High Court at Bombay.*]

ABDUL GAFUR AND OTHERS (*Plaintiffs*) *v.* NIZAMUDIN AND OTHERS (*Defendants*). [31st May and 2nd July, 1892.]

1892
JULY 2.

PRIVY COUNCIL.

17 B. 1 (P.C.) = 19 I.A. 170 = 6 Sar. P.C.J. 238.

Mahomedan law—Wakf—*Settlement*—*Will*—*Invalidity of attempted settlement purporting to constitute a* wakf—*Document not establishing a trust for a religious or charitable purpose, at some time, invalid as a* wakfnama.

A *wakfnama* to be valid must be a substantial dedication of property to a religious or charitable purpose at some time or other.

Mahomed Ahsanulla Chowdhry v. *Amarchand Kundu* (1) referred to and followed.

Where a *wakfnama* purported to make a settlement on heirs, the settlor's intention having been to make the whole estate devolve from one generation to another, without being alienable by them, and without being liable in execution against them.

Held, that the instrument could neither be maintained as establishing a *wakf*, nor as a settlement: also, that it could not be supported as a will, not having been validated by consent of heirs, as to two-thirds of the succession; and that, even if it could have been dealt with as a will, the above provision would have been void.

[R., 27 B. 500 (514); 37 B. 447 = 14 Bom. L. R. 987 = 17 Ind. Cas. 689 (693); 22 C. 619 (630) (P.C); 22 I.A. 76 = 6 Sar. P.C.J. 572; 30 C. 666 (673, 676); 18 M. 201 (212); 5 Bom. L.R, 624 (628); 7 Bom. L.R. 306 (307); 9 Bom.L.R. 295 (302); 9 Bom.L.R. 1337 (1342); 4 C.L.J. 442 (450); 11 C. P. L. R. 150 (154); 18 Ind. Cas. 185 = 24 M L.J. 258 = 13 M.L.T. 91 = (1913) M.W.N. 371 (372); 7 Bur. L. T. 75 = 7 L.B.R. 123 = 23 Ind. Cas. 903.]

APPEAL from a decree (2) (11th June, 1888) of the High Court reversing a decree (17th February, 1887) of the Assistant Judge of the

(1) 17 I.A. 28 = 17 C. 493.

(2) *Nizamudin* v. *Abdul Gafur*, 13 B. 264.

1892
JULY 2.

PRIVY COUNCIL.

17 B. 1 (P.C.) = 19 I.A. 170 = 6 Sar. P.C.J. 238.

Thana District, which affirmed a decree (27th March, 1886) of the Second Class Subordinate Judge of Panvel.

The *wakfnama*, to which the appeal related, was executed on the 16th January, 1838, by Karimuddin, a Shafi, who died in 1840. Two of the five plaintiffs, now appellants, were *mutawallis* appointed by the District Court in 1884, and all were kinsmen [2] of Karimuddin. The property was a tract of salt works, with buildings, in taluka Panvel in the Kolaba District. On the 22nd June, 1866, under a decree against Karimuddin's daughter, Tahirar, her right, title and interest (Civil Procedure Code Act, VIII of 1859, s. 249) were sold at a Court sale. The defendants, (now respondents), made title through the purchasers.

The question, what right of Tahira was sold in 1866, depended on the validity and effect of a disposition, made in the *wakfnama* of 1838, for the benefit of the family and heirs of Karimuddin.

In another case, *Phatè Saheb Bibi* v. *Damodar Premji* (1), this document was before the Court on another point. It purported to settle, with certain exceptions, moieties of Karimuddin's estate on his two wives, and on their respective daughters, and their descendants, so long as each line should subsist, with cross-remainders, on the extinction of either line, to those who might represent the other, with a final remainder to the right heirs. Part of the estate was expressly devoted to specific religious purposes; but there was no dispute as to that; and this suit was confined to a share as to which no trust for any religious, or charitable, purpose was declared. One of the important clauses was the following :—"Neither of the said two wives, nor any one of the *aulad* of the said two wives, shall alienate by sale, gift, or mortgage, either of their shares of the above property.

The *wakfnama* is set forth in the report of the appeal in the High Court (2).

The decisions of the Courts below, with the proceedings before this appeal, appear in their Lordships' judgment. On a second appeal, the Judges (BIRDWOOD and PARSONS, JJ.) were of opinion that the document of 1838 could not be supported as creating a *wakf*, as it contained no ultimate dedication of the property to a religious or charitable purpose. As a mere deed of settlement it could not receive effect, as Karimuddin had not, by law, power to make a series of life-estates with remainder to his heirs. The judgment is given at length in I. L. R., 13 Bom., at p. 270.

On this appeal,

Mr. *J. D. Mayne*, for the appellants :—The disposition for secular [3] purposes in the *wakfnama* can hardly be supported as constituting a *wakf*. Recent decisions are to the contrary of giving such an effect to a *wakfnama* where there is no gift to operate at any time for a religious, or charitable, use. See *Mahomed Ahsanulla Chowdhry* v. *Amarchand Kundu*(3). But, if there was a consent on the part of the heirs, who are benefited, the instrument is maintainable as a will. There are difficulties in the way of treating it as a settlement. There was, however, the case of a grant for life in *Umes Chunder Sircar* v. *Zahur Fàtima*(4). As a will, it might be that the document could receive effect, if assented to.

Reference was made to *Khajooroonissa* v. *Rowshan Jehan*(5).

---

(1) 3 B. 84. (2) 13 B. 264. (3) 17 I.A. 28 = 17 C. 498.
(4) 17 I. A. 201 = 18 C. 164. (5) 3 I. A. 291 = 2 C. 184.

1892
JULY 2.
PRIVY COUNCIL.
17 B. 1 (P.C.) = 19 I.A. 170 = 6 Sar. P.C.J. 238.

JUDGMENT.

The respondents did not appear. Their Lordships' judgment was delivered on a subsequent date (July 2nd) by

LORD WATSON.—The appellants are plaintiffs in this suit, which was brought in 1884 for possession of lands which had been taken in execution and judicially sold in the year 1866, and were thereafter purchased by the father of the defendants. The cause of action disclosed in the plaint was this—that Tahirabibi, the judgment-debtor, held the lands under a *wakfnama* executed in January, 1838, by her father Karimuddin, which limited her interest to a bare life rent; that the decree of sale only carried the life estate of Tahirabibi who died in November, 1873; that the defendants' title to possess came to an end upon her death, and the lands reverted, in the first place, to her sister Fatehsahebbibi in life-rent and on her decease to the appellants as heirs of Karimuddin and his daughter Fatehsahebbibi. The issue adjusted to try the only matter affecting the merits of the case, namely, the nature of the interest which the judgment-debtor had in the lands sold for her debt, was thus expressed,—"Is the *wakfnama* of 1838 valid according to the Mahomedan law?"

The Second Class Subordinate Judge of Panvel found for the appellants, being of opinion that Karimuddin's deed of 1838, although ineffectual to constitute a proper *wakf*, was nevertheless [4] valid as a settlement, and also that Tahirabibi had a mere life-estate. The Assistant Judge of Thana affirmed his decree for reasons substantially the same, recognizing the efficacy of the deed as a settlement; but, on second appeal to the High Court of Bombay, both judgments were reversed and the appellant's claim rejected with costs. The learned Judges agreed with both Courts below that the deed was invalid as a *wakfnama*; but they held that it was also inoperative as a settlement, in respect that no possession had followed upon the lifetime of Karimuddin.

The learned counsel who appeared for the appellants, with great candour and propriety, admitted that after the recent decision of this Board in the case of *Mahomed Ahsanulla Chowdhry* v. *Amarchand Kundu* (1) he could not successfully maintain the document of 1838 to be valid as a *wakfnama*. In that case Lord Hobhouse said that their Lordships "have not been referred to, nor can they find any authority showing that, according to Mahomedan law, a gift is good as a *wakfnama*, unless there is a substantial dedication of the property to charitable uses at some period of time or other." In this case the so-called *wakfnama* makes no gift of the lands in question, either immediate or ultimate, for religious or charitable purposes. The document professes to create a *wakf*, but, in reality, the legal heirs of Karimuddin are the only objects of his bounty. The lands are destined to his wives and children, and to the descendants of the latter in perpetuity in the order and according to the shares prescribed by the Mahomedan law of succession, but subject to the limitation that none of them shall have the power of alienation by sale, gift, or mortgage.

Counsel also admitted that he could not successfully maintain that the document was a settlement, but he endeavoured to support the appeal on the ground that the deed, styled a *wakfnama*, ought to be treated as the will of Karimuddin. He did not dispute that a Mahomedan cannot of himself, by a testamentary writing, either curtail or defeat the legal

(1) 17 I. A. 28.

1892
JULY 2.
PRIVY COUNCIL
17 B. 1 (P.C.) = 19 I.A. 170 = 6 Sar. P.C.J. 238.

interests of his heirs; and that a Mahomedan will is, therefore, inoperative with regard to two-thirds of the testator's succession, unless it is validated [5] by the consent of the heirs having interest. Their Lordships do not think the appellants would take any benefit from the document of 1838 if it were construed as the will of Karimuddin. It was plainly not his intention to create a series of life-rents, a kind of estate which does not appear to be known to Mahomedan law (see *Humeeda and others* v. *Budlun and the Government* (1)), but to make the fee devolve from one generation of his descendants to another without its being alienable by them, or liable to be taken in execution for their debts. Even if Tahirabibi had expressly consented to accept the will, she would not have been the owner of a life estate, but a full owner, with prohibition against alienation, which, being void in law, could not affect either herself or her creditors. Although this point was taken in the High Court, the appellants were not in a position to press it. They have not averred in their pleadings that Tahirabibi gave such consent, and there is no evidence to show that she did. Besides, there was no issue taken upon the point, and, therefore, no finding in fact upon which the High Court could proceed in a second appeal.

The judgment of the High Court appears to their Lordships to dispose, in a satisfactory manner, of all the arguments which have been addressed to them in the *ex parte* argument upon this appeal. They will humbly advise Her Majesty to affirm the judgment complained of, and to dismiss the appeal.

Appeal dismissed.

Solicitors for the appellants: Messrs. *Barrow and Rogers.*

---

17 B. 6 = Chitty's S.C.C.R. 336.

[6] ORIGINAL CIVIL.

Before Mr. Justice Bayley, Acting Chief Justice, and Mr. Justice Farran.

MOTILAL BECHARDASS AND OTHERS (*Plaintiffs*) *v.* GHELLABHAI HARIRAM AND OTHERS (*Defendants*)* AND BHANALALLA AND OTHERS (*Plaintiffs*) *v.* DADABHOY SAGUNBAKSH AND OTHERS (*Defendants*).† [29th July and 2nd September, 1892.]

Partnership—Death of partner—Suit by Firm for a debt accrued due during his life—His representatives need not be parties—Practice—Parties—Indian Contract Act, IX of 1872, *s.* 45.

The representatives of a deceased partner are not necessary parties to a suit for the recovery of a debt which accrued due to the partnership in the lifetime of the deceased partner.

[**F.**, 32 A. 638 (640) = 7 A.L.J. 759 = 6 Ind. Cas. 840; 10 P.R. 1906; **Rel.**, 17 C.L.J. 201 = 16 Ind. Cas. 852 (854); **Appr.**, 17 M. 108, (117); **R.**, 20 A. 365 (366); 22 A. 307 (315, 319); 21 B. 412 (421); 25 B. 378 (384); 10 Bom.L.R. 306 (312); 9 C.L.J. 331 (335) = 13 C.W.N. 509; 1 S.L.R. 191 (194); U.B.R. (1892—1896) 204 (210); 24 Ind. Cas. 268.]

---

* Small Cause Court Suit, No. 15099 of 1891.
† Small Cause Court Suit, No. 1682 of 1892.
(1) 17 W. R. C. R. 525.

1892
SEP. 2.

ORIGINAL CIVIL.

17 B. 6 = Chitty's S. C. C. R. 336.

CASE stated for the opinion of the High Court by C. W. Chitty, Chief Judge of the Bombay Court of Small Causes, under s. 69 of the Presidency Small Cause Courts' Act (XV of 1882) :—

"1. In this case the plaintiffs, sons of Bechar Nager, deceased, sue to recover a sum of Rs. 545-7-0 as the balance of an agency account for goods purchased and moneys paid by the plaintiffs, on account of goods in Bombay, from *Magha Vad* 3rd to *Jesth Sud* 5th, 1945 (18th February to 3rd June, 1889).

"2. The defendants took the preliminary objection that Bechar Nager was a member of the firm when the debt accrued due; that he died about a year ago; that his representatives were not joined, and that no probate or letters of administration or certificate to his estate had been taken out.

"3. It was proved that the plaintiffs, five brothers, and their father carried on a joint business in the name of Bechar Nager at Surat. They were members of a joint and undivided Hindu family, but the said Bechar Nager had no brothers or nephews. The said Bechar Nager died a year ago, after the accrual of the debt in question.

"4. The question for decision in this case is the same as that in suit No. 1682 of 1892, which is sent with this, namely, whether under s. 45 of the Contract Act the representatives of a deceased partner are necessary parties to a suit for the recovery [7] of a debt which accrued due to the partnership in the lifetime of the deceased partner.

"5. If the above question be decided in the affirmative, the further question also arises in this case, whether such a rule would apply in the case of a joint and undivided Hindu family carrying on a business in partnership.

"6. This case is stated on the application of the defendants, and I have postponed the hearing of the suit pending the decision of their Lordships on the above points."

Russell, for the plaintiffs in suit No. 15099 of 1891.

Anderson, at the request of the Court, appeared for the defendants.

The parties in the second suit (No. 1682 of 1892) were not represented by counsel.

JUDGMENT.

The arguments of counsel and the authorities cited fully appear from the judgment, which was delivered by

FARRAN, J.—Upon the first question referred for our opinion in this case there is a conflict of decision between the High Court of Calcutta and the High Court of Allahabad. The latter Court has held that the surviving partners in a firm can sue for a debt due to the partnership without joining the representatives of a deceased partner as plaintiffs—*Gobind Prasad* v. *Chandar Sekhar* (1). The Calcutta High Court has ruled that the representatives of a deceased partner are, in such a case, necessary parties to the suit—*Ram Narain* v. *Ram Chunder* (2).

The question as to what plaintiffs should join in suing to enforce a joint right, is not determined by Statute law in India. The rules by which that question must be solved are rules adopted by the Judges in India from the rules of English law and equity, modified on account of the different procedure which prevails here and in part altered by legislation. In the Common Law Courts in England, before the Judicature

(1) 9 A. 486.

(2) 18 C. 86.

1892
SEP. 2.
ORIGINAL
CIVIL.
17 B. 6 = Chitty's S. C. C. R. 336.

Acts, it was necessary for all persons, jointly interested at law, to join in suing as plaintiffs. The same rule prevails generally in equity; but, when there was a substantial ground for not making some of such persons plaintiffs, it has been held sufficient if they were made defendants —Daniell's Chancery Practice (6th Ed.), Vol. I, **[8]** p. 216; *Luke* v. *South Kensington Hotel Company* (1). These rules, though not of statutory obligation, were deemed essential to the due administration of justice, in order that the same defendant might not be more than once molested in respect of the same cause of action, to give the debtors a valid discharge, and to prevent multiplicity of suits. According to the old English practice, however, not only was it requisite to make all proper persons plaintiffs, but at law the misjoinder of plaintiffs was fatal to the action; and the rules as to who could join in suing were strict and narrow. It was often difficult to select the proper plaintiffs, and mistakes frequently occurred on account of the stringency of the law. To remedy this inconvenience, and to give a latitude, which was considered advisable in this branch of the law of procedure, the rules framed under the Judicature Acts provided that all persons might be joined as plaintiffs in whom the right to any relief claimed was alleged to exist, whether jointly, severally, or in the alternative (Order XVI, R. 11). After the passing of this rule, a misjoinder of plaintiffs, except in the matter of costs, became an immaterial error. The rules and practice, as to the necessity of joining as parties to the suit, all persons jointly interested in the cause of action, have been adopted by all the Indian High Courts—*Kalidas Kevaldas* v. *Nathu Bhagvan* (2); *Dular Chand* v. *Balram Das* (3); *Ramsebuk* v. *Ramlall Koondoo* (4); *Arunachala* v. *Vythialinga* (5). The case last cited is an authority for saying that the rule adopted in the Court of Chancery, rather than that followed by the Courts of Common Law, is the one followed in India.

The Indian Legislature has introduced the provision as to the persons who can sue as plaintiffs in a joint and in a common cause of action from the rules framed under the Judicature Act which we have adverted to. It is now enacted as s. 26 of the Civil Procedure Code. This is a permissive section enacted for the reason and with the object already referred to. The general law, as to the necessity of joining as parties to the suit all persons who have a joint or common interest in the cause **[9]** of action, and as to the consequences of a misjoinder of plaintiffs may be said to be now practically identical under English law and under the practice of the Indian Courts.

Turning to the more particular question with which we have to deal in this reference—the law applicable to joint contractors—we find that, at common law, on the death of one of them the benefit of the joint contract devolved upon the survivors. "In the same manner it is of debts and duties, &c., for if an obligation be made to many for one debt, he, which surviveth, shall have the whole debt or duties, *and so it is of other covenants, contracts, &c.*" (6). An exception was made in the case of partners in trade. The comment of Lord Coke upon the above passage from Littleton is this—"Here by force of the Act an exception is to be made of two joint merchants for the wares, merchandize, debts or duties that they have as joint merchants or partners shall not survive, but shall go to the executors of him that deceaseth: and this is *per legem*

(1) 11 Ch. D. 121. (2) 7 B. 217. (3) 1 A. 453 (4) 6 C. 815.
(5) 6 M. 27. (6) Coke upon Littleton (Ed. 1832), Vol. II, s. 282, p. 182*a*.

mercatoriam, which (as hath been said) is part of the laws of this realm for the advancement and continuance of commerce and trade which is *pro bono publico*, for the rule is that *jus accrescendi inter mercatores pro beneficio commercii locum non habet*. And to the latter, &c., in this section the like exceptions must be made." Mr. Justice Williams says: "The general rule is that the interest which the testator had in a chose in action jointly with another shall not pass to his executor, yet *per legem mercatoriam* as formerly mentioned an exception was established in favour of merchants which has been extended to all traders and persons engaged in joint undertakings in the nature of trade"—Williams on Executors (8th Ed.), p. 850. This is relied upon as a true exposition of the law by Mellish, L. J., in *McClean* v. *Kennard* (1). The whole subject is elaborately considered in *Buckley* v. *Barber* (2). It is clear upon these authorities that in the case of trading partnerships the benefit of a deceased **[10]** partner in a joint contract survived to his executors, both at law and in equity, under the English system. That portion of the English law was incorporated into the law administered in India long before the Indian Contract Act.

The obligations of joint debtors under a joint contract were governed by similar principles. All, if living, were liable to the creditor for the due performance of the contract, but this liability did not devolve, either at law or in equity, upon the representatives of one of them dying in the lifetime of the others—*Richardson* v. *Horton* (3); *Other* v. *Iveson* (4). Partners stood upon a different footing. The estate of a deceased partner was liable, in equity, in respect of a joint contract of the firm. As to how that equity arose, see the judgment of Cairns, L. C., in *Kendal* v. *Hamilton* (5). This equity was also given effect to in Courts in India before the Contract Act. In this High Court it was the common practice to sue the surviving partners and the representatives of a deceased partner for debts due by the firm.

The Indian Contract Act was avowedly based upon the English law. In the case of joint contracts it made a radical change. Section 45, dealing with the right under a joint contract, provides that (unless a contrary intention appears from the contract) "when a person has made a joint contract with two or more persons jointly, the right to claim performance rests, as between him and them, with them during their joint lives, and, after the death of any of them, with the representatives of such deceased person jointly with the survivor or survivors." This enactment places all joint contractors, where a contrary intention is not expressed, upon the same footing as partners jointly contracting (as we have shown) formerly stood. The maxim in India now should be *jus accrescendi inter contractores locum non habet nisi aliter in contractu expressum.*

A somewhat analogous change was made by s. 42 in the obligation which joint contractors lay under to fulfil a joint contract. The obligation is extended to the representatives of **[11]** a deceased contractor, thus again assimilating the law to that which prevailed in the case of partners jointly contracting. The provision of s. 43, which gives the right to the creditor to compel any one of the joint contractors, or the representatives of a deceased contractor, to perform the contract, seems

(1) L. R. 9 Ch. 336, (346).
(2) 6 Ex. 178. The distinctions drawn in this case are difficult to follow; Lord Justice Lindley speaks of it as a "perplexing case." Lindley on Partnership (5th Ed.), p. 342 (in notes).
(3) 6 Beav. 185. (4) 3 Drew. 177. (5) 4 Ap. Ca. 504, (516).

1892
SEP. 2.
ORIGINAL CIVIL.
17 B. 6 = Chitty's S. C. C. R. 336.

new both in the case of ordinary joint contractors and in that to partners jointly contracting; as far as the liability under a contract is concerned, it appears to make all joint contracts joint and several.

We cannot doubt but that these sections, which we have referred to, relate to partners as well as to other co-contractors. It has been so decided in *Lukmidas Khimji* v. *Purshotam Haridas* (1), and, we think, rightly. If the Legislature had intended to except partners from the provisions of these sections, it would have done so in express words. There is no reason for thinking that the general rules laid down in Chap. IV of the Contract Act are not applicable to partners as well as to other contracting parties. The sections under consideration seem, on the contrary, to be intended to assimilate the law relating to joint contracts generally to that which has always been applied to partners contracting jointly.

The Contract Act is not, however, an Act of Procedure. It defines and declares rights and obligations arising out of contracts and obligations *quasi ex contractu*. The rules as to the procedure for enforcing these rights—the remedy in cases of breach of them—must be sought elsewhere.

In the case of contracts, as in other divisions of the law relating to actions, the parties to sue and to be sued were by English law usually those in whom the right to enforce and the liability under a contract "rested," to use an expression borrowed from the Contract Act. These rules governing the proper choice of plaintiffs and defendants in the case of joint contracts will be found concisely stated by Mr. Dicey in his work on Parties to Actions (R. 16, 48, 52, 55 and 58). Speaking broadly, the representatives of deceased joint contractors were not proper parties, either as plaintiffs or defendants, in an action [12] upon a joint contract, but all living parties to the contract were necessary parties. The reason of these rules founded on substantive law relating to joint contracts excluding the representatives of deceased contractors from the benefit and burden of joint contracts has ceased to exist in India since the Contract Act was passed. Logically, the rules should also cease to be operative *ratione cessante lex ipsa cessat*.

The practice relating to the *remedy* in favour of and against partners was, in English law, anomalous. Although amongst them there was no *jus accrescendi* and the interest of a deceased partner in the joint property, including the contracts of the firm devolved upon his executors, the latter could not join the surviving partners in an action upon joint partnership contract—Dicey, R. 21 and 24; Lindley on Partnership (5th Ed.), p. 284. This is stated by Mr. Justice Williams in the passage I have quoted above. It continues thus: "But in these cases, although the right of the deceased partner devolves on his executor, it is now fully settled that the remedy survives to his companion, who alone must enforce the right by action, and will be liable on recovery to account to the executors or administrators for the share of the deceased"—Williams on Executors (8th Ed.), p. 850.

A more logical view was taken in one old case. A surviving partner sued for a debt due to the partnership. The defendant demurred on the ground that the executor of the deceased partner was a necessary co-plaintiff. The demurrer was allowed—*Hall* v. *Huffam* (2). That case was, however, overruled, and the law before the Judicature Acts was well established, that the right to sue for a debt owing to the firm devolved, in

(1) 6 B. 700.

(2) 2 Lev. pp. 188 and 228.

the event of the death of one partner, upon the surviving partners exclusively—Lindley on Partnership (5th Ed.), p. 341.

The same anomalous practice prevailed in Courts of Equity. When the surviving partner in a firm sued for an account, or other legal claims, it was not, except under special circumstances, necessary to make the personal representatives of a deceased partner parties to the suit—*Haig* v. *Gray* (1), Daniell's Chancery Practice, **[13]** p. 219, (6th Ed.), Vol. I. The Judicature Acts and Rules have made no changes in procedure when a surviving partner sues—Bullen and Leake's Pleadings (4th Ed.), Vol. I, p. 294. The same practice prevailed in Indian Courts in the Bombay High Court and in the late Supreme Court at Bombay, at all events before the Indian Contract Act.

Since the passing of that Act the practice in the High Court of Calcutta has been changed—*Ram Narain* v. *Ram Chunder* (2) ; but not in the Allahabad High Court—*Gobind Prasad* v. *Chandar Sekhar* (3). Logical consistency has there yielded to long-established practice based upon considerations of practical convenience. The inconvenience, often resulting in a denial of justice, of altering the procedure is pointed out by Edge, C. J., in his judgment in the above cited case of *Gobind Prasad* v. *Chandar Sekhar* (3).

In the judgment of the third Judge of the Small Cause Court in a case sent up with this reference, it is stated that the practice of the Small Cause Court in Bombay has, hitherto, been not to join the heirs of a deceased co-partner with the surviving partners when suing for a partnership debt. The question has not been, so far as we know, the subject of judicial decision in this High Court, though we believe that since the dictum of the Court in *Lukmidas Khimji* v. *Purshotam Haridas*(4) it has been more usual to add the heirs of a deceased partner as parties plaintiffs *ex majore cautela*. This was a mere form until the passing of the recent Act making it necessary for such heirs to obtain probate or letters of administration before a judgment can be passed in their favour. It has now become a matter of vital importance.

To the observations of Edge, C. J., may be added the remark that frequently the representative of a deceased partner has no interest whatever in the property of the firm, such interest being often represented by a *minus* quantity. Section 263 of the Contract Act IX of 1872 preserves to surviving partners the right of giving valid discharges to debtors of the firm which they possessed under **[14]** English law—*Butchart* v. *Dresser*(5), *Brasier* v. *Hudson*(6) ; Lindley on Partnership (5th Ed.),p. 342. There is no reason on that ground for holding that the surviving partners are not competent to sue.

The introduction, into s. 45, of the words " as between him and them " occasions, no doubt, a serious difficulty in adopting the ruling of the High Court of Allahabad. It is difficult to give these words their full effect, if the surviving contractors in the case of partners are allowed to sue alone. The right to performance of the contract, as far as the other contracting party is concerned, rests just as much with the representative of the deceased partner as with the surviving partner. Can the latter, then, sue without joining the former as a party to the suit? Logical consistency points to an answer in the negative. The case of partners is,

---

(1) 3 DeG. & Sm. 741.
(2) 18 C. 86.
(3) 9 A. 486.
(4) 6 B. 700.
(5) 4 DeG. M. & G. 542.
(6) 9 Sim. 1.

1892
SEP. 2.
ORIGINAL CIVIL.
17 B. 6 = Chitty's S. C. C. R. 336.

however, as we have shown, anomalous, and we think that as the Legislature has not enacted that the representatives of a deceased partner must join in suing in a partnership contract jointly with the surviving partners, we are not wrong in holding that, notwithstanding the provisions of the Contract Act, the old practice of the Small Cause Court need not be changed.

The decision of this Court in *Raghavendra Madhav* v. *Bhima* (1) involves an answer in the affirmative to the second question.

Attorney for the plaintiff :—Mr. *T. A. Bland.*

17 B. 14.

ORIGINAL CIVIL.

Before Mr. Justice Bayley, Acting Chief Justice, and Mr. Justice Farran.

VASSONJI TRICUMJI AND CO. (*Plaintiffs*), *Petitioners v.* THE SOUTHERN MARATHA RAILWAY COMPANY (*Defendants*), *Opponents.** [2nd September, 1892.]

Presidency Small Cause Courts Act (XV of 1882), ss. 38 and 69—Rehearing—Miscarriage or failure of justice—Case stated for the opinion of High Court.

In a suit in the Court of Small Causes, in which questions of law and fact were raised, the plaintiffs at first asked the Judge to state a case for the opinion of the High Court under s. 69 of Act XV of 1882. The Judge was willing to do [18] so, but the plaintiffs withdrew their request. The Judge thereupon delivered his judgment and dismissed the suit. The plaintiffs then applied to the High Court for a rehearing under s. 38 of Act XV of 1882. It was contended that the Judge was wrong in his view of the law as applicable to the facts.

Held that, even if that were the case, there was no "miscarriage or failure of justice" within the meaning of s. 38, and that the plaintiffs were not entitled to a rehearing.

APPLICATION for a rehearing under s. 38 of the Presidency Small Cause Courts Act (XV of 1882).

The plaintiffs petitioned for a rehearing of this suit, which had been dismissed with costs by C. W. Chitty, the Chief Judge of the Small Cause Court, on the 10th August, 1892.

The plaintiffs had at first asked the Chief Judge to state a case for the opinion of the High Court, under s. 69 of the Small Cause Courts Act, but subsequently withdrew such request on the ground that they were advised to apply for a rehearing under s. 38 of the Act.

The petition stated as follows—

1. That your petitioners brought a suit (No. 12790 of 1892) in the Bombay Court of Small Causes against the defendants, the Southern Maratha Railway Company, for the recovery from them of the sum of Rs. 1,481-15, being the amount levied by the defendant Company, or their agents, the Bombay Steam Navigation Company, at Bombay in respect of Port Trust charges and in excess of the freights for which the defendant Company had agreed to carry from stations on the line of their railway to Bombay, *via* Marmagoa, several consignments of cotton belonging to the petitioners, and which amount the petitioners were forced to pay and did pay under protest for obtaining delivery of their said consignments.

* Small Cause Court Suit, No. $\frac{200}{12790}$ of 1892.

(1) 16 B. 349.

2. That the defendant Company without filing any written statement of their defence proceeded to a trial of this suit, which took place before His Honour the First Judge of the Bombay Court of Small Causes.

3. That the hearing of this suit took place on Wednesday the 3rd and Friday the 5th August instant, on which last-mentioned day the judgment was reserved; and on Wednesday the 10th **[16]** August His Honour gave judgment dismissing the said suit with costs, and certifying the defendant Company's professional costs Rs. 90.

4. That the receipts of the defendant Company put in for the plaintiffs in the said suit, which formed their contracts for carriage of the plaintiffs' goods, purport to be dated at the booking stations, and to acknowledge the receipt of such goods for conveyance "to Bombay station by goods train," or "to Bombay station by rail and sea," with different rates of freight inserted in a column therein, in that behalf for the defendant Company, the West of India Portuguese Railway and the Bombay Steam Navigation Company respectively; and among the conditions of contract endorsed upon such receipts the following are set forth, namely:—

(i) "The Southern Maratha Railway Company's responsibility for all goods will be considered to have terminated when forty-eight hours have expired after arrival at the station to which they are consigned."

(ii) "Goods booked to Bombay or elsewhere by sea, *via* Marmagoa are subject to rules and regulations, conditions of carriage, wharfage and other charges in force on the railways and the shipping lines over and by which they are conveyed."

(iii) "Delivery orders for goods booked to Bombay, *via* Marmagoa, will be granted at the Bombay Steam Navigation Company's offices at Bombay on production of this receipt note."

5. That the agreement in writing, dated the 7th November 1890, and made between the said West of India Portuguese Railway Company of the one part and the said Bombay Steam Navigation Company of the other part, in respect of the carriage of goods by the steamers of the latter Company from Marmagoa to Bombay, put in for the plaintiffs, contains, in the 14th clause thereof, a provision to the effect that the said Bombay Steam Navigation Company shall land and deliver the goods to the consignees from their godowns in Bombay.

6. That in the absence of any special agreement to the contrary, all terminal services, such as those for which the Port **[17]** Trust charges in question are made, are always regarded as included in the railway freights and performed by the railway free of any additional charge.

7. That the British India Steam Navigation Company, by whose steamers the goods arriving by the railways were brought down from Marmagoa to Bombay prior to the month of November, 1890, made no charge whatever against the goods, in the nature of the Port Trust charges now made by the Bombay Steam Navigation Company, and the plaintiffs have never had any notice whatever, either from the defendant Company or the Bombay Steam Navigation Company, that the payment of such charges would, at any time, be insisted upon.

8. The plaintiffs respectfully submit to this Honourable Court—

(*a*) that the said learned Judge ought to have held the contracts of the defendant Company in question in the said suit to be for conveyance of the plaintiffs' goods to, and delivery of the same at Bombay station for the freights therein specified and free of any further charge;

(*b*) that the said learned Judge ought to have held that the words "to Bombay station," in the railway receipts forming such contracts,

1892
SEP. 2.
—
ORIGINAL
CIVIL.

17 B. 14.

were not so important as he supposed, but on the contrary the same were of the gravest moment in the case, and clearly signified the liability of the defendant Company to convey, land and deliver the goods to the plaintiffs at Bombay for the freights therein specified, and without making any additional charge ;

(*c*) that the said learned Judge ought to have held that the defendant Company, having by their written contracts agreed for the freights therein specified to convey, land and deliver, the plaintiffs' goods to and at Bombay station, ought to have themselves performed the services of removing, sorting, storing and delivering such goods to the plaintiffs, for which the Port Trust charges in question are made, and which services were included in such freights; and that since the defendant Company did not perform such services, they were bound to pay the said Port Trust charges themselves ;

[18] (*d*) that the said learned Judge ought to have held that the Bombay Steam Navigation Company, having under the fourteenth clause of the said agreement expressly agreed to give delivery of the goods to the consignees from their godowns at Bombay, were liable to perform the said services, or to pay the said Port Trust charges made for such services ;

(*e*) that the said learned Judge was in error in holding, as he did, that the inclusion of wharfage in the proportion of freight due to the West of India Portuguese Railway Company in the book of rates of the defendant Company, indicated, in the absence of any such inclusion in the proportion of freights due to the Bombay Steam Navigation Company, a liability on the part of the plaintiffs to pay the wharfage at Bombay ;

(*f*) that the said learned Judge was in error in holding, as he did, that the clause commencing "goods booked to foreign stations," &c , clearly indicated that the further charges might have to be levied to which the consignees will be liable, inasmuch as the said clause, endorsed on the said receipts, by its latter part relating to goods booked to Bombay, or elsewhere, *viz* Marmagoa, makes such goods subject to the rules and regulations conditions of carriage, wharfage and other charges in force only " on the railways and shipping lines over and by which they are conveyed, and the Prince's Dock at Bombay, where the Port Trust charges in question are made, forms no part of the shipping line by which the plaintiffs' goods were conveyed ;

(*g*) that the said learned Judge ought to have held that the " wharfage " so included in the proportion of freight due to the West of India Portuguese Railway Company and the " wharfage " mentioned in the said clause endorsed on the said receipts were neither of them of the nature for which the said Port Trust charges are made at Bombay, but of the nature defined in clause thirty- six at page seven of the rate book of the defendant Company itself, namely :—" All goods left on the railway premises more than forty-eight hours after midnight of the day on which they arrive, either for the convenience or by the desire or neglect of the consignor or consignee, will be subject to a wharfage charge of three pies per maund per twenty-four hours ;"

[19] (*h*) that the said learned Judge ought to have held that, even in the absence of any special agreement either one way or the other, the defendant Company was bound to perform all terminal services of the nature for which the said Port Trust charges are made ;

(*i*) that the said learned Judge was in error in holding, as he did, that the said Port Trust charges " are recoverable in all cases whether all or any of the said services are rendered or not," inasmuch as there is

no evidence whatever in the case to warrant such assumption, and it is absolutely impossible for any consignee to take charge of his goods, unless the services, at least of sorting and delivering, have been previously rendered;

(*j*) that the said learned Judge was in error in drawing the distinction, he did, between Messrs. Shepherd and Company as agents for the defendant Company and Messrs. Shepherd and Company as agents for the Port Trustees, inasmuch as no such distinction actually existed, and Messrs. Shepherd and Company could not have been the agents of the Port Trustees if they had not been the agents of the defendant Company; nor could Messrs. Shepherd and Company, as agents for the Port Trustees, make charges for the services which they, as agents of the defendant Company, were bound to render free of charges;

(*k*) that the said learned Judge was in error in thinking, as he did, that the payment of the said Port Trust charges by the British India Steam Navigation Company, in their time, was "owing to the keen competition between the shipping lines at that time," and "in order to retain the contract themselves," inasmuch as there is no evidence whatever in the case to justify such supposition.

(*l*) that the said learned Judge was in error in holding, as he did, that neither the defendant Company, nor their agents the Bombay Steam Navigation Company, were bound to perform the said services for which the said Port Trust charges were made, inasmuch as such holding was against the evidence given in the case by the witness Gopal Bapuji, himself a clerk in the employment of the Bombay Steam Navigation Company, who stated: "The Bombay Steam Navigation Company is bound to **[20]** sort the goods when they arrive in Bombay; we pile them; we have our own staff for working; we ourselves deliver the goods; we charge nothing for that work; it is included in our two annas;" and also against the evidence given in the case by Mr. Moir himself, the manager of the Bombay Steam Navigation Company, and called on behalf of the defendant Company, who likewise stated: "I admit we are bound to give delivery from our godowns in Bombay; we have no godowns of our own in Bombay; we contemplated building godowns in Bombay, but when we found we could use Dock, we did so: we saved costs of building godowns;"

(*m*) that the learned Judge was in error in holding, as he did, that the Port Trust charges were payable by the plaintiffs, notwithstanding that it is in evidence (1) that Messrs. Shepherd and Company by the fourteenth clause of their said agreement with the West of India Portuguese Railway undertook to make delivery of the goods to the consignees from their godowns at Bombay; (2) that Messrs. Shepherd and Company did not, in breach of such agreement, build such godowns to save expense to themselves; and (3) that, if such godowns had been built and used, the said Port Trust charges could never have been levied in respect of the plaintiffs' goods;

(*n*) that the learned Judge was in error in applying, as he did, in this case the usages and customs relating to shipments covered by ordinary bills of lading, under which consignees are bound to take delivery from the ship's tackles, and which are entirely different from the said receipts under which the defendant Company, or their agents at Bombay, were bound to convey, land and deliver the plaintiffs' goods at Bombay station;

(*o*) that the said judgment is against the weight of evidence in the case, and against law, equity and good conscience."

1892
SEP. 2.
ORIGINAL CIVIL.
17 B. 14.

The petitioners prayed for an order under s. 38 of the Presidency Small Cause Courts Act, 1882, that the said suit might be re-heard in the High Court.

Inverarity, for the petitioners.—The learned Chief Judge has gone wrong in his law and appreciation of the facts, and has **[21]** consequently come to a wrong decision. That amounts to a failure of justice, such as is contemplated by s. 38 of the Small Cause Courts Act (XV of 1882). Counsel argued the various points of law set forth in the petition, citing several authorities.

[FARRAN, J.—These are all nice points of law, and it may be desirable that the opinion of the High Court should be taken upon them. If so, why did you withdraw your request for a case to be stated? That would have been the right procedure; would it not?]

We are not bound to have a case stated. The Act gives this additional remedy in cases of importance over Rs. 1,000. This is the appropriate remedy in such a case as the present. We are not satisfied with the learned Judge's findings on the facts; and, if we were to take a case, we should be bound by the facts as the Judge might state them.

JUDGMENT.

BAYLEY, C. J. (ACTING).—The plaintiffs had a hearing of some length before the learned Chief Judge of the Small Cause Court, in which this case was admittedly gone into thoroughly and considered. The decision was given there, and with that decision they express themselves dissatisfied, and come to this Court for a re-hearing under s. 38 of the Small Causes Court Act. The learned Judge below was willing to state a case on the various points of law involved if the plaintiffs desired it, but this the plaintiffs, by their pleader, expressly declined. Mr. Inverarity now contends that it was at the plaintiffs' option whether they should take a case under s. 69 of the Act, or apply to this Court, as they have done, under s. 38.

Now s. 38 requires that the party asking for a rehearing must make out that there has been "a miscarriage of justice" or "other grounds for a re-hearing." Mr. Inverarity's argument amounts to this, that the Judge was wrong in the view he took of the law as applicable to the facts of the case. It is possible that that might prove to be so if the case were thoroughly considered, but is that what s. 38 means by "a miscarriage or failure of justice?" I do not think it is, and, therefore, in my opinion, this application should be refused.

[22] FARRAN, J.—I concur. The argument of Mr. Inverarity, though pressed with much emphasis, has not caused me to be of opinion that there has been a miscarriage or failure of justice in this case, or even an error in law, nor do I see that there are other good grounds for a re-hearing. Speaking for myself I am inclined to think that a re-hearing should not be granted under this section when the parties have been contented to take the opinion of the Small Cause Court on nice points of law, or on delicate questions as to the proper inference to be drawn from written documents and undisputed facts, merely because the High Court may incline to entertain, on an *ex parte* argument, a view different from that which the Judge of the Small Cause Court has arrived at. The Legislature has not given an appeal from the Small Cause Court to the High Court on questions of law, but has provided by s. 69, for parties who prefer to have the opinion of the High Court rather than that of the Small Cause Court Judge, on such questions, the means of obtaining it. It is difficult to see how

there can be said to be a "miscarriage or failure of justice," when a party, instead of taking the opinion of the High Court, as he has the means of doing, voluntarily elects to have the law applicable to this case decided by the Small Cause Court. A mistake in law and a miscarriage or failure of justice are not, in my opinion, convertible terms. It is not, however, necessary so to decide in the present circumstance. I merely suggest this question, feeling how excessively inconvenient it is to have nice questions of law argued *ex parte* before us; and entertaining, as I do, a serious doubt whether the Legislature intended to submit us to such an ordeal.

Attorneys for the plaintiffs :—Messrs. *Ardesir, Hormasji and Dinsha.*

---

17 B. 23.

[23] APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Telang.

MUKUND HARSHET, DECEASED *(Original Plaintiff)*, *Appellant v.* HARIDAS KHEMJI AND ANOTHER *(Original Defendants)*, *Respondents.** [11th January, 1892.]

Decree—Execution—Agreement not to execute a decree—Suit to restrain execution—Civil Procedure Code (Act XIV of 1882), *s.* 244—Res judicata—*Agreement not to execute regarded as satisfaction of decree—Civil Procedure Code (Act XIV of* 1882), *ss.* 257*a*, 258, 373.

Mukund and Antaji were partners, and, as such, were indebted to Haridas. Antaji died, and subsequently the debt was settled between Haridas on one side and Mukund and Antaji's widow, as guardian of her minor sons, on the other. For a moiety of the debt a bond was passed by Mukund to Haridas and for the other moiety by the widow of Antaji. Haridas filed a suit against Mukund and got a decree, which was satisfied. Haridas then sued the widow on her bond. The Court allowed her objection that she was not competent to give a bond binding her sons personally, and of its own accord made Mukund a defendant, and passed a decree against Mukund and Antaji's estate. Haridas assigned this decree to Ramchandra, who applied for execution against Mukund. Mukund thereupon filed this suit against Haridas and Ramchandra praying for an injunction against the execution of the said decree and for damages against Haridas. He alleged that during the pendency of the suit in which the said decree had been passed, Haridas had agreed that he would not obtain a decree against him, and that, if such a decree were passed, he would not execute it. The lower appeal Court rejected the plaint, holding (1) that as between the plaintiff Mukund and the defendant Ramchandra the question in issue was *res judicata*, and (2) that there was no cause of action against the defendant Haridas. On appeal to the High Court,

Held, that, as between Mukund and Ramchandra, the suit was not *res judicata*. The alleged agreement by its very terms provided for the event of the decree being passed, and was only intended to prevent its being executed.

Chenvirappa v. *Puttappa* (1) distinguished.

It having been urged that the question was one which could be decided in execution, and that under s. 244 of the Civil Procedure Code (Act XIV of 1882) the present suit would not lie.

Held, that the words "relating to execution" in s. 244 must be restricted to "the contents of the order made, or to how far it has been carried out," and do not, therefore, include an agreement not to execute the decree.

It being further contended that the agreement raised a question as to the "satisfaction" of the decree, and was, therefore, void without the sanction of the Court.

---

* Second Appeal, No. 819 of 1890.

(1) 11 B. 708.

1892

JAN. 11.

APPELLATE CIVIL.

17 B. 23.

[24] *Held*, that the satisfaction contemplated by s. 244 must have arisen out of some transaction between the parties, subsequent to the decree.

[F., 6 C.W.N. 796 (798); 22 B. 267 (270); 22 B. 463 (469); (F.B.) R., 21 C. 437 (459); 5 M.L.J. 140 (141).]

THIS was a second appeal from the decision of R. S. Tipnis, Acting District Judge of Ratnagiri.

Mukund and Antaji were partners, and as such were indebted to the defendant Haridas Khemji. Antaji died and after his death the debt was settled by Haridas on the one side and Mukund and Antaji's widow, as guardian of her minor sons, on the other. For a moiety of the debt a bond was passed by Mukund to Haridas, and for the other moiety a separate bond was given by Antaji's widow. Haridas sued Mukund on his bond, and obtained a decree, which was satisfied. He then sued the widow on her bond. She contended that she was not competent to give a bond binding her sons personally. The Court allowed this objection, and of its own accord made Mukund a defendant in the suit, and passed a decree against him and Antaji's estate. Haridas assigned this decree to the defendant Ramchandra, and Ramchandra applied for execution against Mukund. Mukund thereupon filed this suit against Haridas and Ramchandra praying for an injunction to prevent Ramchandra from executing the decree against him and for damages against Haridas. He alleged that during the pendency of the suit in which the said decree was passed, Haridas had agreed that he would not obtain a decree against him, and that, if such a decree was passed, he would not execute it. The Subordinate Judge allowed the claim, granted the injunction sought for, and damages in the event of the decree being executed. On appeal the Court rejected the plaint on the ground that as between Mukund and Ramchandra the question raised by the suit was *res judicata* and that there was no cause of action against Haridas. The plaintiff appealed to the High Court.

Mahadev Chimnaji Apte, for the appellant.—When we produced the agreement upon which we rely in the execution proceedings, the Court held that it would not then take it into consideration. The Court having taken that view it is not now open to the respondents to say that we must seek relief in the execution proceedings. We have a right to bring a separate suit [25] on the agreement in question for the purpose of restraining execution of the decree—*Dhuronidhur Sen* v. *Agra Bank* (1). The Court can set aside a wrong order passed in the execution of a decree and pass a fresh one—*Delhi and London Bank* v. *Melmoth A. D. Orchard* (2).

The provisions of s. 244 of the Civil Procedure Code (Act XIV of 1882) are not applicable to the present case. That section relates to proceedings in execution. But our contention is that the decree of which we seek to stop execution, cannot be executed at all. Section 244 is inapplicable to a case which involves a question as to whether the execution of a decree can or cannot be had. Questions like this cannot be opened in execution proceedings—*Sudindra* v. *Budan* (3). The remarks in the judgment in *Sakharam* v. *Govind* (4) support our contention. Our case is that the effect of the agreement we rely upon is to make the decree, so far as we are concerned, a nullity.

If the Court is against us on this point we contend that the agreement in dispute operates by way of satisfaction of the decree and,

(1) 4 C. 380. (2) 4 I. A. 127. (3) 9 M. 80. (4) 10 B.H.C. R. 361.

therefore, our right to bring a suit is not taken away by s. 244 of the Civil Procedure Code—*Nubo Kishen Mookerji* v. *Debnath Roy Chowdhry* (1); *Nujeem Mullick* v. *Erfan Mollah* (2); *Chukroo Singh* v. *Jowahir Singh*(3); *Meer Mahomed* v. *Khetoo Bebee* (4); *Ishan Chundar* v. *Indro Narain* (5).

Ganesh Ramchandra Kriloskar, for the respondents.—The question which arises in this case is one which can be determined in the execution proceedings, and ought not to be raised in a separate suit. There are authorities to show that provisions of law relating to the execution of a decree should be construed liberally so as to save litigants from the expenses of a separate suit—*Oseemunnissa Khatoon* v. *Ameeroonnissa Khatoon* (6). The appellants have relied upon the remarks in *Sakharam* v. *Govind* (7), but that case does not lay down that a separate suit will lie. It has **[26]** been held in several cases that questions relating to the fraudulent execution of a decree can be entertained in execution proceedings —*Subbaji Rau* v. *Srinivasa Rau* (8); *Viraraghava* v. *Venkatacharyar* (9); *Ballodeb Lall* v. *Anadi Mohapattur*(10); *Paranjpe* v. *Kanade*(11). The words of s. 244 of the Civil Procedure Code are wide enough to include the question whether a decree can be executed or not—*Mohibullah* v.*Imami*(12). In support of our argument that the appellants must seek relief in the execution proceedings, and not in a separate suit, we rely upon the rulings in *Woomatara Debia* v. *Unnopoorna Dassee*(13); *Sakharam* v. *Damodar*(14). The decision in *Param Singh* v. *Lalji Mal* (15) is against us, but it has been dissented from by our High Court in *Chenvirappa* v. *Puttappa* (16).

If the Court be against us on the above points, then we would support the decree of the lower Court on the ground of *res judicata*—*Kalimandal* v. *Kadarnath* (17).

Lastly we submit that, if the agreement in suit be looked upon as a compromise, satisfaction or adjustment of the decree, it cannot be taken into consideration without the sanction of the Court under ss. 257A, 258 or 375 of the Civil Procedure Code.

[TELANG, J.—But a suit for specific performance can lie under s. 375. See *Ruttonsey* v. *Pooribai* (18).]

JUDGMENT.

The judgment of the Court was delivered by

SARGENT, C.J.—According to the facts found by the Court, Mukund and Antaji were partners in a trade, in respect of which a debt was due to the first defendant Haridas. After Antaji died, the debt was settled between Haridas on the one side and Mukund and Antaji's widow, as guardian of his minor sons, on the other, by which the balance was fixed at 1,100 rupees, and both Mukund and Antaji's widow passed bonds for 550 rupees to Haridas. Haridas obtained a decree against Mukund on his **[27]** bond, which was satisfied, and he then sued Antaji's heirs. The Court allowed the widow's objection that she was not competent to give a bond binding her sons personally, and of its own accord made Mukund a defendant and passed a decree against him and Antaji's estate. Haridas assigned this decree to the second defendant Ramchandra, who applied for execution against Mukund. The present suit is brought by Mukund

(1) 22 W.R.C.R. 194. (2) 22 W.R.C.R. 298. (3) 19 W.R.C.R. 152.
(4) 20 W.R.C.R. 150. (5) 9 C. 788. (6) 20 W.R.C.R. 162.
(7) 10 B.H.C.R. 361. (8) 2 M. 264. (9) 5 M. 217.
(10) 10 C. 410. (11) 6 B. 148. (12) 9 A. 229.
(13) 11 B.L.R. 158 (P.C). (14) 9 B. 468. (15) 1 A. 403.
(16) 11 B. 708. (17) 6 C.L.R. 215. (18) 7 B. 304.

1892
JAN. 11.

APPELLATE CIVIL.

17 B. 23.

to restrain the second defendant from executing the decree, alleging that during the pendency of the above suit Haridas agreed with him that he would not get a decree against him, and, in the event of its being passed against him, he would not execute it. The plaintiff also claims damages from the first defendant Haridas.

The Subordinate Judge granted an injunction as prayed for, and ordered that, in the event of execution, the plaintiff should recover from the defendants the amount realized under the decree with 12 annas per cent. per mensem. The lower Court of appeal rejected the plaint, on the ground that the question in issue in this suit as between plaintiff and second defendant was *res judicata* by the decree in the above suit, and that there was no cause of action for damages as against Haridas. The Court relied on the judgment of West, J., in *Chenvirappa* v. *Puttappa* (1). In that case the plaintiff sought to restrain execution of an *ex parte* decree for possession passed on a deed of conveyance to which he said he had submitted, because the defendant had expressly engaged after the conveyance that plaintiff's possession should not be disturbed. Mr. Justice West considered that "the above undertaking ought to have been pleaded against the defendant's claim, and could not be made the basis of a separate suit." But there the agreement between the parties was directly at variance with the decree for possession which the defendant obtained in the former suit, and of course might have been pleaded in that suit. Whilst here the defendant says: "I will not execute the decree against you. I will get the decree satisfied by Antaji," and the agreement, therefore, by its very terms provides for the decree being passed, and is only intended to prevent its execution. We think, therefore, that the District Judge was wrong in disposing of the case on the ground of *res judicata*.

[28] It was also contended for the respondents that the matter was one which should have been decided in execution, and that under s. 244 of the Civil Procedure Code (Act XIV of 1882) a suit would not lie. The words "relating to execution" in s. 244 of the Civil Procedure Code are doubtless very general, but they must be restricted, as pointed out by the Court in *Sakharam* v. *Govind* (2), to "the contents of the order made or to how far it has been carried out," and do not, therefore, include an agreement, such as the present one, not to execute the decree. It is to be observed that in *Nubo Kishen Mookerjee* v. *Debnath Roy Chowdhry* (3) it was not suggested that a suit would not lie by reason of s. 11 of Act XXIII of 1861, although the agreement not to execute was subsequent to the decree. It was said indeed that the agreement raised a question as to the "satisfaction" of the decree, but the satisfaction contemplated by s. 244 must have arisen out of some transaction between the parties subsequent to the decree.

We must, therefore, reverse the decree of the Court below dismissing the plaint as against the second defendant, and remand the case for a decision on the merits as against the second defendant. The plaintiff not having taken any objection by his second appeal against the part of the decree of the Court below dismissing plaintiff's claim for damages against defendant No. 1, the decree will of course stand as regards that claim. Costs of this appeal to abide the result.

Decree reversed.

---

(1) 11 B. 708 (722). (2) 10 B.H.C. R. 361. (3) 22 W.R.C.R 194.

17 B. 29.

1892
JAN. 11.

APPELLATE CIVIL.

17 B. 29.

[29] APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Birdwood.

RAMKRISHNA MORESHWAR AND OTHERS (*Original Plaintiffs*), *Appellants* v. RAMABAI AND ANOTHER (*Original Defendants*), *Respondents.**

[11th January, 1892.]

Practice—Parties—Non-joinder of parties—Application to join necessary parties refused by Court of first instance—Appeal—Application granted by Court of appeal—Order to add parties operating nunc pro tunc*—Delay the act of the Court—Limitation.*

The plaintiffs, as sharers in certain rent alleged to be due by the defendants, sued to recover their share. The defendants contended that all the co-sharers were necessary parties. At the hearing on the 24th January, 1889, the plaintiffs' co-sharers applied to be made co-plaintiffs, and to be allowed to adopt what the plaintiffs had done in the suit. The application was rejected, and the suit was dismissed for want of parties. On appeal, the District Court in July, 1890, holding that the lower Court ought to have joined the co-sharers, passed an order making them co-plaintiffs, and then confirmed the lower Court's decree on the ground that at the time (3rd July, 1890) the co-sharers were made plaintiffs the suit was barred by limitation. On appeal to the High Court,

Held, remanding the case, that the order of the lower appeal Court of the 3rd July, 1890, allowing the co-sharers' application, which had been made on the 24th January, 1889, but had been refused by the Court of first instance, should be treated as operating *nunc pro tunc*, and that the co-sharers should be regarded as having been made parties to the suit when their application was made. The delay was attributable to the act of the Court, and the plaintiffs should not suffer from it.

[R., 19 B. 807 (809); 127 P.R. 1906=10 P.W.R. 1907.]

THIS was a second appeal from the decision of Khan Bahadur M. N. Nanavati, First Class Subordinate Judge of Ratnagiri with appellate powers.

The plaintiffs, Ramkrishna Moreshwar Kanvinde and others, as co-sharers in rent due from defendants for a certain *thikan*, sued the defendants to recover the said share.

Defendant No. 1, Ramabai, did not appear.

Defendant No. 2, Krishnaji Ramchandra Thakur, admitted his liability to pay half the amount of rent to all the Kanvinde sharers, but contended that, as the plaintiffs' co-sharers were not joined, the suit was not maintainable.

[30] At the hearing of the suit in January, 1889, the plaintiffs' co-sharers came in and applied to be made parties and to be allowed to adopt what the plaintiffs had done therein. The Court of first instance rejected the application, and dismissed the suit for want of parties. In his judgment the Subordinate Judge made the following remarks :—

"The application for the joinder of parties has been made at a very late stage, and their joinder is likely to involve a question of limitation as regards a part of the claim. As no satisfactory cause was assigned for the omission to join them in the plaint itself, or at the proper time, it became the duty of the Court to reluctantly reject the application."

The plaintiffs appealed to the District Court, which having held that the plaintiffs' co sharers ought to have been joined in the suit on their application, passed an order for their joinder, and confirmed the Subordinate

* Second Appeal No. 798 of 1890.

1892
JAN. 11.

APPELLATE CIVIL.

17 B. 29.

Judge's decree, on the ground that, at the time the co-sharers were joined as co-plaintiffs, the claim was time-barred.

Against the decree of the District Court the plaintiffs appealed to the High Court.

Maneksha Jehangirsha Taleyarkhan, for the appellants:—The lower Court was wrong in dismissing our claim on the ground that it was time-barred when the other co-sharers were joined as co-plaintiffs. First of all, we contend that there was no necessity to join them in the suit. Defendant No. 2 had, no doubt, in his written statement, objected to the maintenance of the suit on account of non-joinder, but no issue was raised on that point in the Court of first instance, and, therefore, the objection must be deemed to have been waived—*Trimbak Vithal* v. *Vishnu Maheshwar* (1). Next we contend that, even supposing that there was no waiver, the application was originally made within the period of limitation, and if it had been granted, and the parties had been joined when it was made, our claim would not have been time-barred. Our application was made in time, but the Court delayed the consideration of the matter, and **[31]** when it came to the conclusion that the application should be granted, our suit was time-barred. We, therefore, submit that the order of the Court allowing the application should be treated as made *nunc pro tunc*. The Court ought to have joined the co-sharers as parties at the time when we made the application. The delay on the part of the Court should not be allowed to prejudice our interest. We could do nothing more than make the application. The joinder of a party is the act of the Court for which a party cannot be held responsible. The application being made in time, we submit that the co-sharers should be considered to have been joined in time also.

Ganesh Krishna Deshamukha, for the respondents.—In the first place, we do not admit that the application was made within time.

[SARGENT, C.J.—But the Court seems to have assumed that it was made in time.]

According to the deposition of the plaintiff, the whole claim was barred when the application for joinder was made. One of the reasons given for the rejection of the application is that it was made at a very late stage of the suit,—that is, five days before judgment. Moreover, the application was not made by the original plaintiffs; it was made by the co-sharers themselves, and when the Court rejected it, the plaintiffs ought to have presented another application to bring their co-sharers on the record. We, therefore, submit that there was no proper application for joinder. It seems, as remarked by the District Judge in appeal, that the original plaintiffs acquiesced in the application, because it was their own pleader who made the application after receiving a *vakalatnama* from the co-sharers.

With respect to the point of limitation, we contend that the co-sharers cannot be considered to have been parties to the suit prior to their joinder; and, as they were joined after the statutory period for the suit had expired, the suit was time-barred.

There was no waiver of the objection as to want of parties. It is true that in the Court of first instance there was no distinct issue raised on the point; still the objection was taken in our **[32]** written statement, and the judgment of that Court shows that there was argument on the point.

(1) P. J. 1887, p. 6.

17 1833
16-1-81

1892
JAN. 11.
APPELLATE CIVIL.
17 B. 29.

JUDGMENT.

SARGENT, C.J.—The lower appeal Court has held that the plaint was barred because the co-sharers in the rent were not made parties until they were made so by its decree on the 3rd July, 1890. But we think that, as the co-sharers made their application during the hearing of the suit, as far back as 24th January, 1889, to be allowed to adopt what the plaintiff had done, and to be made co-plaintiffs, its order allowing the application, which had been refused by the Court of first instance, should be treated as operating *nunc pro tunc*, and that the other sharers should be regarded as having been made parties to the suit when that application was made. The delay between 24th January, 1889, when the application was made, and the decision of the Court of appeal, was attributable to the act of the Court, and the appellants should, therefore, not suffer from it (Broom's Legal Maxims, 6th ed., page 117).

We must, therefore, reverse the decree and send back the case for a fresh decision, having regard to the above remarks. Costs to abide the result.

Decree reversed.

---

17 B. 32.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Birdwood.

SIDU (*Plaintiff*) *v.* BALI AND OTHERS (*Defendants*).*
[12th January, 1892.]

Mortgage—Redemption suit—Costs due by mortgagee to mortgagor—Set off against the mortgage debt—Balance remaining due to mortgagor—Liability of mortgagee—Civil Procedure Code (Act XIV of 1882), s. 221.

The mortgagor is entitled to set off or deduct the amount of costs payable to him under the decree against or from the mortgage debt payable by him. If the amount of the costs be larger than the mortgage debt, the mortgagor is entitled to obtain possession at once of mortgaged property and to recover the balance against the mortgagee.

[R., 16 C.P.L.R. 73 (74).]

[33] THIS was a reference made by Rao Saheb Anant Gopal Bhave, Subordinate Judge of Khatav in the Satara District, under s. 617 of the Civil Procedure Code (Act XIV of 1882).

The facts which gave rise to the reference were as follows:—

The plaintiff, Sidu, having obtained a decree for redemption of certain immoveable property on payment of Rs. 20 to the defendant Bali within six months, paid the said amount into Court within the appointed time, and recovered possession of the property through Court. Before the amount was paid to the defendant, the original decree was reversed by the Special Judge, and consequently on the application of the defendant the property was delivered back into his possession, and the redemption money paid by the plaintiff into Court was returned to him. Subsequently the High Court, reversing the decree of the Special Judge, restored that of the Court of first instance, and ordered the defendant to pay costs

---

* Civil Reference No. 15 of 1891.

1892
JAN. 12.
APPELLATE CIVIL.
17 B. 32.

throughout. After six months from the date of the decree of the High Court had expired, the plaintiff made an application for execution of the decree, in which he sought to set off the amount of redemption money due from him against the amount of costs which were payable to him by the defendant, and to recover the balance by attachment of the moveable property of the defendant, and also to recover possession of the mortgaged property.

The Subordinate Judge entertained doubt on the following questions, which he submitted for consideration :—

" (1) Whether the amount of redemption money payable under the decree by the plaintiff to the defendant can be set off against the amount of costs awarded to the former against the latter ?

" (2) Whether the plaintiff's right of redemption was foreclosed by reason of his having failed either to pay into Court the amount of redemption money, or to obtain an order for setting off the said sum against the amount of costs due to him from the defendant, and for compelling him to enter satisfaction upon the decree within the aforesaid period of six months ?

[34] " (3) If the plaintiff's right to redeem is found to be foreclosed, can he still enforce the order of costs against the defendant ; or in other words, will it survive ?"

The Subordinate Judge's opinion on the first two points was in the affirmative, and he expressed no opinion on the third.

Further on in the reference the following question was framed for submission :—

" Whether it was not necessary for the plaintiff to apply to the Court, within the period of six months granted to him by the decree for payment of the mortgage amount, for an order allowing the set-off and declaring him to be entitled to recover possession of the mortgaged property from the defendant at any time of course within the prescribed period of limitation ?

On the above question the opinion of the Subordinate Judge was in the affirmative.

There was no appearance for the parties in the High Court.

JUDGMENT.

SARGENT, C.J.—We think that s. 221 of the Civil Procedure Code (XIV of 1882) is applicable to a case of this description, and we agree with the decision of the Calcutta High Court in *Brijnath Dass* v. *Juggernath Dass* (1), that the mortgagor is entitled to set off or deduct the amount of the costs payable to him under the decree against or from the mortgage debt payable by him. If that be so, and if the costs, as in this case, are of larger amount than the mortgage debt, the mortgagor is entitled to obtain possession at once of the mortgage property and to recover the balance of the costs against the defendant.

Order accordingly.

(1) 4 C. 742.

17 B. 35.

1892
JAN. 18.

APPELLATE CIVIL.

17 B. 35.

[35] APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Telang.

KACHAR ALA CHELA (*Original Defendant and Opponent*), *Appellant v.* SHA OGHADBHAI THAKARSHI (*Original Plaintiff and Claimant*), *Respondent*, and SHA OGHADBHAI THAKARSHI (*Original Plaintiff and Claimant*), *Appellant v.* KACHAR ALA CHELA, (*Original Defendant and Opponent*), *Respondent.** [18th January, 1892.]

Decree—Execution of decree—Mesne profits, ascertainment of—Duty of the Court—Deductions claimed—Res judicata.

Where a decree awarded mesne profits of the lands claimed in the suit, and the Court declined, in execution of the decree, to investigate questions relating to deductions claimed by the defendant, on the ground that to do so would be "to go behind the decree," and that it was not competent to the Court to do that in executing the decree.

Held, that the mesne profits could only be ascertained after making deductions from the gross earnings for all such payments made by the defendant as the plaintiff would have been bound to make if he had been in possession. It was, therefore, the duty of the Court executing the decree to inquire into the payments which the defendant alleged he had made, and also to determine the question, whether, as alleged by the plaintiff, the lands forming the subject-matter of the suit were rent free.

The Court having awarded a particular sum as annual mesne profits without setting forth in the judgment the details thereof, and it having, therefore, become impossible to say that the right to a particular deduction therefrom claimed by the defendant was adjudicated on by the Court,

Held, that the rule of *res judicata* did not apply to the question as to the payment by the defendant.

THESE were cross-appeals from an order passed by E. M. H. Fulton, District Judge of Ahmedabad, in execution of a decree.

The facts of the case were as follows :—

The plaintiff, Sha Oghadbhai Thakarshi, brought a suit in the District Court at Ahmedabad to recover possession of 423 acres and 15 gunthas of land situate at the village of little Matra, in the Dhandhuka Taluka, alleging that he had purchased the land in execution of a decree against Giga Uga and Hatia Giga and had obtained possession, but was forcibly dispossessed by the defendant. The plaintiff also sought to recover Rs. 4,200 as mesne profits for three years preceding the suit.

[36] Defendant, Kachar Ala Chela, Chief of Jasdan, denied that he had forcibly dispossessed the plaintiff, and alleged that the land did not belong to the plaintiff, or to Giga Uga or to Hatia Giga, and that they never had possession.

The District Judge (J. W. Walker) passed a decree directing the plaintiff to recover possession of a portion of the land claimed by him, and also to recover Rs. 2,100 as mesne profits for the three years preceding the suit, with mesne profits from the institution of the suit to the time of obtaining possession. The rest of the plaintiff's claim was rejected.

Against the decree of the District Court the defendant appealed to the High Court, and the plaintiff presented cross-objections under s. 561

* Cross Appeals Nos. 23 and 79 of 1891.

1892
JAN. 18.
APPELLATE CIVIL.
17 B. 35.

of the Civil Procedure Code (Act XIV of 1882). The High Court confirmed the decree (1).

After the confirmation of the decree by the High Court, the plaintiff applied in execution for the recovery of mesne profits. The defendant claimed certain deductions and produced a document which he contended showed that he was entitled to make these deductions. The District Judge refused to allow any deductions, on the ground that to do so would be to go behind the decree, which made no provision for any allowances to the defendant. In making his order he said :—

"I must reject this document as irrelevant to the present inquiry. We cannot go behind the decree. Mr. Verajrai (defendant's pleader) argues that, according to the terms of Ex. 148, Hatia Giga was not entitled to the *santi vero* and *kharajat* leviable on a portion of the land in dispute. He contends, therefore, that, as the plaintiff's title is derived from Hatia Giga, he cannot recover this *vero* and *kharajat*, for which allowance must be made to the defendant in the computation of mesne profits. The answer to this argument is that the decree finally determines the rights of the parties, and it awards the land to the plaintiff without any reservation on account of *vero* and *kharajat*. If there was any mistake in the decree, the proper steps should have been taken to get it amended. In **[37]** execution no evidence, therefore, can be received to show that the defendant is entitled to allowance for *vero* and *kharajat*.

"Similarly no deduction can be made on account of the proportion of Government assessment, which, it is argued, ought to fall on the plaintiff's land. Mr. Narbheram (plaintiff's pleader) contends that, owing to certain circumstances, the plaintiff's predecessor was entitled to hold his land free of contribution for Government assessment, but that is a question into which I cannot enter without going behind the decree. The *jama* of the village is paid in a lump by the defendant, and, if he was entitled to recover contribution from the plaintiff, he should have taken steps to get the right expressly declared by the decree. Instead of this, when the plaintiff in his plaint specified the mesne profits, the defendant does not seem, in his written statement, to have asked to set off any portion of the *jama*. He denied the plaintiff's claim *in toto*, but did not specially plead for reduction of mesne profits on account of assessment. Consequently, when the judgment was written, no allowance seems to have been made for assessment. Under these circumstances no allowance can now be made in execution.

"Similarly with regard to local funds. As the decree does not entitle the defendant to contribution for the cess that may be levied from him by Government, no allowance can be made in execution. Whether by representing the matter properly the defendant can obtain a reduction of local-fund cess with which he is charged under s. 7 of Bombay Act III of 1869, is a question which I need not discuss; but, in any case, there seems no doubt that under Mr. Walker's decree he is not entitled to credit from the plaintiff for any payments which he may have made."

The final order passed by the District Judge ran thus :—

"Mr Walker fixed the mesne profits at Rs. 700 per annum for the years prior to the suit and his decision was confirmed on appeal. I think the same sum may now be fixed. I, therefore, direct that for the (*Samvat*) years 1941, 1942, 1943, 1944 and 1945, the plaintiff do recover mesne profits at the rate of Rs. 700 per annum, *i.e.*, Rs. 3,500 in all.* * *"

(1) See P.J. 1889, p. 222.

1892
JAN. 18.
APPELLATE CIVIL.
17 B. 35.

[38] Against the said order, the defendant and the plaintiff presented cross appeals, Nos. 23 and 79 of 1891, respectively.

Latham (Advocate-General with *F. R. Vicaji* and Rao Saheb *Vasudev Jagannath Kirtikar*), for Giga Uga appellant in appeal No. 23 and respondent in appeal No. 79:—The lower Court erred in omitting to deduct the amount of Government assessment and local-fund cess from the profits of the property in dispute. If the decree-holder had been in possession, he would have been liable to pay the cess and the assessment. We have paid these during the period of our management, and we are entitled to this deduction—Mayne on Damages, 4th Ed., p. 420. The lower Court held that because the decree does not provide for a deduction on this account, we are not entitled to it. But when the decree was passed, the present question had not arisen. It is therefore, open to us to raise it now in execution proceedings. The same may be said as to our right to the *vero* and *kharajat*.

Branson (with *Ganpat Sadashiv Rao*), for Sha Oghadbhai, respondent in appeal No. 23 and appellant in appeal No. 79:—To allow the appellant to raise in the execution proceedings the questions about the assessment and the local cess, the *vero* and the *kharajat*, would be to go behind the decree. These questions were either raised before the judgment, or they were not. If raised, the decree decided the questions against the appellant. If not, he cannot raise them now. The decree is a final and complete adjudication of the rights of the parties, and it cannot be varied in execution. In awarding mesne profits, the lower Court has omitted to award them for two years with interest thereon.

JUDGMENT.

SARGENT, C.J.—We think that the District Judge was wrong in not investigating the questions between the parties relating to the deductions claimed by the defendant on account of the Government assessment and local cess paid by him and also on account of the *vero* and *kharajat* payments. The learned Judge was of opinion that to investigate these questions would be "to go behind the decree," and that it was not competent to him to do that in the course of the execution of the decree. The decree however, awarded the plaintiff mesne profits of the lands claimed [39] in the suit, and such profits can only be ascertained after making deductions from the gross earnings for all such payments made by the defendant as the plaintiff would have been bound to make if he had been in possession. It is hardly necessary to cite authorities for this proposition, but reference may be made to those which were relied on by the Advocate General. See Mayne on Damages, 4th Ed., p. 420, and the cases there cited. It was, therefore, the duty of the Court executing the decree to inquire into the payments which the defendant alleged he had made on this account, and also to determine the question whether, as alleged by the plaintiff, the lands forming the subject-matter of the suit were rent-free.

As regards the other question touching the *vero* and *kharajat* payments, it cannot be said that that was determined by the decree. The defendant's case on that point would have afforded no proper defence to the suit as a suit in ejectment. No doubt, there was a prayer for mesne profits also made in the plaint, and that prayer was granted by the Court. But the details of the item of Rs. 700 allowed by the Court as the annual mesne profits of the lands, are not set forth in the judgment of the Court, and it is, therefore, impossible to say that the right to this

1892
JAN. 13.
APPEL-
LATE
CIVIL.
17 B. 35.

particular deduction claimed by the defendant was adjudicated on by the Court. In a very recent case of *In re Browne and Wingrove; exparte Ador* (1) the debtors, who had jointly guaranteed to one Ador the payment with interest of a sum of £1,000 lent by him, presented a bankruptcy petition on which a receiving order was made, and ultimately a scheme of arrangement with the creditors was approved of by the Court. * * * Ador tendered a proof under the scheme for £1,000 principal and £11-16-8 interest down to the date of the receiving order. The trustee under the scheme rejected the proof as regarded the interest, and allowed it for the principal only, on the ground that the debtors had not guaranteed the payment of interest. Ador did not appeal from this rejection. On the case coming up before the Court of appeal to determine for what amount Ador could prove, and how the dividend payable was to be calculated, it was argued for the **[40]** trustee under the scheme that the matter of the claim for interest was *res judicata* "by reason of the trustee's rejection of the proof for £11-16-8 interest and the appellant's omission to appeal against the rejection" within the time allowed. But Lindley, L. J., having held that the guarantee extended to the interest as well as the principal, proceeded to say: It was contended that an order had been already made, which was inconsistent with this view, and that that order not having been appealed from, it was not competent to the appellant to contend that the interest was guaranteed. The order in question, however, related only to a sum of £11-16-8 for interest up to the date of the receiving order, and the appellant is content to have that sum rejected. The point now before the Court is a totally different one, and ought to be decided upon its merits, although that course unquestionably renders it necessary to reconsider the construction of the letter in question." In the present case there is even less ground than there was in *Ex parte Ador* for applying the rule of *res judicata*, because there is not here any evidence to show that the question as to the payments in question was in truth adjudicated on by Mr. Walker. And there is, of course, no attempt now on the part of the defendant to get rid of the order to pay Rs. 700 per annum as mesne profits for the period to which Mr. Walker's order in terms applies.

The order of the Court below must, therefore, be reversed, and the matter remitted for the mesne profits to be ascertained according to the principles now laid down. In the view, which we have taken, we have not considered it necessary to hear any argument with respect to the other objections of the appellant to the order of the Court below. But the parties agreeing to this course, we direct that the Court below should take an account of the mesne profits for the years 1940 and 1946 in the present proceeding, and that interest should be allowed to the plaintiff on the amount of mesne profits which the Court may award. Costs including the costs in this Court to be dealt with by the Court below.

Order reversed.

(1) (1891) 2 Q. B. 574 (578).

17 B. 41.

1892
JAN. 21.

APPELLATE CIVIL.

17 B. 41.

[41]

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Birdwood.

VITHAL HARI ATHAVLE (*Original Plaintiff*), *Appellant v.* GOVIND VASUDEO THOSAR (*Original Defendant*), *Respondent.**

[21st January, 1892.]

Claim for interest from institution of suit until payment—Stamp—Future mesne profits —Court Fees Act (VII *of* 1870), *s.* 7.

No additional stamp is required on account of the claim for interest from the date of the institution of the suit until payment. It stands on the same footing as future mesne profits, which do not fall under s. 7 of the Court Fees Act (VII of 1870).

THIS was a reference made by C. E. G. Crawford, District Judge of Thana, under s. 617 of the Civil Procedure Code (Act XIV of 1882).

The facts of the case were as follows :—

The plaintiff, Vithal Hari Athavle, constituted attorney of one Hari Mahadeo Athavle, sought to recover from the defendant Rs. 457-8-0 due on a mortgage, and claimed interest on the mortgage amount from the date of the institution of the suit till payment.

The defendant, Govind Vasudeo Thosar, admitted the mortgage and pleaded payment of Rs. 67-8-0, which, he alleged, was not given credit for by the plaintiff.

The Subordinate Judge found the payment of Rs. 67-8-0 proved, and awarded the plaintiff's claim for the rest of the amount with interest up to date of the plaint.

The plaintiff appealed to the District Court on certain grounds, one of which was that he was entitled to interest up to date of payment.

The respondent's pleader objected to the raising of the above point, unless a Court-fee was paid for the amount claimed under it.

The District Judge, thereupon, submitted the following question for the opinion of the High Court :—

"Is a Court-fee leviable, in this appeal, in respect of appellant's claim for interest after date of plaint ?"

[42] The District Judge's opinion was that the precise amount of interest claimable not being ascertainable until the date of payment is known, special provision would have been made for the case, as has been done for mesne profits in s. 11 of the Court Fees Act (VII of 1870) had it been the intention of the Legislature that a Court-fee should be levied in such a case. On the other hand he considered that it might fairly be argued that the interest is part of the subject-matter of the appeal, at least in cases like the present, where the principal and some interest up to date of plaint has been awarded, the case then ceasing to be similar to that of the original claim for interest under s. 209 of the Civil Procedure Code, inasmuch as the claim becomes one for interest separately from that for the principal.

There was no appearance for the parties in the High Court.

* Civil Reference No. 18 of 1891.

1892

JAN. 21.

APPELLATE CIVIL.

17 B. 41.

OPINION.

SARGENT, C. J.—We think that no additional stamp would be required on account of the claim for interest from institution of the suit until payment. It stands on the same footing as future mesne profits, which in *Ramkrishna* v. *Bhimabai* (1) were held not to fall under s. 7 of the Court Fees Act.

Order accordingly.

17 B. 42.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Birdwood.

DAMODAR GOPAL DIKSHIT (*Original Defendant*), *Appellant* v. CHINTAMAN BALKRISHNA KARVE AND OTHERS (*Original Plaintiffs*), *Respondents.** [28th January, 1892.]

Small Cause Court—Provincial Small Cause Courts Act (IX *of* 1887), *sch.* II, *cls.* (4) *and* (31); *s.* 23, *cl.* (1)—*Jurisdiction—Suit to recover share of profits of inam villages —Money had and received for plaintiffs' use.*

In a suit for the recovery of a certain share in the profits of *inam* villages, of which the defendant was the manager, the only relief claimed by the plaintiffs being payment of money, namely Rs. 130.

Held, that the suit was for money had and received for plaintiffs' use, and was cognizable by the Court of Small Causes. It did not fall under cl. (4) of sch. II of the Provincial Small Cause Courts Act (IX of 1887), as it was not [43] a suit for the possession of immoveable property, or for recovery of an interest in such a property. If the plaintiffs had alleged that the defendant had "wrongfully received" the plaintiffs' share of profits, then the suit would have fallen under cl. (31), sch. II of the Act.

[F., 23 A. 437 (438)=21 A.W.N. 128; 32 B. 560 (562)=10 Bom.L.R. 733; 34 B. 171=11 Bom.L.R. 1330=4 Ind. Cas. 830; 9 Bom.L.R. 207-N: **Appr.**, 21 B. 248 (250); **R.**, 35 M. 726=11 Ind. Cas. 31=21 M.L J. 442=(1911) 2 M.W.N. 189; 16 Ind. Cas. 868=6 S.L R. 85; 1 L.B.R. 335 (336); 14 M.L J. 396 (400); 18 M.L.J. 88 (89); 2 O.C. 276 (279); 13 P.R. 1901=137 P.L.R. 1901; 98 P.L.R. 1904: **Expl.**, 25 B. 85 (89).]

THIS was an appeal against an order of remand passed by A. D. Pollen, District Judge of Poona.

Suit to recover a share of the profits of *inam* villages.

The plaintiffs, Chintaman Balkrishna Karve and others, stated that the two villages in dispute belonged to the families of the parties as *inam*; that the plaintiffs had one-fifteenth share therein; that the defendant, Damodar Gopal Dikshit, had the management thereof, and that they claimed to recover Rs. 130 from the defendant as their share of the profits for three years.

The defendant, Damodar Gopal Dikshit, resisted the suit on the ground that it was time-barred; that Vishnu Dikshit, whose heirs the plaintiffs claim to be, had no share in the property in dispute; and that the Court had no jurisdiction to entertain the suit.

The Subordinate Judge (Rao Saheb Vaman M. Bodas), in whose Court the suit was originally instituted, held that it was within the

* Appeal No. 25 of 1891.

(1) P. J. 1890, p. 364.

cognizance of the Court of Small Causes at Poona, and dismissed it for want of jurisdiction.

The plaintiffs appealed to the District Court, which held that the jurisdiction of the Small Cause Court was barred by sch. II, arts. (4) and (31) of the Provincial Small Cause Courts Act (IX of 1887), and reversed the decree, and remanded the suit for trial on the merits.

Against the order of remand, the defendant appealed to the High Court.

Balkrishna Narayan Bhajekar, for the appellant.—The suit relates to the recovery of money, and that was the only prayer of the plaint. The District Judge was wrong in holding that in the present suit the respondents wanted to establish their right to the income of the property. In the plaint they asked for Rs. 130 on account of their share in the income, and nothing more; and that being so, the case falls within the cognizance of the Court of Small Causes at Poona. The plaintiffs **[44]** did not seek to recover, or establish, their right to any immoveable property over which the Small Cause Court has no jurisdiction.

[BIRDWOOD, J., referred to *Gulam Nabi* v. *Shahabudin* (1).]

That case supports our contention; so also the ruling in *Krishnaji* v. *Gangaram* (2).

Purushottam Parashuram Khare, for the respondents.—The view taken by the District Judge is correct. We say in our plaint that we have got a fifteenth share in the property and the income, and the appellant denies our right to a share in the property. The pleadings in the case, therefore, raise a question of title, which the Small Cause Court has no jurisdiction to entertain. The Judge also relied on arts. (4) and (31) of sch. II of the Provincial Small Cause Courts Act (IX of 1887), and was of opinion that the claim related to an interest in immoveable property.

JUDGMENT.

SARGENT, C. J.—The plaintiffs sued to recover their one-fifteenth share of the profits of two *inam* villages which had been collected by the defendant as the representative of the eldest branch of the family of *inamdars*, and as manager of the property for the several sharers. The Subordinate Judge dismissed the claim, as he was of opinion thst the suit was within the cognizance of the Court of Small Causes, and that he had no jurisdiction.

The District Judge has, however, held that the case falls under cls. 4 and 31 of sch. II of Act IX of 1887, and is, therefore, excepted from the cognizance of a Court of Small Causes; and he has remanded the case for trial by the Subordinate Judge. We are unable to concur in this decision. The suit is one for money had and received to the plaintiffs' use. It does not fall under cl. 4 of sch. II of Act IX of 1887, as it is not a suit for the possession of immoveable property, or for the recovery of an interest in such property; the only relief claimed being the payment of money. If the plaintiffs had alleged that the defendant had "wrongfully received" the plaintiffs' share of profits, then, no doubt, the suit would have fallen under cl. 31 of the sch. II. But the **[45]** plaintiffs' allegation is that the defendant rightfully received, but wrongfully retained, the profits. To such a suit cl. 31 has no application (*cf. Krishnaji* v. *Gangaram* (2)). The suit, as brought, is cognizable by a Court of Small Causes. If the plaint is now proceeded with in such a Court, and the

(1) P. J. 1885, p. 14.

(2) P. J. 1890, p. 255.

1892
JAN. 28.

APPELLATE CIVIL.

17 B. 42.

defendant denies the plaintiffs' title, it would be open to the Court to act under s. 23, cl. (1) of Act IX of 1887.

We reverse the order of the lower appellate Court and direct that the plaint be returned to the plaintiffs for presentation in the Court of Small Causes. The parties to pay their own costs of this appeal. Other costs to be costs in the cause.

Order reversed.

---

17 B. 45.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Birdwood.

MOTILAL PRANNATH AND OTHERS (*Original Defendants*), *Appellants v.* BAI KASHI, WIDOW OF GOPAL PRANNATH (*Original Plaintiff*), *Respondent.** [1st February, 1892.]

Hindu law—Maintenance — Widow's maintenance — Withholding of maintenance—Demand and refusal—Arrears of maintenance—Limitation—Decree providing for reduction of maintenance in event of altered circumstances of persons paying it.

K., a Hindu widow, sued the undivided brothers of her deceased husband for maintenance. She also claimed arrears of maintenance for six years prior to the institution of the suit. The Court of first instance passed a decree in her favour awarding her maintenance at the rate of Rs. 52 a year during her lifetime, but "subject to variation according to the change in defendants' circumstances for the worse." The Court also awarded her arrears of maintenance for three years only (not six as claimed) on the ground that she was only twenty years old, and had always lived with her father and been maintained by him, and that a formal demand had only been made on the defendants three years previously. On appeal, the District Court increased the rate of maintenance to Rs. 65 per annum, and awarded the plaintiff arrears for six years, holding that the fact of the demand having been made only three years before suit did not prevent her from recovering arrears for six years.

Held by the High Court that although the withholding of maintenance, which constituted the cause of action, might be proved otherwise than by a demand and refusal, yet in this case it had not been shown that there were any circumstances [46] which would amount to a refusal of maintenance. The decree of the lower appeal Court was, therefore, confirmed, except so far as it gave the plaintiff arrears of maintenance for six years, which period was altered to three years. The clause as to the reduction of maintenance in the event of altered circumstances was also struck out.

[R., 24 B. 386 (392); 13 C.P.L.R. 156 (157); 16 C.P.L.R. 30 (32); Cons., 24 M. 147 (155) (P.C.)=2 Bom.L.R. 945=5 C.W.N. 74=27 I. A. 151=10 M.L.J. 294=7 Sar.P.C.J. 761.]

THIS was a second appeal from the decision of E. H. Moscardi, Acting Assistant Judge with full powers, of Broach.

Suit to recover maintenance.

The plaintiff, Bai Kashi, widow of one Gopal Prannath, who died a minor, sought to recover from the defendants, who were the undivided brothers of the deceased, arrears of maintenance for six years prior to the institution of the suit, and also for an order directing that the defendants should continue to pay her maintenance annually in future, and that, in default, she should recover it from their property.

The defendants, Motilal, Lallubhai and Ranchhod Prannath, urged (*inter alia*) that the plaintiff was unchaste; that she had from the

---

* Second Appeal No. 10 of 1891.

time of her husband's death lived with her father, and that, therefore, she was not entitled to recover maintenance.

The Subordinate Judge (Rao Saheb Gulabdas Laldas) found that the allegation as to the plaintiff's unchastity was not proved, and that she was entitled to recover future maintenance and arrears thereof only for three years, and not more. He, therefore, made the following order :—

"The order is that the plaintiff do recover from the defendants Rs. 144 for the three years pending the suit, and Rs. 48 more for the period until the 16th August 1838, and the defendants do go on paying to the plaintiff her maintenance Rs. 52 (fifty-two) a year during her lifetime, subject, of course, to variation according to the change in defendants' circumstances for the worse, on the 16th August every year from the year 1889, and that, in default of the defendants paying the same, the plaintiff may, recover the same from the family property of the defendants."

The reasons assigned by the Subordinate Judge for awarding arrears for three years only were as follows :—

"There is no objection to their award for a longer period on the ground of limitation, but the plaintiff is only twenty years [47] old. She has lived all the time with her father, and been fed by him as her natural protector. No separate accounts for her food are kept. According to the rules of the caste to which the parties belong, a female does not go to reside permanently with her husband before the age of sixteen. Until then she is simply a visitor at her husband's house, and is, therefore, generally maintained by the parents. Though, as a rule of Hindu law, the female is entitled to be maintained by her husband and his relations from the date of her marriage, it is only in theory; practically she is maintained by them after sixteen years of age. As she has been put to no expenses, and has to contract no debts, the award of a lump sum is simply to enrich her, and, therefore, it should not be for more than three years only.

"Moreover, the maintenance was demanded formally only three years ago from the defendants. This is also one of the principal grounds why she should not get a lump sum as arrears for a longer period."

Against the decree of the Subordinate Judge both the parties appealed to the District Court, and the District Judge being of opinion that the rate of maintenance awarded by the Subordinate Judge was lower than it ought to have been, and that though the plaintiff had demanded arrears of maintenance only for three years prior to the institution of the suit, still that circumstance did not debar her from getting the arrears for six years, varied the decree by increasing the rate of the arrears, as well as future maintenance, to Rs. 66 per annum and by awarding the arrears of six years.

The defendants appealed to the High Court, and the plaintiff respondent presented cross-objections under s. 561 of the Civil Procedure Code (Act XIV of 1882).

Manekshah Jehangirshah Taleyarkhan, for the appellants :—Though the respondent had claimed arrears of six years in her plaint, still it was during the three years prior to the institution of the suit that a demand for maintenance was made. We, therefore, contend that the lower Court was wrong in giving her arrears of six years. The Subordinate Judge awarded arrears of three years only, and he has given very good reasons for his doing so. In [48] order that a Hindu widow may be entitled to

1892
FEB. 1.
APPELLATE CIVIL
17 B. 45.

maintenance, there must be either a demand, or an improper withholding of maintenance from her—*Narayanrao* v. *Ramabai* (1) : *Chanbasapa* v. *Cholawa* (2). The demand was made only three years prior to the institution of the suit, and no improper withholding on our part has been proved.

Chimanlal Harilal Shetalvad, for the respondent :—Irrespective of any demand or refusal, a Hindu widow is by law entitled to arrears of maintenance for six years, which is the period allowed by the Statute of Limitation (Act XV of 1877)—*Jivi* v. *Ramji* (3). The lower Courts have not gone into the question as to whether there was any demand and withholding, and we submit that it is not necessary in every case to prove any such demand and withholding.

The lower Courts have not conformed to the practice in framing the decree. The clause in the decree as to the reduction of the maintenance, in the event of the appellants' circumstances becoming unfavourable, should be left out.

JUDGMENT.

SARGENT, C. J. —The decision of the Privy Council in *Narayanrao* v. *Ramabai* (1) shows that a withholding of maintenance, which constitutes the cause of action, may be proved otherwise than by a demand or refusal. But the District Judge, in amending the finding of the Subordinate Judge which limited the arrears to three years, has not found that there were any circumstances which would amount to a refusal of maintenance as explained in the above decree. We must, therefore, confirm the decree, except so far as it gives the plaintiff arrears of maintenance for six years, which period must be altered to three years. It is not usual to reserve, in express terms in a decree for maintenance, the right of the parties paying the maintenance to ask for a reduction in the amount in the event of altered circumstances. Those words should, therefore, we think, be omitted from the decree. Parties to pay their own costs of this appeal.

Decree varied.

---

17 B. 49.

[49] APPELLATE CIVIL.

Before Mr. Justice Jardine and Mr. Justice Telang.

GOWRI (*Original Defendant*), *Applicant* v. VIGNESHVAR AND OTHERS (*Original Plaintiffs*), *Opponents.** [11th February, 1892.]

Parties—Practice—Appeal—Appeal by some of the parties to a suit—Decree in appeal binding parties to the suit who were not parties to the appeal—Civil Procedure Code (Act XIV of 1882), *s.* 244, *cl.* (*c*)—*Decree—Execution.*

The plaintiffs filed a suit in ejectment against A. B. and C. The Subordinate Judge decreed the claim. On appeal, the District Judge rejected it. The plaintiffs then preferred a second appeal to the High Court, which finally decided in plaintiffs' favour. To this second appeal the defendant A. was not made a party. In execution of the High Court's decree, A. was dispossessed, but was restored to possession by the Subordinate Judge under s. 332 of the Code of Civil Procedure (Act XIV of 1882). This order was reversed, on appeal, by the District Judge.

---

* Application No. 226 of 1891 under Extraordinary Jurisdiction.

(1) 6 I. A. 114. (2) P. J. 1890, p. 172. (3) 3 B. 207.

1892
FEB. 11.

APPELLATE CIVIL.

17 B. 49.

A, thereupon applied to the High Court, under s. 622 of the Code of Civil Procedure (Act XIV of 1882), to set aside the District Judge's order as *ultra vires*, on the ground that s. 244 of the Code was not applicable to the case, A. not having been a party to the appeal in which the decree under execution was passed and that, therefore, no appeal lay to the District Judge from the Subordinate Judge's order.

Held, that A being a party to the suit, though not to the appeal in which the final decree was passed, the District Judge had jurisdiction to hear the appeal under s. 244, cl. (*c*) of the Code of Civil Procedure.

[Diss., 23 A. 346 (352); 30 C. 134=6 C.W.N. 10 (12); 23 T.L.R. 57 (59); F., 6 Bom. L. R. 697 (698); 15 C.P.L.R. 106 (110); 31 B. 33=8 Bom. L. R. 858 (859); R., 23 M. 361 (366) (F.B.); 15 M.C.C.R. 247 (250).]

THIS was an application under s. 622 of the Code of Civil Procedure (Act XIV of 1882).

The opponents filed a suit against Vithal and others, including the present applicant, to recover possession of certain lands, alleging that the defendants were tenants, who had forfeited their tenancy on failure to pay rent. The Subordinate Judge passed a decree awarding possession to the plaintiffs.

Against this decision the defendant Vithal alone appealed to the District Judge, who reversed the decree of the Subordinate Judge.

Thereupon plaintiffs preferred a second appeal to the High Court. The applicant Gowri was not made a party to this appeal.

The High Court held that, if the defendant Vithal did not pay the arrears of rent within three months, the plaintiffs were entitled to recover possession of the lands in dispute.

[50] Vithal failed to make the payment as ordered, and the plaintiffs took possession, in execution of the High Court's decree, of the whole property, including the land in the possession of the applicant Gowri.

Gowri thereupon applied to the Court, under s. 332 of the Code of Civil Procedure (Act XIV of 1882), to be restored to possession, on the ground that she was not a party to the High Court's decree, in execution of which she was dispossessed. The Subordinate Judge granted this application.

The plaintiffs appealed to the District Judge, who held that no appeal lay against an order under s. 332 of the Code of Civil Procedure, and therefore rejected the appeal. Against this decision the plaintiffs appealed to the High Court. The High Court was of opinion that the Subordinate Judge's order restoring the applicant to possession was one under s. 244, and not 332, of the Code of Civil Procedure (Act XIV of 1882), and was appealable. The case was, therefore, remanded for a decision on the merits. On remand the District Judge reversed the order of the Subordinate Judge, which directed the applicant Gowri to be restored to possession.

Against this order the present application was made to the High Court on the grounds (1) that applicant, not being a party to the High Court's decree, ought not to have been dispossessed in execution of the said decree, and (2) that the District Judge had no jurisdiction to entertain an appeal against the Subordinate Judge's order.

A rule *nisi* was issued to the opponents to show cause why the District Judge's order, in appeal, should not be set aside, as being illegal and *ultra vires*.

Manekshah Jehanghirshah, for the plaintiffs (opponents) showed cause :—The case falls under s. 244 of the Code of Civil Procedure (Act XIV of 1882). The applicant was a party to the original suit, and

1892
FEB. 11.
APPELLATE CIVIL.
17 B. 49.

though she was not a party to the appeal in which the final decree was passed, the question whether she was legally dispossessed in execution of the final decree is one falling under cl. (*c*) of s. 244. The proceedings in appeal are but a continuation of the original suit, and the **[51]** suit does not terminate until the final decree is passed by the highest Court of appeal. The final decree in the present case, therefore, binds the applicant in common with the other parties to the suit. Refers to *Raghunath Ganesh* v. *Mulna Amad* (1); *Nimba Harishet* v. *Sitaram Paraji* (2); *Rajrup Singh* v. *Ramgolam Roy* (3).

Narayan Ganesh Chandavarkar, for the applicant, *contra*:—The applicant was not a party to the appeal in which the final decree was passed. She is not, therefore, bound by it. Section 544 of the Code of Civil Procedure does not make one respondent liable under a decree passed against other respondents. No decree can be passed against a party unless he is properly brought before the Court. In s. 244, "suit" includes an appeal, and, unless a person is a party to the appeal, he is not bound by the appellate decree, and the case does not fall under s. 244. Cites *Gour Kishore* v. *Mahomed Hassim* (4).

JUDGMENT.

TELANG, J.—The applicant was one of several defendants in a suit brought by her opponent, who sued for possession of land. On appeal to the District Court, to which she was also a party, that claim was rejected. The plaintiff appealed further to the High Court, which awarded it. But to this second appeal the applicant was not made a party. She was, however, ejected in execution, but, on her complaint thereof, her possession was restored by the Subordinate Judge. Her adversary appealed to the District Judge, who, for reasons into which we need not inquire, reversed the Subordinate Judge's order. She now invokes our jurisdiction, under s. 622 of the Code of Civil Procedure (Act XIV of 1882), to set aside the District Judge's order as made without jurisdiction.

It has been argued on her behalf that there was no appeal from the Subordinate Judge's order, s. 244 not being applicable under the circumstances, she not having been a party to the appeal in which the decree under execution was passed. We are asked to follow *Gour Kishore* v. *Mahomed Hassim* (4), the only reported case, as far as we know, in which the point has been **[52]** decided. The words to be interpreted are those of s. 244, cl. (*c*): "Any other questions arising between the parties to the suit in which the decree was passed or their representatives" The scope of the section is stated by their Lordships of the Privy Council in *Chowdry Wahed Ali* v. *Mussamut Jumaee* (5). They say: "This enactment was undoubtedly passed for the beneficial purpose of checking needless litigation, and their Lordships do not desire to limit its operation" In the present case we are virtually asked to read the words as if they were "parties to the decree in the suit or in the appeal in which the decree was passed." In the Calcutta case and in *Sankaravadivammal* v. *Kumarasamya* (6), it is, however, pointed out that the words used are "parties to the suit." In the former case it seems that the part of the claim of the plaintiff relating to one of the defendants' lands was rejected by the Court which tried the suit; and when in execution the plaintiff attached these lands it was held that the defendant was not a party to the suit within the meaning of the

(1) 12 B. 449. (2) 9 B. 458. (3) 16 C. 1.
(4) 10 W. R. C. R. 191. (5) 11 B.L. R. 149 (155). (6) 8 M. 473 (477).

section, on the ground that he was released from the operation of the decree, and must, as regards the operation of that decree, be considered a stranger to the suit in which he had no further interest or concern.

We are of opinion that, if the Legislature had intended such exceptions to be made, it would have so expressed it, and that we ought to give a literal interpretation to the language of s. 244, cl. (*c*). If so, the applicant was a party to the suit, and the District Judge had jurisdiction to hear the appeal.

The construction placed upon s. 11 of Act XXIII of 1861, which answers to s. 244 of the present Civil Procedure Code, by the High Court of Calcutta in *Gour Kishore* v. *Mahomed Hassim* (1), was avowedly not the one pointed to by the words of the enactment. And it appears to us to be not in harmony with the intention of the Legislature, as indicated by the language used. That intention appears to be to dispose, in a single litigation, of all questions in reference to the subject-matter of that litigation arising between the parties once properly brought before the Court. The opinion expressed by the **[53]** Privy Council in *Chowdry Wahed Ali* v. *Mussamut Jumaee* as to the proper method of construing a provision of this nature, supports this conclusion. And it also avoids the possible embarrassments which must arise in the event of contradictory orders being made by different Courts with reference to the same subject-matter and between the same parties. Although, therefore, the question is not quite free from doubt, we do not see, on the one hand, enough to justify a departure from the broad language used by the Legislature, and on the other, we do see some reasons, of greater or less weight, to warrant us in giving its full effect to that language.

We may add that this point appears to have been practically disposed of by Sargent, C. J., and Candy, J., in this very case at an earlier stage. On looking into the papers referred to in the judgment of the District Judge, it appears that at first the District Judge, upon the appeal being made to him, considered that the order was not one under s. 244, but under s. 332, and, therefore, held that no appeal lay to him. Against his decree there was a second appeal to the High Court, and on the 17th February, 1891, the High Court decided that the order of the Subordinate Judge was one under s. 244, and *not* under s. 332, and that, therefore, an appeal did lie to the District Court, which appeal, accordingly, the District Judge was directed to hear under s. 244. It is, therefore, out of the question now for us to hold that the District Judge acted without jurisdiction in hearing the appeal so remanded to him for hearing. But, apart from this consideration, the judgment we have referred to shows that Sargent, C. J., and Candy, J., took the same view of the construction of s. 244 as we have arrived at. And, therefore, as the case falls under s. 244, it is not one for the extraordinary jurisdiction of the Court, and the rule granted in this case must consequently be discharged with costs.

Rule discharged.

(1) 10 W.R. C. R. 191.

1892
MARCH 21.

APPELLATE CIVIL.

17 B. 54.

17 B. 54.

[54] APPELLATE CIVIL.

Before Mr. Justice Jardine and Mr. Justice Telang.

RAM TUKOJI (*Original Plaintiff*), *Appellant v.* GOPAL DHONDI (*Original Defendant*), *Respondent.** [21st March, 1892.]

Landlord and tenant—Tenant's liability to pay cess imposed by an Act subsequent to the lease—Bombay Act III of 1869, *s.* 8—*Local-fund cess.*

Under s. 8 of Bombay Act III of 1869, a lessor, who is in the position of a superior holder, may recover the local fund cess from his lessee.

Ranga v. *Suba Hegde* (1) followed.

[R., 17 B. 422 (424) ; 26 B. 504 (516, 517).]

SECOND appeal from the decision of R. S. Tipnis, Acting District Judge of Ratnagiri, in appeal No. 154 of 1889 of the District File.

The plaintiff sued to recover Rs. 80, being the amount of rent and local fund cess due for the years 1883-84 to 1886-87 in respect of certain lands in defendant's occupation.

The defendant held, at a fixed rent of Rs. 10 per annum, under a permanent lease granted by the plaintiff's father in 1862.

The defence to the suit was that the plaintiff had no right to enhance the rent, or recover the local-fund cess, in respect of the lands in defendant's possession.

Both the lower Courts held that the claim to enhanced rent was *res judicata*, having been decided against the plaintiff in a former litigation between the parties.

As to the local fund-cess, the Subordinate Judge awarded the claim, but the appellate Court rejected it, on the ground that the cess was *prima facie* payable by the the lessor, and that there was no agreement by the lessee to pay it.

Against this decision the plaintiff preferred a second appeal to the High Court.

Ghanasham Nilkanth, for appellant:—Under s. 8 of Bombay Act III of 1869, a superior holder can recover the local-fund cess from an inferior holder. A landlord is in the position of a superior holder. He is, therefore, entitled to recover the cess from his tenants—*Ranga* v. *Suba Hegde*(1).

[55] *Daji Abaji Khare*, for respondent:—The defendant held under a lease granted by plaintiff's father in 1862 long before the cess was imposed. The lessor cannot recover anything in excess of the rent fixed in the lease. It would be varying the terms of the written contract between the parties if the lessee were held liable to pay the cess in addition to the fixed rent—*Babshetti* v. *Venkataramana* (2). Section 83 of Bombay Act V of 1879 prevents a lessor from enhancing the rent in the face of an express agreement.

JUDGMENT.

JARDINE, J.—We do not differ from the opinion of the lower Court of appeal on the question of *res judicata*.

Objection has been taken to the ruling of that Court, that the defendants, who obtained a permanent lease of the land in 1862, are not

---

* Second Appeal, No. 877 of 1890.

(1) 4 B. 473.

(2) 3 B. 154.

liable to pay the local-fund cess, since imposed by Bombay Act III of 1869. The District Judge's reasons are that no agreement to pay the cess had been proved, and that it is *prima facie* payable by the land-owner. The pleader for the appellant argues that the Act imposes the tax on the lessee, as ruled in a reported case from North Kanara, *Ranga* v. *Suba Hegde* (1), where it is said: "The cess is distinct from rent, and not having been in existence at the time the lease was made, it is of course not provided for in that lease. In the absence of any contract to the contrary, we think that it is equitable, and in accordance with the intention of the Legislature as shown in s. 8 of Bombay Act III of 1869, that the cess should be ultimately paid by the tenant." The pleader has not been able to refer us to any authority in support of the argument derived from equity.

No reference has been made to the Land Revenue Code, Bombay Act V of 1879; but the argument advanced for the appellant amounts to this—that we should interpret s. 8 of Act III of 1869 as if it meant what is very plainly said in s. 50 of the Act of 1879. *Cf.* Regulation XVII of 1827, s. 6, cl. 2, now repealed. This argument concedes that the Bombay Legislature has imposed the tax on the superior holder, in the present case the lessors; and the only question is whether s. 8 of the Act of 1869 implies that the superior holder may recover the amount from the lessee. That the lessor was a superior holder within the **[56]** definition of the Bombay Survey Act I of 1865, s. 2, cl. (*k*), the law in force in 1869, may be conceded. As to "occupants" being regarded as superior holders for the purpose of the assistance provided by Regulation XVII of 1827, Chaps. 6 and 7, see s. 44 of the Survey Act.

The difficulty of construing s. 8 of Bombay Act III of 1869, as imposing a duty on the inferior holder or lessee to pay the cess, arises from the want of explicit statement such as may be expected in a law imposing a new tax, especially when this section is compared with s. 50 of Bombay Act V of 1879. On the other hand, s. 8 of the Act of 1869 makes the provisions of the law relative to assistance applicable to *all* superior holders. The question is one of general importance, and we have taken time to consider it. On the whole, we think s. 8 is open to the construction put upon it, in *Ranga* v. *Suba Hegde* (1), by Westropp, C. J., and Melvill, J., and though that interpretation is not perhaps the necessary meaning of the words, we think we ought to lean to it, in order to avoid the unsettling of titles which might arise if we departed from what those eminent Judges have laid down. We now reverse the decree of the District Court and restore that of the Subordinate Judge. Costs of both appeals on the present respondent, the first defendant.

Decree reversed.

(1) 4 B. 473.

1892
APRIL 11.

APPEL-
LATE
CIVIL.

17 B. 56.

17 B. 56.

APPELLATE CIVIL.

Before Mr. Justice Jardine and Mr. Justice Telang.

SARDARSINGJI (*Original Plaintiff*), *Appellant v.* GANPATSINGJI AND ANOTHER (*Original Defendants*), *Respondents.**

[11th April, 1892.]

Court Fees Act (VII of 1870), *s.* 7, *cl.* 4, *sub cls.* (c) *and* (d) —*Valuation of suit*—*Valuation of a suit for injunction*—*Injunction*—*Appeal*—*Order rejecting plaint as insufficiently stamped.*

A suit for a declaration of right and for an injunction falls under s 7, cl. 4 sub-cls. (*c*) and (*d*) of the Court Fees Act VII of 1870. The valuation of the relief sought in such a suit rests with the plaintiff, and not with the Court.

[57] A. sued B. and C. (1) for a declaration of his title to certain property, and (2) for an injunction restraining C. from paying, and B. from receiving, an allowance of Rs. 2,400 a year out of the income of the property in dispute. A. valued each of the reliefs sought at Rs. 130, and affixed a Court-fee stamp of Rs. 20 to the plaint.

The Court of first instance rejected the plaint as insufficiently stamped, holding that the claim for the injunction sought should have been valued at ten times the annual allowance paid by C. to B., as provided by s. 7, cl. 2 of Act VII of 1870.

On appeal to the High Court,

Held, that the suit fell under s. 7, cl. 4, sub-cls. (*c*) and (*d*) of the Court Fees Act, and the plaintiff had a right to put his own valuation on the relief sought.

Held, also, that the order rejecting the plaint as insufficiently stamped was appealable.

[F., 111 P.R. 1913=23 P.L.R. 1914=228 P.W.R. 1913; Appr., 32 C. 734 (739)=9 C. W.N. 690; R., 19 B. 198 (201); 23 B. 486 (490); 34 B. 267=12 Bom. L.R. 149 (154)=5 Ind. Cas. 867; 6 C.L.J. 427=11 C.W.N. 705 (707 and 709); 16 C.L.J. 371=17 C.W.N. 503 (505)=16 Ind. Cas. 575 (576); 13 Ind. Cas. 408=93 P.L.R. 1912=52 P.W.R. 1912; 19 Ind. Cas. 859=93 P.R. 1913=232 P.L.R. 1913=134 P.W.R. 1913; 63 P.R. 1902.]

APPEAL from the decision of E. H. Moscardi, Acting Assistant Judge of Surat at Broach, in suit No. 1 of 1887.

This was a suit originally brought for a mere declaration that the plaintiff was the sole heir and successor of his father to the Sarod *wanta* estate. The plaintiff alleged that the defendant No. 1 was a spurious child set up by his step-mother to defeat the plaintiff's right of inheritance; that the estate was in the management of the Talukdari Settlement Officer, defendant No. 2, under Bombay Act XXI of 1881; and that out of the revenues collected by that officer, the defendant No. 1 was illegally paid Rs. 200 per mensem on account of his maintenance.

The plaint was filed on a ten-rupee stamp.

The suit was dismissed by the Court of first instance under s. 42 of the Specific Relief Act (I of 1877).

On appeal, the High Court also held that the suit for a mere declaration of title would not lie, but allowed the plaintiff to amend the plaint by adding a prayer for consequential relief, and remanded the case to the lower Court, to enable the plaintiff to make the necessary amendment(1).

On remand, the plaintiff amended the plaint by inserting an additional prayer for an injunction, restraining the defendant No. 2 from paying,

* Appeal No. 134 of 1890.

(1) See 14 B. 395.

and defendant No. 1 from receiving, Rs. 200 a month out of the income of the property in dispute.

[58] The plaintiff valued the claim for injunction at Rs. 130, and paid a Court-fee of Rs. 10.

Thereupon the Court raised the following issue :—

"Is the amended plaint properly stamped ?"

The Court held that the plaint was not properly valued, and that it should have been valued at Rs. 24,000.

The reasons for this finding were stated as follows :—

"The object of the amended suit is to put a stop to the allowance paid by defendant No. 2, the Talukdari Settlement Officer, to defendant No. 1, whose estate he is administering under the Talukdari Settlement Act, on the ground that the plaintiff, and not defendant No. 1, is the rightful heir to the estate. In other words, plaintiff claims the money which defendant No. 2 pays defendant No. 1 as allowance, on the ground that he, and not defendant No. 1, is rightfully entitled to it. I am, therefore, of opinion that plaintiff's claim should be valued in accordance with Act VII of 1870, s. 7, cl. 2, at ten times the amount of the yearly allowance paid by defendant No. 2 to defendant No. 1. This allowance being Rs. 200 per month, or Rs. 2,400 per year, I think the proper valuation of the relief sought is Rs. 24,000."

For these reasons the Court directed the plaintiff to correct the valuation of his plaint to Rs. 24,000 within a period of two months.

The plaintiff refused to pay any additional Court-fee, and the plaint was rejected.

Against this order of rejection the plaintiff appealed to the High Court.

Ganpat Sadashiv Rao, for appellant.—This is a suit for a declaratory decree and an injunction. In such a case the plaintiff is at liberty to put his own valuation on the reliefs sought. The case falls under s. 7, cl. 4, sub-cls. (*c*) and (*d*) of the Court Fees Act VII of 1870. This is not a suit for an annuity or other periodical payment. The plaintiff does not claim any sum of money in this suit. Clause 2 of s. 7, therefore, **[59]** does not apply. Refers to *Raghunath Ganesh* v. *Gangadhar Bhikaji* (1).

Rao Saheb *Vasudev Jagannath Kirtikar*, for respondents.—The claim for the injunction sought is not properly valued. The valuation should be the same as if the suit was for actual money, and the amount can be calculated under cl. 2 of s. 7 of the Court Fees Act. This is not an ordinary case of an injunction where the relief sought is not capable of valuation even approximately. Refers to *Omrao Mirza* v. *Jones* (2).

JUDGMENT.

JARDINE, J.—This case, which has been before the High Court at an earlier stage (3), is one in which the Court has jurisdiction to hear an appeal from an order rejecting the plaint on a question of valuation. See the Full Bench decision in *Vithal Krishna* v. *Balkrishna Janardan* (4).

The plaintiff sues for a declaration of right and for an injunction to prevent the first defendant from receiving from the second defendant, the Talukdari Settlement Officer, the amount of an annual allowance. Such a suit comes, in our opinion, within the words of s. 7, cl. 4, sub-cls. (*c*) and (*d*) of the Court Fees Act VII of 1870, and the amount of fee payable is to be computed under that section " according to the amount at which the

(1) 10 B. 50. (2) 10 C. 599. (3) See 14 B. 395. (4) 10 B. 610.

1892
APRIL 11.
APPELLATE CIVIL.
17 B. 56.

relief sought is valued in the plaint," and this amount the plaintiff is required to state. It may be that the result of the suit, if successful, will eventually be tantamount to the relief which might be awarded in a suit of the kind described in cl 2, which states the mode of computing the fee " in suits for maintenance and annuities or other sums payable periodically ;"and the Assistant Judge has rejected the plaint on the ground that the valuation should be computed according to this clause. A fiscal Act ought, however, to be interpreted precisely ; and no authority has been shown us for holding that cl. 2 applies. The case of *Boidya Nath Adya* v. *Makhan Lal Adya* (1) to which we referred at the hearing, deals with the valuation of a partition suit and is not in point. The decisions in **[60]** *Ostoche* v. *Hari Das* (2) and *Jogal Kishor* v. *Tale Singh* (3) are upon the section and clause which we have to interpret. In them it was held that the valuation of the relief sought rests with the plaintiff and not with the Court. The reasons which appear to account for the Legislature leaving it to the plaintiff to name the valuation of suits of the nature described in cl. 4, s. 7 are given by Westropp, C.J., in *Manohar Ganesh* v. *Bawa Ramcharandas*(4). Being of opinion that the Assistant Judge was bound to treat the suit as coming under cl. 4, sub-cls. (*c*) and (*d*), we reverse his order and remand the case for trial on the merits. Costs to be dealt with when the new decree is passed, except the costs of this appeal, which we order the defendant No. 2 to pay.

TELANG, J.—I concur. The plaintiff in this case prays, in terms only, for a declaration and an injunction ; and the case, therefore, *prima facie*, must be dealt with under s. 7, cl. 4, sub-cls. (*c*) and (*d*) of the Court Fees Act. The Judge in the Court below, however, applied s. 7. cl. 2, to the case, because, as he says, "the plaintiff claims the money which the defendant No. 2 pays to defendant No. 1 as allowance, on the ground that he, and not defendant No. 1, is rightfully entitled to it." But this view is plainly not correct, for the plaintiff does not in fact " claim the money " in the ordinary meaning of that expression, and cannot possibly get a decree for it in this suit. Indeed, in the judgment of Jardine, J., in this case on the previous remand, it was expressly decided (Candy, J., apparently not dissenting from that view) that " the plaintiff cannot sue for the possession of the estate, as it is under management in pursuance of an order under the special Statute." And *Ganpatgir* v. *Ganpatgir* (5) and *Chokalingapeshana* v. *Achiyar* (6) were on that ground distinguished. If, then, possession cannot be claimed of the whole estate, or of the portion of it referred to by the Court below, it cannot be fair, even apart from the actual language of the Court Fees Act, to levy a Court fee from the plaintiff as if the suit was for possession. Yet this **[61]** is the result of the order of the Court below. Mr. Vasudev sought to support that order on the ground that this is not like an ordinary case for an injunction, where the relief sought cannot be valued. But I do not think that the words of the Act warrant any such distinction as Mr. Vasudev seeks to draw. And, in any event, I cannot perceive why, in construing a fiscal enactment, we are to take a distinction, by which, without clear authority in the language used by the Legislature, a suit in which a plaintiff does not pray for money or property to be paid or delivered to him is to be treated on exactly the same footing as a suit in which he does pray for such relief.

---

(1) 17 C. 680.
(2) 2 A. 869.
(3) 4 A. 320.
(4) 2 B. 219 (226, 227).
(5) 3 B. 230.
(6) 1 M. 40.

If, then, cl. 4, sub-cls. (*c*) and (*d*), apply to the case, the question arises whether the words "the amount at which the relief sought is valued in the plaint" allow the plaintiff to put forward an arbitrary valuation. *Prima facie*, they certainly do seem to leave such a liberty to a plaintiff, and some reasonable grounds for such liberty being allowed are suggested by Westropp, C. J., in *Manohar Ganesh* v. *Bawa Ramcharandas*(1). But, without going into the general question on the present occasion, I think the case before us is one in which the valuation did not form part of the functions of the Court, but could be made by the plaintiff as he pleased. And the Judge's order, therefore, to amend the valuation, and his subsequent dismissal of the suit for refusal to amend, were both erroneous. The decree of the Court below must, therefore, be reversed and the suit remanded for trial on the merits. The defendant ought, I think, to pay the appellant his costs of his appeal. All other costs to be dealt with by the Court below in making its decree on the new trial.

Order reversed.

---

17 B. 62.

[62] ORIGINAL CIVIL.

Before Mr. Justice Farran.

LILLADHAR JAIRAM NARRANJI AND OTHERS (*Plaintiffs*) *v.* GEORGE WREFORD AND OTHERS (*Defendants*).*

[15th September and 3rd October, 1892.]

Sale of goods—Appropriation to vendee—Passing of property to vendee—Bankruptcy of agents for purchase—Unpaid vendor—Stoppage in transit—Termination of transit—Goods landed in Dock and held by Dock authorities—Bombay Act, VI of 1879, *ss.* 43 *and* 62*—Port Trustees of Bombay—Bye-laws of Port Trust, Rule* 59.

In August 1890, the plaintiffs, through Benn, Ashley and Co., of Bombay, ordered from Bevis, Russell and Co., in London, 100 bales of grey shirtings at 7*s.* 10*d.* per piece f. o. b., November-December shipment. In order to carry out this order, Bevis, Russell and Co. purchased goods of the required description from Messrs. Dewhurst and Co. of Manchester. The heading of the invoice of the goods supplied by Dewhurst and Co. contained these words: "Proceeds to be remitted to Messrs. Bevis, Russell and Co , London, specifically for the protection of their acceptances of Geo. and R. Dewhurst's draft against this or any of these shipments," and the letter addressed by Dewhurst and Co., to Bevis, Russell and Co., forwarding draft, contained the following clause:—"It is understood that the proceeds of the goods are to be remitted to be held by you specifically for the protection of the enclosed bill, or any other of your acceptances of our drafts against such shipments, which please confirm." To this letter Bevis, Russell and Co. replied: "We confirm the arrangements between us as to the disposal of remittances and against the shipments." The bales were duly marked with the plaintiffs' mark by direction of Bevis, Russell and Co. and were to be delivered f. o. b. at Liverpool. Dewhurst and Co. accordingly despatched the 100 bales to Liverpool, and there Bevis, Russell and Co. had them shipped in eight different vessels, *viz.*, 13 bales in each of the four steamers "Nubia," "Clan Drummond," "Inchulva" and "Roumania," and 12 bales in each of the ships "Hispania," "Eden Hall," "City of Edinburgh" and "Wistow Hall." The 100 bales were consigned to Bombay by Bevis, Russell and Co., in their own name, the bills of lading being made out to their order or to his or their assigns." Bevis, Russell and Co. paid the freight at Liverpool and effected insurance on the plaintiffs' behalf. All the shipments were made before the 1st December,

---

* Suit No. 679 of 1890.

(1) 2 B. 219.

1892
OCT. 3.
ORIGINAL CIVIL.
17 B. 62.

1890, except the 12 bales by the "Wistow Hall," which were shipped on that day. On the several shipments being effected, Bevis, Russell and Co. accepted bills of Dewhurst and Co., payable three months after date. The bills of lading of the bales shipped in the "Nubia," "Clan Drummond" and "Hispania" were endorsed, in blank, by Bevis, Russell and Co., and sent by post to Benn, Ashley and Co., of Bombay. The "Nubia" arrived at Bombay in November, and the plaintiffs received the 13 bales shipped by her, Benn, Ashley and Co. having endorsed the bill of lading to the plaintiffs. No specific payment was made by the plaintiffs in respect of these bales, but at that time they had a sum standing to their credit in the books of Benn, Ashley and Co. The invoices of 25 more bales, *viz.*, 13 bales *ex* "Clan Drummond" and 12 bales *ex* "Hispania," arrived in Bombay later in November, and were handed to the plaintiffs. On [63] the 1st December, 1890, the plaintiffs paid Rs. 25,000 to Benn, Ashley and Co. Neither the "Clan Drummond" nor the "Hispania" had then arrived in Bombay.

On the 4th December, 1890, Bevis, Russell and Co. suspended payment, and on that day a receiving order was made vesting their assets in the first defendant, Wreford; and on the next day Pixley was appointed special manager of the estate under s. 12 of the English Bankruptcy Act (Stat. 46 and 47 Vic., c. 52). At that time the bills of lading for the remaining 62 bales were still with Bevis, Russell and Co., who then handed them over to Pixley. On the same 5th December, 1890, Benn, Ashley and Co. suspended payment in Bombay. On the 13th December, 1890, Dewhurst and Co. telegraphed to their agents in Bombay, Messrs. Ritchie, Steuart and Co., directing them to stop the goods in transit, including the 25 bales *ex* "Clan Drummond" and "Hispania." On the 15th December, Ritchie, Steuart and Co. on behalf of Dewhurst and Co., gave notice to the agents of the "Hispania" to stop the 12 bales on board that vessel. Previously to that notice, however, the bales had been landed in the Dock at Bombay. They then gave the Dock authorities notices, but at that time the ships' agents had already given the plaintiffs a delivery order for the goods. On the same day, *viz.*, the 15th December, Ritchie, Steuart and Co. gave notice to the agents of the "Clan Drummond" to stop the 13 bales on board. These bales had not then been landed, and were then still on board.

The other five steamers with the remaining 62 bales duly arrived in Bombay and went into Dock. On the 2nd January, 1891, the "Roumania," the "City of Edinburgh" and the "Wistow Hall" had landed all the bales which they had on board. The "Eden Hall" had landed 9 out of the 12 which she had brought, leaving 3 still to be discharged, and the "Inchulva" had not landed any of her bales, the whole 13 being still on board. On that day (2nd January, 1891) Ritchie, Steuart and Co., on behalf of Dewhurst and Co., wrote to the several agents of the above steamers notices of stoppage in transit of the above bales, except in the case of "Wistow Hall," in respect of which no notice was sent. These notices were all delivered on the 3rd January, 1891.

Held—

(1) On the evidence, that the payment of the Rs. 25,000, by the plaintiffs, to Benn, Ashley and Co., in Bombay was a payment for and on account of the 100 bales. In respect of transactions before bankruptcy, a payment to Benn, Ashley and Co. was a payment to Bevis, Russell and Co.; but, if that were not so, Benn, Ashley and Co. were agents to receive payment.

(2) That on the goods being shipped at Liverpool, if not at an earlier date, the property in them passed from Dewhurst and Co., to Bevis, Russell and Co., and from the latter, by reason of the plaintiffs' contract with Bevis, Russell and Co., to the plaintiffs,—Bevis, Russell and Co. having, by holding the bills of lading, the constructive possession of the goods, and the legal right to their actual possession, and to retain the same until their price was paid by the plaintiffs with the charges.

(3) That the plaintiffs were entitled, as against the representatives of Bevis, Russell and Co., and Benn, Ashley and Co., in bankruptcy, to the bills of lading and the goods represented by them without further payment, Ritchie, Steuart and Co., as agents of the Official Receiver had not, therefore, the right to withhold the bills of lading of any of these bales from the plaintiffs.

[64] (4) On the evidence, that when Dewhurst and Co. forwarded the goods to Bevis, Russell and Co. at Liverpool they really started the goods on their voyage to Bombay, and that the transit lasted until the bales were "at home" in Bombay. Until then the right of Dewhurst and Co. to stop the goods in transit lasted.

(5) That effectual notice on behalf of Dewhurst and Co., to stop in transit was given in respect of the 13 bales *ex* "Roumania" by the notice sent by Ritchie, Steuart and Co., on the 15th December 1890. The general notice given on that day to the agents of the "Roumania" not only as to specific bales, but as to any other bales shipped on account of Geo. and R. Dewhurst to Messrs. Benn, Ashley and Co., although indefinite, covered the shipment by the "Roumania," and was given in time to prevent the bales on board that ship from reaching "home."

(6) That effectual notice by Ritchie, Steuart and Co., on behalf of Dewhurst and Co., to stop in transit was given in respect of the 13 bales *ex* "Inchulva" and 3 bales (out of the 12) *ex* "Eden Hall" which were still on board and undischarged at the date of the notice of the 2nd January 1891.

(7) As to the 12 bales *ex* "Hispania" landed prior to the notice of the 15th December, and as to the 12 bales *ex* "City of Edinburgh" and the 9 (out of the 12) *ex* "Eden Hall," landed before the notice of the 2nd January 1891, and as to the 12 *ex* "Wistow Hall" in respect of which no notice at all was given, that the plaintiffs were entitled to them.

(8) That the goods ceased to be in transit when landed in Dock in Bombay.

BENN, Ashley and Russell carried on business in Bombay as merchants under the style of Benn, Ashley and Co., and in London and Manchester under the style of Bevis, Russell and Co. W. Macdonald was the manager of Benn, Ashley and Co., in Bombay, but was not a partner.

The plaintiffs were merchants carrying on business in Bombay under the name of Jairam Narranji and Sons. They dealt in piece-goods, which they used to order out from England from Bevis, Russell and Co., through the Bombay firm of Benn, Ashley and Co.

In August 1890, the plaintiffs ordered from Bevis, Russell and Co. in London, through Benn, Ashley and Co., of Bombay, 100 bales of grey shirtings at 7*s.* 10*d* per piece f. o. b., November-December shipment. In order to be in a position to execute this order, Bevis, Russell and Co. purchased goods of the required description from Dewhurst and Co., of Manchester.

The heading of the invoice of the goods supplied by Dewhurst and Co. contained these words: "Proceeds to be remitted to Messrs. Bevis, Russell and Co., London, specifically for the **[65]** protection of their acceptances of Geo. and R. Dewhurst's drafts against this or any of these shipments," and the letter addressed by Dewhurst and Co. to Bevis, Russell and Co., forwarding draft contained the following clause :—"It is understood that the proceeds of the goods are to be remitted to be held by you specifically for the protection of the enclosed bill or any other of your acceptances of our drafts against such shipments, which please confirm," and to this letter Bevis, Russell and Co. replied as follows :—"We confirm the arrangements between us as to the disposal of remittances and against the shipments."

On the 1st September, 1890, Bevis. Russell and Co. directed the 100 bales to be marked with the plaintiffs' mark. The goods were to be delivered f. o. b. at Liverpool. Dewhurst and Co. accordingly despatched the 100 bales bearing the plaintiffs' mark to Liverpool in different lots. At Liverpool, Bevis, Russell and Co. had them shipped in eight different vessels, *viz.*, 13 bales in each of the four ships "Nubia," "Clan Drummond," "Inchulva," and "Roumania" and 12 bales in each of the ships "Hispania," "Eden Hall," "City of Edinburgh" and "Wistow Hall." The 100 bales were consigned to Bombay by Bevis, Russell and Co., in their own names, the bills of lading being made out to their own "order or to his or their assigns." The freight was paid by Bevis, Russell and Co., in Liverpool on the plaintiffs' behalf, and they also effected insurance for the plaintiffs. All

1892
OCT. 3.
ORIGINAL CIVIL.
17 B. 62.

the shipments were made before the 1st of December, 1890, except the 12 bales by the "Wistow Hall," which were shipped on that day. On the several lots being shipped, Bevis, Russell and Co. accepted bills of Dewhurst and Co., payable three months after date.

The bills of lading for the bales *ex* "Nubia," "Clan Drummond" and "Hispania" were endorsed, in blank, by Bevis, Russell and Co., and sent by post to Benn, Ashley and Co., of Bombay. The "Nubia" arrived in Bombay in November, and the plaintiffs received the 13 bales shipped by her,—Messrs. Benn, Ashley and Co., having endorsed the bill of lading to the plaintiffs. The plaintiffs received these bales without making any specific payment in respect of them, but at that time they had a sum standing to their credit in the books of Benn, Ashley and Co. The **[66]** invoices of 25 more bales, *viz.*, 13 *ex* "Clan Drummond" and 12 *ex* "Hispania" arrived in Bombay later in November, and were handed to the plaintiffs. On the 1st December 1890, the plaintiffs paid Rs. 25,000 to Benn, Ashley and Co. Neither the "Clan Drummond" nor the "Hispania" had then arrived in Bombay.

On the 4th December 1890, Bevis, Russell and Co. suspended payment, and on the same day a receiving order was made vesting their assets in the first defendant, Wreford. On the next day F. W. Pixley was appointed special manager of the estate under s. 12 of the English Bankruptcy Act, 1883. At that time the bills of lading for the remaining 62 bales were still with Bevis, Russell and Co., in England, who then handed them over to Pixley. On the same day (5th December 1890) Benn, Ashley and Co. suspended payment in Bombay.

On the 6th December 1890, the vendors, Dewhurst and Co., gave notice to the receiver, Wreford, that they claimed all shipping documents, goods and proceeds of goods and remittances to Benn, Ashley and Co., Bombay, for which Dewhurst and Co. had drawn bills, and requiring him to apply the same proceeds and remittances towards payments of such bills in accordance with the invoice headings. On the 10th December 1890, Dewhurst and Co., sent a telegram to their agents in Bombay, Messrs. Ritchie, Steuart and Co., stating that they claimed "to have the goods sold by them and proceeds specifically applied to pay bills against goods." This was notified to Benn, Ashley and Co.

On the 11th December it was arranged between the Official Receiver and Dewhurst and Co., that the goods of the latter which had been sent out to native constituents in India should be sold by Messrs. Ritchie, Steuart and Co., of Bombay, who should hold the proceeds of such goods to the joint account of the receiver and Dewhurst and Co. On this arrangement being made, a joint telegram was sent to Ritchie, Steuart and Co., on the 12th December 1890 in the following terms :—"Please carry out sales to natives delivering goods against cash only and remit proceeds to England in joint names of Pixley and Dewhurst." In pursuance of this arrangement, Pixley sent the bills of lading for the 62 bales to Ritchie, Steuart and Co., in Bombay.

[67] On the 13th December, 1890, Dewhurst and Co., having heard that the Official Assignee in Bombay claimed all goods consigned to Benn, Ashley and Co., sent a telegram to Ritchie, Steuart and Co., directing them to stop the goods in transit, including the 25 bales *ex* "Clan Drummond" and "Hispania." On the morning of the 15th December, Ritchie, Steuart and Co., on behalf of Dewhurst and Co., gave notice to Graham and Co., the agents for the "Hispania," to stop the 12 bales on board that vessel. Previously to that notice, however, the goods had been landed in the

Dock at Bombay. They then gave the Dock authorities notice to stop them, but at that time Graham and Co. had already given the plaintiffs a delivery order for the goods. On the same morning, *viz.*, the 15th December, Ritchie, Steuart and Co. gave notice to the agents of the "Clan Drummond" to stop the 13 bales on board that vessel. These bales had not then been landed, and were then still on board.

The remaining 62 bales duly arrived in Bombay. As already mentioned, Pixley had sent the bills of lading to Ritchie, Steuart and Co. By the arrangement of the 11th December between Dewhurst and Co. and the receiver it had been arranged that Ritchie, Steuart and Co. should sell these (with others) goods and hold the proceeds. On the 31st December, Ritchie, Steuart and Co., on behalf of the Official Receiver and of Pixley sent notices to the agents of the five different vessels in which the 62 bales were shipped, to hold the goods for them, stating that they held the bills of lading. At that time four of the vessels were in the Dock. On the 2nd January, 1891, out of the 62 bales which had arrived, 46 had been discharged and were in the hands of the Dock authorities, and 16 were still on board. On that day the 62 bales were found to be as shown in the following table :—

Vessel.	Number of bales discharged.	Number of bales undischarged.
"Eden Hall"	9	3
"Inchulva"	0	13
"Roumania"	13	0
"City of Edinburgh" ...	12	0
"Wistow Hall"	12	0
Total discharged ...	46 Undischarged ...	16

[68] On the said 2nd January 1891, Ritchie, Steuart and Co., *on behalf of Dewhurst and Co.*, wrote to the several agents of the above steamers notices of stoppage in transit of the above bales, except in the case of the "Wistow Hall," in respect of which no notice was given. These notices were all delivered on the 3rd January, 1891.

The suit was filed on the 8th December, 1890. The plaint set forth (*inter alia*) that, prior to the failure of Bevis, Russell and Co., and Benn, Ashley and Co., the 100 bales had been shipped to Bombay on account and at the risk of the plaintiffs by Bevis, Russell and Co.; that 13 bales *ex* "Nubia" had been duly received by the plaintiffs; that a further lot of 25 bales (*viz.*, 13 bales *ex* "Clan Drummond" and 12 bales *ex* "Hispania,") had arrived, and of these the plaintiffs, as receivers, had got possession of 13, but that the agents of the S.S. "Hispania," in which the 12 bales had arrived, refused to deliver these latter to the plaintiffs; that subsequently 62 bales, the remainder of the 100 bales, arrived in Bombay, and were taken possession of by the defendants, Messrs. Ritchie, Steuart and Co. acting, as they alleged, under the instructions of the first defendant, Wreford, the Official Receiver in England of the estate of Bevis, Russell and Co., and also on behalf of Messrs. Dewhurst and Co., of Manchester, the alleged vendors of the said 100 bales. Messrs. Ritchie, Steuart and Co. refused to deliver up the said bales to the plaintiffs except upon the terms of the plaintiffs paying the full invoice price thereof and the charges thereon.

The plaint prayed (*inter alia*) that the plaintiffs might be declared entitled to the two lots of 25 bales and 62 bales, and that the defendants,

1892
OCT. 3.
ORIGINAL CIVIL.
17 B. 62.

Messrs. Ritchie, Steuart and Co., might be ordered to deliver up the said 62 bales, and to pay Rs. 1,000 as damages for the illegal detention thereof.

The defendants, Messrs. Ritchie, Steuart and Co., filed a written statement. They set forth that, in respect of the matters complained of, they had acted as the agents for the defendant Wreford, the Official Receiver in England of Bevis, Russell and Co., and also as the agents of one F. W. Pixley of London who had been, on the application of the creditors, appointed by the said Official Receiver to the special manager of the estate **[69]** of the said insolvent firm under s. 12 of the English Bankruptcy Act (Stat. 46 and 47 Vic., c. 52) and also as the agents of Messrs. Geo. and R. Dewhurst, the vendors of the said goods. They submitted that the right of Wreford, of Pixley, and of Messrs. Geo. and R. Dewhurst, or of some of them, to the said 87 bales was superior to the right (if any) of the plaintiffs.

They further stated that for many years Messrs. Geo. and R. Dewhurst had dealt with Messrs. Bevis, Russell and Co. as follows. The latter firm on obtaining indents from natives in Bombay used to contract to purchase goods from Geo. and R. Dewhurst, who sold the same on the express condition that they should be consigned to Benn, Ashley and Co., of Bombay, and that the proceeds of such goods should be specifically held for the protection of all the acceptances by Bevis, Russell and Co. of the drafts of Geo. and R. Dewhurst drawn against every shipment of goods sold by Geo. and R. Dewhurst to Bevis, Russell and Co.

The bills drawn by the said Geo. and R. Dewhurst against the said 87 bales, and accepted by Bevis, Russell and Co., had been dishonoured, and there were outstanding dishonoured acceptances of Bevis, Russell and Co. on the drafts of Geo. and R. Dewhurst drawn in the course of business aforesaid to the amount of about £ 22,676-14-6.

The defendants submitted that, (having regard to the course of dealing between Geo. and R. Dewhurst and Bevis, Russell and Co.) all goods sold by them as aforesaid were held by Bevis, Russell and Co., or by Benn, Ashley and Co., as trustees for the said Geo. and R Dewhurst, and that the said goods, and the proceeds of such goods, formed no part of the estate of Bevis, Russell and Co., or Benn, Ashley and Co, but were specifically set apart and ear-marked as appropriated for the protection, not only of the drafts drawn on any particular shipment, but of all outstanding acceptances of Bevis, Russell and Co. on the drafts of Geo. and R. Dewhurst. They contended that, in the events that had happened, the said Geo. and R. Dewhurst were entitled to a lien and charge on the said 87 bales of goods, or that the said 87 bales were impressed with a trust in favour of Geo. and R. Dewhurst for the amount of all outstanding **[70]** acceptances, or, at any rate, for the amount of the drafts drawn against the said 87 bales and dishonoured by Bevis, Russell and Co., or that otherwise Geo. and R. Dewhurst had a claim to the 87 bales paramount to the plaintiffs.

The written statement further alleged that Geo. and R. Dewhurst, as unpaid vendors, had stopped the said goods in transit, and were entitled to do so.

The defendants annexed to this written statement, copies of the form of invoice and of the letter forwarding draft drawn against shipments for acceptance used by Geo. and R. Dewhurst in their dealings with Bevis, Russell and Co., and of the letter in reply from Bevis, Russell and Co. The written statement alleged that " the said forms were always

used, and the drafts, with reference to the goods in the plaint mentioned, are in the same form." The following was the heading of the invoice :—

"Invoice of 5 bales goods marked, &c., shipped per S. S.————to Bombay consigned to Messrs. Benn, Ashley and Co. there on account of the concerned. Proceeds to be remitted to Messrs. Bevis, Russell and Co., London, specifically for the protection of their acceptance of Geo. and R. Dewhurst's drafts against this or any of these shipments."

The following was the form of the letter addressed to Messrs. Bevis, Russell and Co. forwarding draft :—

"MESSRS. BEVIS, RUSSELL AND CO.,

"London.

"DEAR SIRS,—We beg to hand, for favour of your acceptance and return to our London office, our draft @ 3 m/d. for £————against shipment as per above statement.

"It is understood that the proceeds of the goods are to be remitted to and held by you specifically for the protection of the enclosed bill, or any other of your acceptances of our drafts against such shipments, which please confirm.

"Yours faithfully,

"(Signed) G. AND R. DEWHURST."

The following was the form of Bevis, Russell and Co's letter of reply :—

"MESSRS. GEO. AND R. DEWHURST,

"Manchester.

"DEAR SIRS,—We are in receipt of your favours of yesterday enclosing your draft upon us for £————due 13th October, which we have handed to your firm here **[71]** duly accepted, and we confirm the arrangements between us as to the amount of remittances and against the shipments.

"Yours faithfully,

"(Signed) BEVIS, RUSSELL AND CO."

On the 24th February 1891, by consent of the parties an order was made that the plaintiffs should obtain possession of all the bales not already received by them upon their undertaking, (in the event of the defendants, or any of them, being held entitled to the bales, or any of them, or to a lien, charge or trust on them, or any of them, as against the plaintiffs), to pay to the defendants so held entitled the invoice value of the bales or the amount of such lien, charge, &c., &c.

Lang (Acting Advocate-General) and *Anderson*, for the plaintiffs.

Inverarity and *Jardine*, for the defendants, Messrs. Ritchie, Steuart and Co.

Scott, for the Official Receiver, Wreford, (defendant No. 1).

Lang (Acting Advocate-General) and *Anderson*, for plaintiffs. —The plaintiffs are entitled to the goods. Dewhurst and Co. have no title. Apart from the question of stoppage in transit, the goods had become the property of the plaintiffs. The plaintiffs had paid Rs. 25,000 as the price of these, and the bales had been duly appropriated to them. The freight and insurance had also been paid on their behalf. It cannot be said that on the bankruptcy of Bevis, Russell and Co. the bales were in their reputed ownership under s. 44 of the English Bankruptcy Act, 1883, Stat. 46 and 47 Vic., c. 52. That doctrine does not apply in a case like

1892
OCT. 3.
ORIGINAL CIVIL.
17 B. 62.

this. See Lindley on Partnership (5th Ed.), p. 682. Here, however, the goods were not in possession of the bankrupt. They only had the bills of lading, and they held these in trust for the owners of the goods, who became entitled to them on payment of the prices—Lindley on Partnership (5th Ed.), p. 683. As to stoppage in transit, we contend that the transit, during which Dewhurst and Co. could exercise the right to stop, was only to Liverpool, not to Bombay—Indian Contract Act (IX of 1872), s. 99; *Ex parte Miles* (1); *Ex parte Watson* (2); [72] *Bethell* v. *Clark* (3); *Lyon* v. *Hoffnung* (4); *Berndtson* v. *Strang* (5). If so, there was clearly no stoppage. Nor was there a good stoppage, even assuming that the transit lasted to Bombay—Benjamin on Sales (4th Ed.), pp. 871—884; *Ex parte Falk* (6).

Inverarity and *Jardine*, for the defendants, Messrs. Ritchie, Steuart and Co.:—It is admitted that Dewhurst and Co. are unpaid vendors. They, therefore, had a right to stop the 87 bales in transit. The transit lasted until the goods reached Bombay. Bevis, Russell and Co. were bound to ship to Bombay, and to Bombay only—Smith's Mercantile Law (10th Ed.), p. 690; *Lyon* v. *Hoffnung*(4); *Bethell* v. *Clark* (3); *Ex parte Watson* (2). We further contend that we did effectually stop the bales in transit. Even those which were landed in Dock at the time notice was given were then still in transit—Benjamin on Sales (4th Ed.), p. 871. The 59th Bye-law of the Port Trust provides that goods which have been landed shall only be delivered on production of the bill of lading and a delivery order from the master or agent of the vessel. The bales *ex* "Clan Drummond" and *ex* "Hispania" were wrongfully delivered, and by such delivery our right could not be affected. As to the 62 bales, we got the bills of lading, and that was enough—*Ex parte Watson* (2), but besides that, we gave notice to the ship-owners—Benjamin on Sales (4th Ed.), p. 882: *Phelps, Stokes and Co.* v. *Comber* (7). We also contend that the plaintiffs did not pay for the goods. The Rs. 25,000 paid in by them on the 1st December was a deposit—*Berndtson* v. *Strang* (5); *Ex parte Hayman* (8); *In re Rowland* (9).

JUDGMENT.

FARRAN, J.—This suit has arisen out of the failure of the firms of Bevis, Russell and Co. of London and other places, and of Benn, Ashley and Co. of Bombay. As is not unusual in such cases, the questions which have to be decided in it are of some nicety. At the close of the case I thought that I had satisfactorily solved them all, and so expressed myself. Further consideration has caused me to modify my [73] views in some particulars, and to feel that the difficulties are somewhat greater than I then supposed.

The facts, though somewhat involved, are not much in dispute. The plaintiffs, a firm of piece-goods merchants in Bombay, seek to establish their right to 87 bales of grey shirtings which they purchased from Bevis, Russell and Co., and which they allege that they paid for before the failure of that firm. By their plaint, however, they offer to pay anything which may still be due in respect of the bales. The bales have been sold since suit by arrangement between the parties embodied in an order of

---

(1) 15 Q. B. D. 39. (2) 5 Ch. D. 35. (3) 20 Q. B.D. 615. (616).
(4) 15 Ap. Ca. 391. (5) 37 L. J. (Ch.) 665. (6) 14 Ch. D. 446.
(7) 29 Ch. D. 813. (8) Ch. D. 11. (9) L.R. 1 Ch. Ap. 421.

Court dated the 24th February, 1891. The decree will determine what is to be done under that arrangement and order.

The defendants at present on the record are the members of the firm of Ritchie, Steuart and Co., George Wreford, the chief Official Receiver of the London Bankruptcy Court, and J. Whinney, trustee of the estate of Bevis, Russell and Co. The Official Assignee, C. A. Turner, is also a defendant, but nothing is now claimed by or against him, and his presence on the record has long since become unnecessary. The firm of Ritchie, Steuart and Co. are attorneys for the firm of Geo. and R. Dewhurst, of Manchester, who claim the bales as unpaid vendors, and have stopped them in transit and also under arrangement which they allege that they have made with Wreford, Pixley and Whinney as representing Bevis, Russell and Co., Ritchie, Steuart and Co. are also the attorneys of the defendant Wreford. They are not personally interested in the matter. Wreford and Ritchie, Steuart and Co. were made parties to the suit on the 19th January, 1891. As against them the suit began on that day.

It will be convenient to consider, first, the rights of the plaintiffs in respect of the 87 bales as against the firm of Bevis, Russell and Co., and their representatives in bankruptcy; secondly, what rights Dewhurst and Co. have derived from these representatives, and what rights they were entitled to put in force as unpaid vendors of the bales, and how far they effectually exercised these latter rights.

[74] On the 12th and 14th of August, 1890, the plaintiffs by telegram ordered from Bevis, Russell and Co. 100 bales grey shirtings. The exact terms of the order are contained in the plaintiffs' letter to Bevis, Russell and Co. of the 15th August. It is only necessary to note here that the price was 7*s.* 10*d.* per piece f. o. b. November-December shipment, and that such price bore interest, from shipment at all events, at five per cent. This order was accepted by Bevis, Russell and Co. In order to be in a position to execute the plaintiffs' order. Bevis, Russell and Co. ordered goods of the required description from Dewhurst and Co. The memorandum of sale by Dewhursts to Bevis, Russell and Co. is dated 15th August, 1890. Bevis, Russell and Co. on the 18th August confirmed the purchase, and on the 1st September directed, in correction of a previous direction, the 100 bales to be marked ($\frac{\overline{\text{J. N. S.}}}{\text{Bombay}}$). These are the initials of the plaintiffs' firm Jairam Narranji and Sons. In connection with Dewhursts' claim to stop the goods in transit, it will be necessary to examine with accuracy the terms upon which this sale was made. For the present purpose it need only be stated that the goods were to be delivered f. o. b. at Liverpool.

Dewhurst and Co. accordingly despatched the 100 bales, bearing the plaintiffs' mark, to Liverpool in different lots. There Bevis, Russell and Co. had them shipped in eight different vessels, as follows:—

13 bales by the "Nubia."
13 bales by the "Clan Drummond."
12 bales by the "Hispania."
12 bales by the "Eden Hall."
13 bales by the "Inchulva."
13 bales by the "Roumania."
12 bales by the "City of Edinburgh."
12 bales by the "Wistow Hall."

These steamers were what were called "Conference" steamers. By agreement between their owners and the Bombay Piece-goods Association, the former carry the goods of members of the Association at a fixed rate of

1892
OCT. 3.
ORIGINAL CIVIL.
17 B. 62.

freight. The plaintiffs were members [75] of the Association; and Bevis, Russell and Co. had standing orders to ship plaintiffs' goods by "Conference" vessels.

Bevis, Russell and Co. consigned the 100 bales to Bombay in their own names, having the bills of lading made out to their own "order or to his or their assigns." The freight was paid by Bevis, Russell and Co. in Liverpool on plaintiffs' behalf, and insurance was effected by Bevis, Russell and Co. for the plaintiffs. It is unnecessary to state the date of the several shipments. They were all made before the 1st December, 1890, save the 12 bales by "Wistow Hall" which were shipped on that day. On the several lots being shipped, Bevis, Russell and Co. accepted bills of Dewhurst and Co., payable three months, I think, after date of their invoiced price, f. o. b.

There can, I think, be no doubt but that on the goods being so shipped, if not at an earlier date, the property in them passed from Dewhurst and Co. to Bevis, Russell and Co. (see Benjamin on Sales (4th Ed.), p. 322); and from the latter, by reason of the plaintiffs' contract with Bevis, Russell and Co. to the plaintiffs. The terms of the plaintiffs' contract show that this was the intention of the parties. If it can be said that, by reason of the bill of lading being taken by Bevis, Russell and Co. in their own name payable to their order, the legal property in the goods was, after their shipment, in Bevis, Russell and Co., these latter were then trustees of that legal property for the plaintiffs, having a lien on the bills of lading, the symbols of the goods, and upon the goods themselves for their price and charges incurred in respect of them. I think, however, the correct view is that the property in the goods was in the plaintiffs,—Bevis, Russell and Co. having, by holding the bills of lading, the constructive possession of the goods and the legal right to their actual possession and to retain the same until their price was paid by the plaintiffs with the charges.

The bills of lading of the bales by "Nubia," "Clan Drummond" and "Hispania" Bevis, Russell and Co. endorsed in blank and sent by post to the firm of Benn, Ashley and Co. in Bombay. The "Nubia" arrived in Bombay in November. Benn, Ashley and Co. endorsed the bill of lading of the goods by her to the plaintiffs. The plaintiffs under it received the 13 bales [76] *ex* "Nubia." The plaintiffs did not then make any specific payment in cash for the goods, but they had a sum standing to their credit in a book kept by Benn, Ashley and Co. called the "Goods Indenters' Hundi Account." I shall more particularly refer to it hereafter. On this account no doubt they were given delivery of the 13 bales without making any specific payment. The invoices of the 25 bales per "Clan Drummond" and "Hispania" arrived in Bombay previously to the 1st December (probably on 14th November), showing the amount due by the plaintiffs for the 13 bales per "Clan Drummond" and the 12 per "Hispania" (on the 31st October and 3rd November respectively). They were handed to the plaintiffs. On the 1st December the plaintiffs paid Rs. 25,000 to the firm of Benn, Ashley and Co.

It is an important question in the case whether this payment is to be considered as a payment for or on account of the 100 bales or not. The defendants contend that it was not a payment for the bales, but was, in fact and in law, a deposit by the plaintiffs with the firm of Benn, Ashley and Co., out of which the plaintiffs intended probably to pay for the goods, but that, as thes plaintiffs did not fix the rate of exchange so as to convert it into sterling, it never became a payment for the goods to

Bevis, Russell and Co. Before mentioning the oral evidence upon the subject, I will notice the manner in which this payment is treated in the books of Benn, Ashley and Co. The first to refer to is the "Goods Indenters' Ledger." In this the invoices, on their arrival, are entered to the debit of the dealers. The invoices per "Nubia," "Clan Drummond" and "Hispania" are accordingly entered to the plaintiffs' debit on the 31st October and 14th November respectively; the invoices of goods per "Clan Drummond" and "Hispania" on the latter date. The sterling price shown in the invoices is the amount so entered. This was the only debit to the plaintiff in the books of Benn, Ashley and Co. on the 1st December. The plaintiffs had no account with that firm, but their goods purchase account. The Rs. 25,000 paid in by the plaintiffs on the 1st December are entered in the cash book thus:—"Jairam Narranji and Sons—Received from them Rs. 25,000 on account." On what account? The natural conclusion to draw is that they were received on [77] account of the only debit in the books against the plaintiffs; but as the sums paid in exceeded that debit, the further inference arises that they were paid on account of the transaction of which that debit forms a part. The cash book entry is posted in the ledger to the plaintiffs' account and credit. That entry is colourless, and throws no light on the object of the payment. It is, however, also carried to the plaintiffs' credit in the "Goods Indenters' Hundi Account." This shows, I think, clearly on what account the parties intended the payment should be treated as made. It could not be carried directly to the plaintiffs' credit in the "Goods Indenters' Ledger," as that account was kept in sterling. Before that could be done, rupees had to be artificially valued into sterling and in that condition transferred from the "Goods Indenters' Hundi Account" into the "Goods Indenters' Ledger." As far as the books show that conversion might have been an arithmetical calculation carried out by any calculator in the office. Looking at the books alone, the plaintiffs would appear to have paid for the 100 bales when they paid the Rs. 25,000 into the firm of Benn, Ashley and Co.

The plaintiff Khimji Jairam swears that he paid in the Rs. 25,000 to pay for the 100 bales, and that he did so thus early to save interest, which was running against the plaintiff. (He made the same statement on 6th December, 1890, and again on 7th January in reply to Ex. O). He calculated, he says, from the invoices already received the probable price of the whole (the invoices of the bales per "Clan Drummond" and "Hispania" were exactly a quarter of the whole), and paid in Rs. 25,000 to cover the total costs. Mr. Macdonald, the manager of the firm in Bombay and an ostensible, though not an actual, partner in it, confirms the plaintiffs' evidence on this point. The after-conduct of the partners points in the same direction. Mr. Macdonald and the Official Assignee, after the insolvency of Macdonald, calculated the sterling value of the money paid by the plaintiffs on account of goods purchased, and placed the sum to the plaintiffs' debit in the "Goods Indenters' Hundi Account," carrying it to their credit in the "Goods Indenters' Ledger." This may have been unauthorized after Macdonald had received notice of the bankruptcy of the English firm, but when it was notified to the representatives in banruptcy of the English, [78] firm, they entered the sum to the credit of the plaintiffs in the books of the English firm. The plaintiffs now stand credited in the books of Bevis, Russell and Co. with the price of 100 bales in sterling. The plaintiffs have not repudiated this action of Macdonald.

1892
OCT. 3.
ORIGINAL CIVIL.
17 B. 62.

Against this strong body of evidence we have the remark of Macdonald in his letter of the 10th January, 1891:—"Owing to the low rate of exchange the dealers would not remit, but left the money with us in deposit." This is not evidence against the plaintiffs; but I have to consider it, inasmuch as a book-keeper of the firm said, in answer to a leading question, that the contents of the letter were correct. Macdonald's attention was not drawn to it when he was cross-examined. It is really of no value, as the remark applies to about fifty dealers. It may have been correct as to forty-nine of them, yet not correct as to the plaintiffs. On looking through the cash book of Benn, Ashley and Co., I find that, when moneys were deposited with Benn, Ashley and Co., the fact is so stated in the cash entry with the rate of interest. The evidence of the plaintiff Khimji is sought to be impeached by a reference to the former course of dealing between the plaintiffs and the firm of Benn, Ashley and Co., and by a consideration of the improbability of the plaintiffs making a payment for goods, as to some of which they did not know whether they had been shipped or not. It would be improper, I think, to disbelieve positive evidence as to the payment for the goods in question, if and because it can be shown that in previous instances the plaintiffs had made a deposit with Benn, Ashley and Co., and not a payment for goods, the deposit being subsequently applied in payment for the goods. But nothing of the kind has been shown. To render the argument of any value, we should have to consider each particular case in connection with all the circumstances connected with it, and if, after such consideration, we found that in most cases the plaintiffs made a deposit, and not a payment in the first instance, some inference might be drawn from that fact unfavourable to the plaintiffs' contention. So far, however, as I can judge, it was the plaintiffs' practice to make a large payment in rupees, when the early invoices of any of their indents arrived, and to settle the exchange; or, in other words, to adjust the account **[79]** when the indent was completed, or nearly so. Khimji is not strictly accurate. On the whole, I think him an honest and careful witness when he says that the exchange was always fixed within a week or fortnight after the payment of a sum by him to pay for goods. Longer intervals occurred. The strongest instance relied upon by the defendants is in the case of the transaction immediately preceding the present. On the 19th July and 4th August, Khimji paid in Rs. 8,000 and Rs. 2,000 respectively. The sterling was not fixed till September 12th. Just, however, when their payment was made, it will be seen from Ex. H, that invoices of the plaintiffs' goods were arriving in considerable quantities and the plaintiffs were being debited with their amount. From the books alone I should draw the inference (as in this case) that the payment of Rs. 8,000 and Rs. 2,000 were payment on account of goods, though the account was not adjusted for a considerable time after the payment was made. On the other hand, I myself see nothing improbable in the plaintiffs making the payment in question, even though they were not certain that the goods had been shipped. Khimji, however, tells us that Macdonald told him that the goods would come (*i.e.*, were coming), and so he made the payment. I have arrived at a very positive conclusion that the plaintiffs intended to pay the Rs. 25,000 on account of the goods, and that Macdonald received the money on that account.

I also am of opinion that it was, in law, a payment for the goods. It was argued that the money paid in rupees was not and could not be payment for goods priced in sterling. That is not so. Payment may be

made in any medium which the parties mutually agree to give and accept. In India a guest may pay his hotel bill with English sovereigns if the host will accept them. The present case is much stronger; for the plaintiffs never, on any occasion, paid for their goods except in rupees. Having regard to the course of business, the contract was really to pay Benn, Ashley and Co., on behalf of Bevis, Russell and Co., as many rupees as would make up the price of 100 bales expressed in sterling.

[80] Then it is said that there was no payment till the exchange was fixed. That, again, I think, was not so. The payment was made, but until the exchange was fixed it could not be known how much change the plaintiffs were entitled to get back. Till that was done, the proper entries could not be made to close the transaction, just as in the case of the English sovereigns given to the hotel clerk in payment of the hotel bill. Lastly, it is said that payment was in rupees to Benn, Ashley and Co., while the payment had to be made in sterling to Bevis, Russell and Co., and it is argued that the two firms were distinct, as Macdonald was an ostensible, though not a real, partner in Benn, Ashley and Co. That may be so in the case of bankruptcy for the purpose of regulating the distribution of the assets; but in respect of transactions before bankruptcy, it certainly seems to me that a payment to Benn, Ashley and Co. was a payment to Bevis, Russell and Co.; but, if that were not so, Benn, Ashley and Co. were certainly agents to receive payment in the manner in which the plaintiffs paid. The cash book entries were sent home each week to Bevis, Russell and Co., to let them know how the dealers' accounts stood. It was open to Bevis, Russell and Co., not to receive payments for indent goods in rupees unless the exchange in respect of the rupees paid was at once fixed, but for mutual convenience the other course was adopted with the assent of Bevis, Russell and Co. The plaintiffs' payment was, in my judgment, good in law. At the time of the payment, Macdonald had the bills of lading in his hands of the goods shipped per "Clan Drummond," and "Hispania." He was quite ready to hand them, endorsed to the plaintiffs, but the plaintiffs did not ask for them, as the vessels had not arrived. On the payment being made, Benn, Ashley and Co. in Bombay held these bills of lading in trust for the plaintiffs freed from any lien or claim on their part. Similarly, in London, Bevis, Russell and Co. held the bills of lading, in respect of the 62 bales shipped in the steamers "Eden Hall," "Inchulva," "Roumania," "City of Edinburgh" and "Wistow Hall," in trust for the plaintiffs.

On the 4th of December, 1890, Bevis, Russell and Co. suspended payment, and on the same day a receiving order was made vesting their assets in the defendant Wreford. On the next **[81]** day, F. W. Pixley was appointed special manager of the estate. The bills of lading for the 62 bales were then handed by Bevis, Russell and Co. to Pixley. It was not argued before me, and I do not think that it could have been successfully contended, that under the order and disposition clause of the English Bankruptcy Act, 1883, (Stat. 46 and 47 Vic., c. 52) or otherwise, Wreford or Pixley acquired by the vesting order any other or different right to the bills of lading of the 62 bales which they held in London, or to the bills of lading of the 25 bales held by Benn, Ashley and Co., or to the goods of which these bills of lading were the symbols, than that in which Bevis, Russell and Co. and Benn, Ashley and Co. held them immediately before their suspension. The point was not expressly conceded or admitted, but it was not, on the other hand, expressly contended for. I, therefore, do not enter upon it more fully. If that be so,

1892
OCT. 3.
ORIGINAL CIVIL.
17 B. 62.

Wreford or Pixley became trustee of these bills of lading and of the bales represented by them for the plaintiffs. The bills of lading for the 62 bales at that time bore the endorsement, in blank, of Bevis, Russell and Co.

Macdonald filed his petition in insolvency in Bombay on the 10th day of December, 1890. Under the vesting order made upon that petition the defendant C. A. Turner claimed to be entitled to hold the assets of Benn, Asbley and Co. in Bombay. Macdonald handed the bills of lading per "Clan Drummond" and "Hispania" to C. A. Turner endorsed in blank apparently.

On the 8th December, 1890, the plaintiffs filed this suit against Bevis, Russell and Co. and Benn, Ashley and Co., and Macdonald for a declaration of their right to the 25 and 62 bales, and consequential relief. On giving security the plaintiff Khimji Jairam was appointed *interim* receiver of the bales. On the 16th December Mr. Turner endorsed the bills of lading per "Clan Drummond" and "Hispania" to the plaintiff Khimji Jairam. These vessels had before then arrived in Bombay. The plaintiff Khimji Jairam under that endorsement received the 13 bales *ex* "Clan Drummond" on the 23rd December, 1890, but not those *ex* "Hispania" till much later. On the 9th December, 1890, the Official Receiver, Wreford, had caused a telegram to be sent to Ritchie, Steuart and Co, to protect the [82] goods of Bevis, Russell and Co. and Benn, Ashley and Co. on his behalf in Bombay. Ritchie, Steuart and Co. accordingly claimed the assets from C. A. Turner on the 10th December. Since then Ritchie, Steuart and Co., have represented the Official Receiver of the bankrupt firms in Bombay. Prior to the 21st of December, 1890, they received the bills of lading for the 62 bales from Pixley. On the 30th of December, 1890, the plaintiffs by their solicitors' letter (Ex. J.) demanded these bills of lading from Ritchie, Steuart and Co. To this letter Ritchie, Steuart and Co. replied by their solicitors' letter of the 31st December, that they had received the bills of lading from Pixley with his orders not to deliver until completion of the payments. They accordingly refused to deliver the bills of lading to the plaintiffs. On the same day Ritchie, Steuart and Co. wrote to the plaintiffs offering to deliver the 62 bales to the plaintiffs, as they arrived in Bombay, on payment of their invoiced price. On 21st January they demanded payment from the plaintiffs of £2,008.

In the view I have taken of the case, the plaintiffs were entitled, as against the representatives of Bevis, Russell and Co. and Benn, Ashley and Co. in bankruptcy, to the bills of lading and the goods represented by them without further payment. Ritchie, Steuart and Co., as attorneys for the Official Receiver, had not, therefore, the right to withhold the bills of lading of any of them, or the bales, from the plaintiffs.

The firms of Bevis, Russell and Co. and Benn, Ashley and Co. were adjudged bankrupt on the 14th of February 1891, and the defendant J. Whinney was appointed their trustee on the 16th February, 1891. He was subsequently added as a defendant to this suit. The bankrupts made an arrangement with their creditors, under which they have paid, or secured their creditors, a composition of 6s. in the pound. Their bankruptcy was, therefore, annulled on the 5th August, 1891. The defendant J. Whinney makes no claim to any of the 87 bales, or their proceeds. All assets which C. A. Turner collected belonging to the estate of Benn, Ashley and Co. in Bombay he has made over to the defendant J. Whinney.

[83] It follows, from what I have said, that the representatives in bankruptcy of Bevis, Russell and Co. and Benn, Ashley and Co. had no

rights to the 87 bales in dispute to confer on Geo. and R. Dewhurst, and that firm can claim no rights in the bales conferred by these representatives. They have not, however, purported to confer any rights on Dewhurst and Co. or assigned any rights to that firm. The claim of Dewhurst and Co. to the 87 bales depends, therefore, in my judgment, altogether on their right, as unpaid vendors, to stop the goods in transit.

Before I enter upon a consideration of their rights in that respect I shall clear the ground by stating that, in my judgment, they have not lost, since suit, the rights (if any) which they possessed when it was filed against them, I mean by reason of the agreement which they have entered into with the defendant Whinney on 31st July, 1891. So far as the plaintiffs and the 87 bales are concerned, the agreement amounts to this:—Dewhurst and Co. are to recover the 87 bales, or their proceeds, from the plaintiffs, if they can, and are to give up their claim to the Rs. 25,000, and, giving credit for what they may receive in respect of the 87 bales, are to provide for the difference in bankruptcy, or under the deed. This is not so stated in so many words, as the 87 bales in question are only one of many consignments to a very much larger extent made by Dewhurst and Co. under similar circumstances, and the agreement relates to all the goods sold by Dewhurst and Co. to Bevis, Russell and Co., for which they have not been paid, but in effect that is the arrangement as to the 87 bales. I, at one time, thought that, if Whinney held the Rs. 25,000 in trust for Dewhurst and Co. under the terms of the invoices under which Dewhurst and Co. had sold them, the arrangement was a fraud on the plaintiffs, as Dewhurst and Co. gave up a fund out of which they were entitled to pay themselves for the 87 bales; but I am now satisfied that the Rs. 25,000 had been before bankruptcy mixed up with the other moneys of the bankrupt firm, and could not be followed or ear-marked, and that, therefore, Wreford first and Whinney after him did not hold any fund in trust to pay Dewhurst and Co. for the 87 bales. It is not necessary to consider what would have been the result if they had done so. Possibly it would have been a case of subrogation. **[84]** I give no opinion upon it. I also think that Dewhurst and Co. have not been paid 4*s.* or 6*s.* in the pound on the price of the 87 bales. Notwithstanding the endorsements of that 4*s.* payment on the bills, the truth is that it was paid in the balance estimated to remain due to Dewhurst and Co. after their securities, including the 87 bales in question, had been realized—a balance which is still open to final adjustment.

In this view it is unimportant to consider why Dewhurst and Co. were not made parties to this suit.

It is admitted that Dewhurst and Co. were, upon the suspension of Bevis, Russell and Co., unpaid vendors of the 87 bales and entitled to the exercise of all rights which unpaid vendors possess, including the right to stop the bales in transit. The first question which arises is whether that right did not cease when Bevis, Russell and Co. received (if they received) and shipped the bales at Liverpool. That depends upon the terms upon which Dewhurst and Co. sold the goods to Bevis, Russell and Co., and started them upon their journey. The memoranda of sale and purchase of the goods in question already referred to do not profess to be more than mere memoranda. The terms upon which the sale took place must be taken to be the usual terms upon which Bevis, Russell and Co. were in the habit of purchasing goods from Dewhurst and Co. These

1892
OCT. 3.
ORIGINAL CIVIL.
17 B. 62.

are set out in the invoices. They are similar in the case of all the shipments. The following is the wording of one of them :—

"Invoice of 12 bales goods marked J. N. & S. 159/175 shipped per "Eden Hall," Bombay, consigned to Messrs. Benn, Ashley and Co. there on account of the concerned. Proceeds to be remitted to Messrs. Bevis, Russell and Co., London, specifically for the protection of their acceptances of Geo. and R. Dewhurst's drafts against this or any of these shipments."

The letter of Dewhurst and Co. enclosing their draft for acceptance for the price of the goods repeats the terms as to the specific appropriation of the proceeds. The letter of Bevis, Russell and Co. notifying acceptance of the draft confirms the arrangement. From these documents and the oral evidence given in commission, it appears to me that when Dewhurst and Co. forwarded the goods to Bevis, Russell and Co. at Liverpool, and sent the carrier's receipts with the name of the steamer by which they [85] were to be forwarded, they really started the goods on their voyage to Bombay, consigned to Benn, Ashley and Co. there, and that though Bevis, Russell and Co. at Liverpool had the power, by reason of their possession of the indicia of title to the goods, to alter their destination there and to start them on a different voyage, yet to have done so would have been a breach of faith on their part towards Dewhurst and Co., if not a violation of the express terms of their contract. At Liverpool, Bevis, Russell and Co. never had actual physical possession of the goods. That was always in the hands of intermediaries for the purposes of the voyage; and though Bevis, Russell and Co. shipped the goods in their own name, they did so in pursuance of the contract between them and Dewhurst and Co. They did not impart to the goods a new destination. This circumstance differentiates the present case from *Ex parte Miles* (1), and brings it within the authority of *Ex parte Watson* (2). The fact that it was the firm of Bevis, Russell and Co. who attended to the shipping arrangements in Liverpool, does not render the voyage, which, in its inception, was intended to be a voyage to Bombay, a voyage first to Liverpool and then from Liverpool to Bombay. It is not sufficient, so to say, to break the continuity of the voyage—*Lyon* v. *Hoffnung* (3) approving *Bethell* v. *Clark* (4). The transit lasted, in my opinion until the bales were, as it is called in some cases, "at home" in Bombay. Until then the right of Dewhurst and Co. to stop the goods in transit lasted.

I have next to consider whether Dewhurst and Co. did effectually stop the goods, or any of them, in transit so as to defeat plaintiffs' title to them.

On the 6th December Dewhurst and Co. wrote to the receiver giving him notice that they claimed all shipping documents, goods, and proceeds of goods and remittances in respect of shipments to Benn, Ashley & Co., Bombay, for which Geo. and R. Dewhurst drew bills, and requiring him to apply the same proceeds and remittances towards payments of such bills in accordance with the terms of the invoice headings. On the 9th December [86] Dewhurst and Co. caused a telegram to be sent to Ritchie, Steuart and Co.: "Dewhursts request give every assistance Macdonald, Benn, Ashley and Co., protecting their interest," and on the 10th December another telegram: "Dewhursts claim (to have) goods

(1) 15 Q.B.D. 39. (2) 5 Ch.D. 35. (3) 15 Ap.Ca. 391. (4) 20 Q.B.D. 615.

sold by them and proceeds specifically applied to pay bills against goods. Sending p/a." This was notified to Benn, Ashley and Co. Since then Ritchie, Steuart and Co. have acted for Dewhurst and Co. in Bombay as well as representing the Official Receiver in the bankruptcy proceedings. After the sending of these telegrams, negotiations took place between Dewhursts and the Official Receiver. There is in my judgment no foundation, either in fact or in law, for the argument that they amounted to a stoppage of the goods in transit on the part of Dewhursts.

The letters which passed between the parties and the oral evidence alike show that on the 11th December it was arranged that the Official Receiver and Pixley should carry out the sale of Dewhursts' goods which had been made to native constituents for cash, through Ritchie, Steuart and Co., and that Ritchie, Steuart and Co. should hold the proceeds of such goods to the joint account of the Official Receiver and Dewhursts. When this arrangement was made, it was not known that the plaintiffs claimed the 87 bales, nor was it known that the Official Assignee asserted an adverse interest to that of the Official Receiver. At that time Dewhursts relied on their remedy under the specific appropriation clause in their invoices. This claim was not then actually admitted by the Official Receiver, but it does not seem to have been seriously disputed. Its validity was left to be determined thereafter.

On this arrangement being come to, the joint telegram of the 12th December was sent to Ritchie, Steuart and Co., in order that they might carry it out. This telegram was not in the exact form the parties had agreed on. That will be found at the back of Ex. 68 and in Ex. 72 to the commission: "Please carry out sales to natives delivering goods against cash only and remit proceeds to England in joint names of Pixley and Dewhursts." This arrangement was not communicated to the ship-owners, and it did not, of course, contemplate a stoppage of the goods in transit **[87]** by Dewhursts. It is in these respects altogether different from the arrangement in *Ex parte Watson* (1). In pursuance of it, Pixley sent forward the bill of lading of the 62 bales to Ritchie, Steuart and Co. He did not part with, and did not intend to part with the bill of lading of the 62 bales, except to his agents, nor to deprive himself of such advantages as the possession of the bill of lading conferred upon him, though the proceeds of the goods were to be remitted to the joint account of himself and Dewhursts. Mr. Wade's letter, which was probably written after Pixley's, expresses the arrangement more accurately than Pixley's, and must be considered the guiding one. Dewhursts' solicitors' letter by the same mail shows the view which they took of the position. Before it was written, Dewhursts had received the telegram of 11th December, notifying the Official Assignee's adverse claim to all goods consigned to Benn, Ashley and Co. In consequence of this claim, on December 13th Dewhurst and Co., had a telegram sent to Ritchie, Steuart and Co., directing them to stop, in transit, a large number of bales including the 25 bales *ex* "Clan Drummond" and "Hispania." They also sent instructions to the agents of the "Clan Drummond" and "Hispania" in England to stop these bales, but as these were later in date to the steps actually taken in Bombay I need not further refer to them.

I now come to the steps taken on behalf of Dewhurst and Co., in Bombay. On the 15th December the solicitors of Ritchie, Steuart and

---

(1) 5 Ch. D. 35.

1892
OCT. 3.
ORIGINAL CIVIL.
17 B. 62.

Co., wrote to Benn, Ashley and Co., that they had instructions to stop in transit, amongst the bales, the 25 bales *ex* "Clan Drummond" and "Hispania;" but as Macdonald was then insolvent, and had long before parted with all documents to the Official Assignee, this notice cannot be treated as of any value as a stoppage in transit of these bales, even if under any circumstances a notice to the consignees can be treated as effectual as a stoppage. I think that it cannot: see on this point *Phelps Stokes and Co.* v. *Comber* (1). The solicitors of Ritchie, Steuart and Co., on the same day wrote to the Official Assignee, informing him that they had stopped the 12 bales *ex* "Hispania" in the hands of [88] the Port Trust, and also of steps which they had taken as to the 13 bales *ex* "Clan Drummond" then expected. It appears from this letter that previous to its date Graham and Co.. had given a delivery order for the 13 bales *ex* "Hispania." The notice of stoppage to the Official Assignee was valueless as in itself a stoppage in transit. It was apparently written after the notice presently to be referred to.

On the morning of the 15th December, Ritchie, Steuart and Co., gave notice to Graham and Co., agents for the "Hispania," to stop the 12 bales which had been brought by that vessel. It would, however, appear that, previous to that notice, the goods had been landed in the Dock. Mr. Ker, on behalf of Ritchie, Steuart and Co. acting for Dewhurst and Co., went to the Prince's Dock and found the bales landed there. He thereupon gave the Dock authorities notice to stop them. At this time a delivery order for the goods had been granted by Graham and Co. For reasons which I shall presently assign, I have come to the conclusion that this was an ineffectual attempt to stop these particular bales, and that the plaintiffs' title as to them must prevail over that of Agents of Dewhurst and Co. The goods were "at home" before the notice to stop was given. It is unnecessary to refer to other letters put in on this part of the case. The tortious act of the carrier, after the goods are "at home," cannot defeat the purchaser's right—*Bird* v. *Brown* (2).

On the same morning of the 15th December, Ritchie, Steuart and Co., gave notice to Finlay, Muir and Co., agents for the "Clan Drummond," to stop the 13 bales by that vessel in transit. At the time this notice was given, it appears, from the evidence of Mr. Ker, that these bales were still on board the "Clan Drummond." He went to the Prince's Dock and ascertained that fact. He also gave notice to the Dock authorities to stop the goods. At this time the goods were, without doubt, in the possession of the master of the "Clan Drummond," and, therefore, were still in the carrier's hands and liable to be stopped. It was, it appears to me, the duty of the agents at once to have communicated that notice to the master of the "Clan [89] Drummond," and the notice to the agents is, therefore, equivalent to a notice to him—*Kemp* v. *Falk* (3). The bill of lading had not, at this time, been endorsed or handed to the plaintiff Khimji, but was in the hands of the Official Assignee of Macdonald, who did not hold it in any better right than that of Benn, Ashley and Co., a right which the unpaid vendors were entitled to defeat. I think, therefore, that this notice to stop was in time to defeat the plaintiffs' title to the 13 bales. It is unnecessary to refer to the further correspondence on this point. On the 23rd December the 13 bales were delivered to the plaintiff Khimji, as receiver and under the endorsement of the bill of lading, by the Official Assignee. It is, I think,

(1) 29 Ch. D. 813. (2) 4 Ex. 786. (3) 7 Ap. Ca. 585.

clear law that a wrongful delivery of goods by the carrier after notice to stop in transit does not defeat the right of the unpaid vendor—*Sett* v. *Cowley* (1).

I now come to the 62 bales of which Pixley offered delivery to the plaintiffs on the 31st December, if they would pay for them. Under the agreement of the 11th December between Dewhurst and Co., and the Official Receiver, to which I have already referred, Ritchie, Steuart and Co., in my judgment, held them as agents for the Official Receiver and Pixley, and not for Dewhursts. The letter of Messrs. Conroy and Brown of the 8th January, 1891, is erroneous in stating that they were held for Dewhurst as well. It was the proceeds of the goods which were to be held on joint account and not the bill of lading. This possession of the Official Receiver and Pixley, who were trustees of the bill of lading for the plaintiffs, enured for the benefit of the plaintiffs against Dewhurst and Co. On the 31st of December, Ritchie, Steuart and Co., on behalf of the Official Receiver and Pixley sent round notices to the agents of the five different vessels, in which the 62 bales had been shipped, to hold the goods for them, stating that they held the bills of lading. These notices were all received before the series of notices next to be referred to, on behalf of Dewhursts were sent out. At that time four of the vessels, at least, were in the Dock. The dates of discharge of the bales in question were as follows:—

[90] "Eden Hall" had on the 2nd January 1891, discharged 9 bales, leaving undischarged 3

"Inchulva"	do.	do.	do.	0	do.	do.	13
"Roumania"	do.	do.	do.	13	do.	do.	0
"City of Edinburgh"	do.	do.	do.	12	do.	do.	0
"Wistow Hall"	do.	do.	do.	12	do.	do.	0
		Total discharged	46			Undischarged	16

On the evening of the 2nd January 1891, therefore, 46 bales were in the hands of the Dock authorities, and 16 bales were still on board the "Inchulva" and "Eden Hall."

On the 2nd January, Ritchie, Steuart and Co., wrote notices to the several agents of the above steamers, on behalf of Dewhurst and Co., of stoppage in transit of the above bales, except in the case of the "Wistow Hall," in respect of which no notice was given. At the end of the letter there was also a notice to stop in transit on behalf of the Official Receiver, but as in respect of these particular bales he was not an unpaid vendor, the notice on his behalf may be disregarded.

These notices were all delivered on the 3rd January. As to the 16 bales then on board the steamers, I must hold, for the same reasons I gave in the case of the "Clan Drummond," that notices to stop in transit on behalf of Dewhursts were in time. The title of Dewhurst and Co., to these must prevail. It must also prevail, I think, as to the 13 bales *ex* "Roumania." The notice given to Graham and Co., the agents of the "Roumania," on the 15th December 1890, related not only to the bales per "Hispania," but also to "any other bales shipped on account of Geo. and R. Dewhurst to Messrs. Benn, Ashley and Co." This notice was no doubt indefinite, but still it covers the shipment by the "Roumania," and was given in time to prevent the bales per "Roumania" reaching "home." As to the 12 bales per "Wistow Hall" out of the remaining 33 bales which were in

(1) 7 Taunt, 169.

1892
OCT. 3.

ORIGINAL CIVIL.

17 B. 62.

the Prince's Dock on the 2nd January, no notice of any kind on behalf of Dewhurst and Co., has been proved, and to these the plaintiffs are entitled.

The position of the remaining 21 bales raises questions of great doubt and difficulty. I regret that as to them the case was not more fully argued. In what capacity did the "Trustees of the [91] Port" hold such goods? Bombay Act VI of 1879 constitutes them a public body, and imposes certain duties upon them. Amongst other things it constitutes them wharfingers, and for their duties as such they are to levy tolls and charges under s. 43. Being a public body they are bound to receive on their wharves and in their sheds all goods properly tendered to them. Section 62 provides that, if the master or owner of any vessel before landing goods at any wharf of the Board shall give the Board notice in writing that such goods are to remain subject to a lien for freight or other charges payable to the shipowner, such goods shall continue liable to the same lien (if any) for such charges as they were subject to before the landing thereof. The goods, however, are to lie in the warehouse and sheds of the Board at the risk and expense of the owners liable to be sold to pay the above lien and the Board's charges. The sections in the Bombay Act relating to this subject are similar to those under which goods are landed at "Sufferance" wharves in London and elsewhere. The effect of landing goods at such wharves was much considered in *Barber* v. *Meyerstein* (1) and in *Glyn Mills Co.* v. *East and West India Dock Co.* (2). In the latter case there was much difference of opinion amongst the several Judges, before whom the case came, as to whether the goods after being landed were held under a contract or not, and, if yea, with whom. The view on this point held by Brett, L. J., in the Court of appeal was, I think, that adopted in the House of Lords, *viz.*, that the goods are landed under the provisions of the statute, and held under the same provisions, and that there is no contract with any one. In the statute there considered as here also, there was no provision as to how and to whom delivery was to be made, and it was held that the landing of the goods made no difference in that respect, and that the wharfingers were for this purpose placed in the same position as the master, and had to make delivery according to the exigencies of the bill of lading handed to them duly endorsed. A further proposition is also, I think, to be gathered from the judgments delivered in the House of Lords, namely, that as long as the goods are subject to a stop order for freight, the bill of lading has not discharged its office, and that the [92] goods are subject to incidents arising out of the original contract contained in the bill of lading.

From this it would seem to follow that so long as they are subject to a lien for freight the transit has not ended. The goods are not at home. The converse proposition would, however, seem also to be true, that when the shipowner lands the goods under the statute, and his freight has been paid, his right of control and lien over the goods is gone, and thenceforth the goods are held by the statutable wharfingers for the consignee alone. In the present case, as the freight was in every instance prepaid, the masters of the several vessels, when they landed the plaintiffs' goods at the Prince's Dock, had no longer any control or lien over them. The Dock authorities held them under the provisions of the statute for the holders of the bills of lading, *i.e.*, the Official Receiver and Pixley, represented by their agents, Ritchie Steuart and Co., who in turn held

(1) 4 Eng. and Ir. App. 317.

(2) 7 Ap. Ca. 591.

these bills of lading as trustees for the plaintiffs. If that is the correct view, the goods ceased to be in transit when landed.

Great difficulty is, however, introduced by the 59th rule of the Bye-laws of the Port Trust, which is this:—"Goods landed at the Dock shall only be delivered on production of bills of lading accompanied by a delivery order from the master or agent of the vessel." This delivery order is, no doubt, intended as a voucher that the freight has been paid, and that there is no lien under s. 62 of the Act. Does the non-obtaining of it by the holder of the bill of lading keep up the transit until it has been obtained, when there is no freight due, and no lien on the part of the master? On the whole, I have come to the conclusion that it does not. The rule, I think, was not intended to have, and has not, any effect on the rights of consignees, but is merely a departmental rule to prevent servants of the Board from delivering goods subject to the master's lien. I do not see how the agent of a steamer could be compelled to give such a delivery order. The goods, as I have shown, are not under his control after being landed free of freight. This seems to be the view of the Dock authorities. The shed master under pressure of the cross-examination seems to me to have put the delivery order on too **[93]** high a footing. In the case of the "Hispania," however, it must be remembered that the bill of lading was endorsed with the delivery order of the agents before Dewhurst and Co. gave notice of the stoppage on the 13th of December. As to the 21 bales also, I think that, when the Official Receiver gave his notices of the 31st December, the case must be treated as if he had obtained delivery orders at that time.

Whether that be so or not, I am of opinion that, in respect of the goods which were landed before Dewhurst and Co. gave their notice of stoppage on the 3rd of January, no notice of stoppage in transit has been proved to have been given to proper persons. The Dock authorities were not the servants of the several agents to whom notices were given, and no duty was cast on the several agents to give information of them to the Dock authorities. The agents' duties as to the goods were over when they had been landed under the provisions of the statute. Accordingly, when the latter gave up the goods in March under the endorsement upon the bills of landing of Ritchie, Steuart and Co. which must be taken to have been made by them as agents of the Official Receiver and Pixley, they are not shown to have received any notice of stoppage in transit, and, therefore, the title of the plaintiffs to the 21 bales, which I am now considering, is superior to that of Dewhurst and Co.

The result is that under terms of the consent order of the 24th February, 1891, the plaintiffs must pay Dewhurst and Co. through Ritchie, Steuart and Co. the invoice cost of 42 bales (see note), with interest at 5 per cent. per annum from their due dates to payment.

All parties to bear their own costs respectively.

Attorneys for the plaintiffs:—Messrs. *Thakurdas, Dharamsi and Cama.*

Attorneys for the defendants:—Messrs. *Conroy and Brown.*

NOTE.—The 42 bales in respect of which it was held that goods notice to stop in transit had been given, and for which, therefore, the plaintiffs had to pay (see order of 24th February *supra*, p. 71), were made up as follows:—13 bales *ex* "Clan Drummond" and 13 bales *ex* "Roumania" stopped by the notice dated the 15th December, 1890, and 13 bales *ex* "Inchulva" and 3 (out of 12) *ex* "Eden Hall" which were still on board and undischarged on the 3rd January, 1891.

17 B. 94.

1891
OCT. 8.

APPELLATE CIVIL.

17 B. 94.

[94] APPELLATE CIVIL.

Before Mr. Justice Jardine and Mr. Justice Parsons.

SHEKH ADAM ISUFBHAI (*Original Defendant*), *Appellant v.* JAMNADAS RANCHORDAS AND OTHERS (*Original Plaintiffs*), *Respondents.** [8th October, 1891.]

Civil Procedure Code (Act XIV of 1882), s. 283—Suit to establish right to attach—Onus of proof—Right of defendant in such suit to set up the title of a third person where defendant's own title derived from such persons is tainted with fraud—Decree—Execution—Registration—Registration Act III of 1877, ss. 21 and 60—Description of property not contained in body of the deed of conveyance, but inserted as a foot-note.

Faizulla owned a house in Surat. On the 21st August 1882 he was adjudged a bankrupt by the Supreme Court of the Straits Settlements, within whose jurisdiction he was then carrying on business as a merchant. On the 20th February 1884 he executed a conveyance of the house to Mr. Carew, the trustee in bankruptcy, for the benefit of his scheduled creditors, of whom the defendant was one. The defendant held a mortgage on the house for advances made by him to Faizulla. Mr. Carew had an agent in India, one Nazir Mahomed, with whom the defendant was a partner in business. On the 20th November 1884 the plaintiffs obtained a decree for Rs. 78,000 against Faizulla and another person, and in execution of this decree they attached the house in question as the property of Faizulla. Prior to the attachment the defendant, in consideration of the mortgage-debt due to him, had obtained a transfer of the house from Carew with possession. No further consideration was paid by him at the time of the transfer. On the attachment being levied by the plaintiffs, the defendant claimed the house as purchaser from Carew, and the attachment was raised. The plaintiffs then filed this suit under s. 283 of the Civil Procedure Code (Act XIV of 1882) to establish their right to attach the house as the property of their judgment-debtor. The plaintiffs (the respondents) contended that the transfer of the house by Carew to the defendant was fraudulent, the defendant being a partner of Carew's agent, and no consideration having been paid for the transfer. The defendant (appellant) contended that it was sufficient for him to show that Carew's title was good, and that, if the house had validly passed to Carew, it could not afterwards be attached for Faizulla's debt. The plaintiffs (respondents) on the other hand argued that the defendant ought not to be allowed to set up Carew's title; that the transfer by Carew to him was fraudulent, and that he ought not to be allowed to benefit by his own fraud.

Held, that the defendant was entitled to set up Carew's title as a defence, although he might have been guilty of fraud in his subsequent dealings with Carew. If Carew's title neither originated in, nor was upheld by, any fraud of the defendant, and if the plaintiffs' claim failed on proof of Carew's title alone, the [95] defendant would not benefit by his own fraud, but by the proof of a title paramount to that of both plaintiffs and defendant.

In a suit brought under s. 283 of the Civil Procedure Code (Act XIV of 1882) to establish the right to attach property, it is for the plaintiff to prove that the property in question is the property of the judgment-debtors. The onus of proof is upon him. He can have no right to attach property which is proved either never to have belonged to his judgment-debtor, or having been his, to have passed out of his possession and ownership, and become, in law, the property of others prior to the time at which attachment is sought. The defendant defending such a suit may, therefore, rely on the title of a third person.

A conveyance of immoveable property did not contain, in the body of the deed, a description of it sufficient to identify it. In a foot-note, however, such a description was given, and it was signed by the assignee only. The deed was accepted by the Registrar, and was registered, and a certificate to that effect was given under s. 60 of the Registration Act (III of 1877). The deed being tendered in evidence was objected to on the ground that it ought to be treated as unregistered, since it had been improperly accepted for registration by the Registrar.

* Appeal No. 88 of 1891.

Held, that the error in accepting it, if error there was, did not invalidate the registration; see *Sah Makhan Lal* v. *Sah Koondan Lal* (1).

[R., 25 B. 202 (206); U.B.R. (1897—1901), 270.]

APPEAL from the decision of Khan Bahadur B. E. Modi, First Class Subordinate Judge of Surat, in suit No. 237 of 1885.

One Faizulla was the owner of a house at Surat. On the 21st August, 1882, he was adjudged bankrupt by the Supreme Court of the Straits Settlements, within whose jurisdiction he was carrying on business as a merchant, and on the 20th February, 1884, he executed a conveyance of the said house to Carew, the trustee of the property of the bankrupt, for the scheduled creditors, of whom the defendant, Shekh Adam Isufbhai, was one. Carew had an agent in India, one Nazar Mahomed, with whom the defendant was a partner in business.

On the 20th November, 1884, the plaintiffs obtained a decree in Surat against Faizulla and one Abdulali for Rs. 78,000, and in execution of this decree they attached the house in question as the property of Faizulla. Prior to the attachment the defendant, who, as above stated, was a creditor of Faizulla and who held a mortgage on the house for advances made by him, obtained a transfer of the house from Carew as trustee in consideration of his mortgage-debt. No further consideration was paid by him at the date of the transfer. On the attachment **[96]** being made by the plaintiffs, the defendant claimed the house as purchaser from Carew, and the attachment was raised. The plaintiffs then filed this suit under s. 283 of the Civil Procedure Code (Act XIV of 1882) praying for a declaration that the house was the property of their judgment-debtor Faizulla, and that they were entitled to attach it.

The Court of first instance passed a decree for the plaintiffs, holding that the purchase by the defendant was void as against all the creditors of Faizulla, including the plaintiffs.

In appeal, a question was raised as to whether the house had ever belonged to Faizulla. The Court held, on the evidence, that it had been his property.

Vicaji (with *Gokaldas Kahandas Parekh*), for the appellants.

Branson, for the respondents.

JUDGMENT.

JARDINE, J., (holding, on the evidence, that the house had been Faizulla's property, continued):—The house which thus belonged to Faizulla was undoubtedly conveyed by him to Carew.

Exhibit 32 shows that Faizulla was adjudged bankrupt by the Supreme Court of the Straits Settlements on the 21st August 1882, and this adjudication was followed by a conveyance of the house executed by Faizulla on the 20th February 1884 in favour of Carew, who was the Sheriff of Singapore and trustee of the property of the bankrupt for the scheduled creditors (Ex. 85).

This conveyance was executed prior to any attachment of the property by the plaintiffs (prior indeed to their decree), and would have been a perfectly valid and legal conveyance under the law of this country. The only objection raised against its validity is that it ought to be treated as unregistered, since it was improperly accepted for registration by the Registrar of Bombay. This was the view taken by the Subordinate Judge, who, however, (as is here admitted) made a mistake in saying that it was

(1) 2 I.A. 210.

1891
OCT. 8.
APPELLATE CIVIL.
17 B. 94.

registered too late, so that the case he relied on—*Raya* v. *Anapurnubai* (1) —has no application. But his other remark is true, *viz.*, that "the assignment contains no description of the immoveable property sufficient to identify it" in the body of the deed, though such a **[97]** description is given in a foot-note. Section 21 of the Indian Registration Act, 1877, enacts that "no non-testamentary document relating to immoveable property shall be accepted for registration unless it contains a description of such property sufficient to identify the same." It does not particularise where the description shall be contained, and in the present case the Registrar may have thought that the provisions of the law were sufficiently complied with, in that the proper description was given in a foot-note signed by the assignee only, especially as Faizulla admitted the execution and genuineness of the document to him and signed an endorsement to that effect. Be this as it may, the document was registered, and a certificate to that effect was given under s. 60. The error in accepting it, if error there was, cannot, we think, be held now to invalidate the registration. The Judicial Committee of the Privy Council make the following observations in the case of *Sah Mukhun Lal Panday* v. *Sah Koondan Lal* (2) :—"It is scarcely reasonable to suppose that it was the intention of the Legislature that every registration of a deed should be null and void by reason of a non-compliance with the provisions of ss. 19, 21 or 36, or other similar provisions. It is rather to be inferred that the Legislature intended that such errors or defects should be classed under the general word "defect in procedure" in s. 88 of the Act, so that innocent and ignorant persons should not be deprived of their property through any error or inadvertence of a public officer on whom they would naturally place reliance." Section 21 of the Act there referred to (XX of 1866) is the same as s. 21 of the Act now in force (Act III of 1877). On this point of construction we have referred also to the Full Bench decision in *Hardei* v. *Ram Lal* (3) and the authorities on which it proceeds, and we are of opinion that the document must be held to have been registered in accordance with the provisions of the Act (see s. 49). The second point, therefore, is found in the affirmative.

The purchase by the defendant from Carew has been held by the lower Court to be void as against Carew and all the creditors **[98]** of Faizulla, including the plaintiffs, because the defendant who purchased the property was the partner of Carew's agent, Nazar Mahomed, and no consideration was paid for the transfer. It has not been attempted by argument in this Court to contest this point, the counsel for the appellant being content to rest his case upon the assignment to Carew under which the legal title to the property in suit had passed from Faizulla.

It was, however, contended on behalf of the respondents, that to allow the defendant thus to rest his defence on proof of Carew's title would be to set up a new case for him, and would also enable him to benefit by his own fraud. Neither of these contentions are, in our opinion, sound. It is no new case for the defendant to allege that the property could not be attached, because it had been conveyed to Carew, and, therefore, no longer belonged to Faizulla. Such a plea was raised in the Court of first instance, embodied in an issue and decided. The abandonment, or rather the abstention from argument in this appeal of the further point, whether the defendant purchased from Carew, cannot make the case a

(1) 10 B.H.C.R. 98.
(2) 15 B.L.R.P.C. 228 (235) = 2 I.A. 210 (216).
(3) 11 A. 319.

new one, for the case remains the same, only it is curtailed by the omission of a final link which, if redundant, need never have been added, but of which, if essential, the omission would be fatal. The contention that to allow the defendant to rely on Carew's title will be to enable him to benefit by this own fraud rests on a misconception. It is plain that, if Carew's title neither originated in, nor is upheld by, any fraud of the defendant, and if the plaintiffs' claim fails on proof of Carew's title alone, the defendant will benefit not by his own fraud, but by the proof of a title paramount to that of the plaintiffs and that of the defendant himself, and as injurious, therefore, to the defendant as to the plaintiffs. We think, therefore, that, if the defendant can under ordinary circumstances set up against the plaintiffs' claim the title of a third person, he can clearly set up the title of Carew in the present case, though he may have been guilty of fraud in subsequent dealings with Carew.

This brings us to the question whether a defendant can rely on the title of a third person in defending a suit like the present, brought under the permission given in s. 283 of the Code of Civil Procedure (Act XIV of 1882). The words of that section are **[99]** "the party may institute a suit to establish the right which he claims to the property in dispute." The right here claimed by the plaintiffs is the right to attach the property in dispute in execution of the decree they obtained against Abdulali and Faizulla on the 20th November, 1884, for the sum of 78,000 and odd rupees. It is, we think, plain that they can be held to have established their right to attach this property under that decree only if they prove that it is the property of their judgment-debtors. They can have no right to attach property which is proved either never to have belonged to their judgment-debtors, or having been theirs to have passed out of their possession and ownership, and become in law the property of others prior to the time at which attachment is sought. The onus of proving that the property is their judgment-debtors' must lie on the plaintiffs, and whether or not the defendant has a title, the plaintiffs must prove their right to attach, *i.e.*, the title of their judgment-debtors. In the present case it is not proved that Abdulali ever had any title in the property in suit; on the contrary, it is proved that Faizulla was the owner thereof; it is also proved that Faizulla on the 20th February, 1884, conveyed the property to Carew, and that Carew was the legal owner thereof at the time of the attachment of it by the plaintiffs, and Carew is still the legal owner of the property if there has been no valid transfer of it from him to the defendant. Whether there has been a valid transfer or not, is a point for determination in a contest between him and Carew, not in a contest between the plaintiffs and the defendant. Indeed, the point is in no way material in the present suit, for no fraud committed by the defendant against Carew could have the effect of divesting Carew's title and re-vesting the property in the plaintiffs' judgment-debtor Faizulla.

For these reasons we are of opinion that it is unnecessary to decide whether or not the property was purchased by the defendant from Carew; we hold that the title of Carew can be relied on by the defendant; and since it is proved that the plaintiffs have no right to attach the house in execution of their decree we reverse the lower Court's decree, and order that this suit be dismissed with costs throughout on the plaintiffs.

Decree reversed.

1892
JAN. 18.

APPELLATE CIVIL.

17 B. 100.

17 B 100

[100] APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Telang.

GIRIAPA (*Original Defendant*), *Appellant v.* NINGAPA (*Original Plaintiff*), *Respondent.** [18th January, 1892.]

Hindu law—Inheritance—Share of adopted son where a son is subsequently born—Western India—Mitakshara—Vyavahar Mayukha—Point taken by appellant on second appeal not raised by him in his first appeal—Practice.

In Western India, both in the districts governed by the Mitakshara and those specially under the authority of the Vyavahar Mayukha, the right of the adopted son, where there is a "legitimate son" born after the adoption, extends only to a fifth share of the father's estate.

In a suit by an adopted son to recover his share in his adoptive father's estate, a son having been born to the adoptive father subsequently to the plaintiff's adoption, the Court of first instance awarded the plaintiff a fourth share of the property in dispute. The defendant appealed to the District Court, but in appeal raised no question as to the extent of the share awarded to the plaintiff. On second appeal to the High Court it was contended that, in any event, the plaintiff was only entitled to a fifth share.

Held, that under the circumstances, and having regard to the nature of the question, the point might be taken in second appeal on behalf of the defendant, and the High Court varied the decree by awarding the plaintiff a fifth share instead of a fourth share, but ordered the appellant (defendant) to bear his own costs of the appeal.

[R., 17 B. 303 (305); 27 B. 452 (460); 1 C L.J. 388 (392,403).]

THIS was a second appeal from the decision of T. Hart-Davies, Assistant Judge of Dharwar.

Suit by an adopted son. The plaintiff Ningapa alleged that he had been duly adopted twenty-three years previously by one Bhimapa Bhiksheti, and that after the adoption his adoptive father had executed a document in his favour, providing that, in the event of his (the adoptive father) having "legitimate sons" subsequently born to him, the plaintiff should receive a half share of his whole estate. Afterwards, and while the plaintiff was living with his adoptive father, the defendant was born.

The plaintiff, being dispossessed by the defendant, sued to recover a half share of the property.

The defendant, Giriapa Bhimapa, denied the plaintiff's adoption and his claim, and pleaded limitation.

[101] The Subordinate Judge (Rao Saheb Babaji Lakshman) found the plaintiff's adoption proved, and his claim not time-barred. He allowed the plaintiff a fourth share in the property in dispute.

On appeal the District Court confirmed the decree.

The defendant then appealed to the High Court.

Manekshah J. Taleyarkhan, for the appellant.

There was no appearance for the respondent.

JUDGMENT.

TELANG, J.—The question raised in the argument of this appeal relates to the share of an adopted son, where a son is born to the adoptive father after the adoption. The original text to which all the authorities on

* Second Appeal No. 741 of 1890.

this question go back, is a text of Vasishtha (1), which we find quoted in the various modern Digests. The different readings of that text as quoted in those works do not require to be considered in the present case (2). All the principal text books of authority in Western India on the subject of adoption read the text so as to mean, that where a "legitimate son" is born after an adoption, the adopted son "shares a fourth part" (3). And the question before us turns on the meaning of this equivocal phrase. The different significations of which the phrase is susceptible have been expounded in several modern text books (4); but without examining the grounds for the various interpretations, it is enough to say that in Western India the weight of authority strongly preponderates in favour of the view, that where one legitimate son is born after an adoption, the legitimate son takes four-fifths of the estate of the father and [102] the adopted son one-fifth. Taking the authorities in Western India on the subject of adoption as mentioned by Westropp, C.J., in *Narayan Babaji* v. *Nana Manohar* (5), we find that the Mitakshara sets out the texts of Vasishtha, but says nothing about the interpretation of the phrase "a fourth share." It is to be noted, however, that Colebrooke's marginal note against this passage speaks of "a quarter of a share," thus probably indicating an interpretation identical with that which, as we shall see in the sequel, the Vyavahara Mayukha places on the phrase. A somewhat similar phrase occurs in connection with the provision for the marriage of unmarried daughters when a joint family is about to divide. And the Mitakshara has a long discussion on the interpretation of the phrase there used. But the words there (Stokes' Hindu Law Books, p. 398) are not indentical with the words here, inasmuch as they do specify the estate or fund of which a fourth share is to be taken. And as we see from the Mitakshara's discussion of those words, they also have given rise to very considerable differences of opinion. But it is unnecessary to dwell on that passage further, as owing to the different language used, as already pointed out, it can throw no light on the meaning of the text which has to be construed here. The Vyavahara Mayukha to which we must next refer is quite explicit as to the meaning of Vasishtha's text. In chap. IV, s. v, placitum 25, it is said: "He should take a quarter of the share allotted to a legitimate son of his adoptive father; from the (following) text of Vasishtha 'when a son has been adopted, if a son of the body be afterwards born, the adopted son shall be a sharer of a portion equal to a fourth.'" The "fourth share," therefore, according to this view, is to be a fourth not of the whole estate, but of the share allotted to the "legitimate son." The Viramitrodaya affords no light on the subject, nor does the Dattaka Chandrika, both only setting out Vasishtha's text, and not expounding this phrase in it. The Dattaka Mimamsa only says that the adopted son "receives a quarter, not an entire share." But this

(1) See Bühler's Vasishtha in Sacred Books of the East, Vol XIV, p. 76. And see also Baudhayana in the same volume, p. 336, where the words inserted by Dr. Bühler between brackets are to be noted (Comp. Stokes' Hindu Law Books, 595). The text of Devala and Katyayana on the point are quoted in Dattaka Chandrika, Stokes' Hindu Law Books, pp. 657-8.

(2) See Colebrooke's notes at Stokes' Hindu Law Books, p. 421.

(3) Mitakshara, p. 420 (Stokes' Hindu Law Books); Mayukha, p. 66 (ditto); Viramitrodaya by G. C. Sarkar, p. 124; Samskara Kaustubha, p. 49 (Bombay Ed. 1861, quoting Baudhayana); Dattaka Mimamsa, p. 594 (Stokes' Hindu Law Books); Dattaka Chandrika, p. 657 (Stokes' Hindu Law Books).

(4) See Rajkumar Sarvadhikari's Tagore Lectures, pp. 537-9; Mr. Justice Banarji's Tagore Lectures, pp. 367-8; Dr. Jolly's Tagore Lectures, pp. 182-4.

(5) 7 B.H.C.R. A.C.J. 153.

1892
JAN. 18.
APPEL-
LATE
CIVIL.
17 B. 100.

explanation is not itself quite clear, and Mr Sutherland proposes two different interpretations of it, one of which is in harmony with the view of the [103] Vyavahara Mayukha, while the other is not (1). Looking, however, at the original text of the Dattaka Mimamsa as printed in the edition published at Calcutta in 1857, and also in the edition published at Benares in 1874, we find that "not an entire share" is not quite an accurate translation of the words used by Nanda Pandita. The correct translation is "not an equal share." This latter phrase, too, does not perhaps make the point perfectly clear. It seems to contain an allusion to texts which apparently lay down an equal division between the adopted son and the subsequently born "legitimate son." Such texts are to be found cited in the Samskara Kaustubha for instance (see passage cited below), and in the Dattaka Mimamsa itself (Stokes' Hindu Law Books, p. 595, and compare West and Bühler, p. 1187 and note (*e*) there). But at all events the phrase "not an equal share" rather appears to indicate that, in Nanda Pandita's view, the word "quarter" points to the relation between the shares of the after-born son and the adopted son, not the relation between the share of the latter and the whole estate. It may, therefore, be said to be at least very probable, that Nanda Pandita's view was in accord with that of Nilakantha. And the opinion of the author of the Samskara Kaustubha (2) appears also to be the same.

It is true, that in the Smriti Chandrika, a text metrical in form, not aphoristic like the one under discussion (3), is quoted as belonging to Vasishtha, in which it is laid down, that "if after he is accepted (in adoption) a legitimate son is born, he becomes a sharer of a fourth share in the inheritance" (4). And it is also [104] true, as I suggested in the course of the argument, and as I find has been already pointed out by Professor H. H. Wilson (quoted by Mayne as well as in West and Bühler's Digest), that to interpret the phrase "a quarter share" to mean a fourth of the whole inheritance would reconcile the two readings of Vasishtha's aphoristic text with each other, and both with the metrical text now referred to, namely, by taking one-third, where it occurs, to mean one-third of the after-born son's share, and one-fourth to mean one-fourth of the whole estate. This is true, though there are difficulties even on this construction, as for instance in the case of four or more sons being born after an adoption. But, apart from this and other difficulties, it is pretty clear that, according to the principle laid down by the Privy Council in the case of *The Collector of Madura* v. *Mootoo Ramlinga Sethupati* (5), the Court must give effect to what it finds to be the interpretation of Vasishtha's text now actually current as shown by the modern Digests in general use, and not enforce as law a doubtful inference from the words of the ancient Smriti writers.

---

(1) See Stokes' Hindu Law Books, p. 678. The other interpretation of Mr. Sutherland may be compared with the Mitakshara's views about the provision for daughters, at p. 398 of Stokes' Hindu Law Books. See also Stokes' Hindu Law Books, pp. 55, 426.

(2) This work is stated in Steele quoted at West and Bühler, p. 1187, to hold a different opinion. But the phrase used there, according to the reading of the Bombay edition, though perhaps not a very happy one, can only mean "one quarter of his share," which meaning agrees with the interpretation put on Vasishtha's text by the Vyavahara Mayukha.

(3) See as to this West and Bühler's Digest, p. 43.

(4) See Smriti Chandrika, p. 57 (Calcutta edition). In the translation by Mr. Krishnaswami Iyer (p. 146) the words "in the inheritance", which occur in this printed text, are omitted.

(5) 12 M. I. A. 397.

1892
JAN. 18.
APPELLATE CIVIL.
17 B. 100.

Passing now to the modern English text books, we find that Sir T. Strange leaves this point in uncertainty. In West and Bühler's Digest, it is said in one place, that, "if a legitimate son be born after the adoption has taken place, the adopted son receives a fifth of the deceased's estate, according to the preceding question. According to the Mitakshara, chap. I, s. xi, placitum 24, the adopted son takes a fourth part" (1). The language thus used by the learned authors of that work seems intended to convey the impression, that the "fourth part" referred to by the Mitakshara means one-fourth of the deceased estate. But, as we have seen, the words there used contain nothing that can be said to be decisive on this point, and nothing inconsistent with the view of the Vyavahara Mayukha. In other passages of West and Bühler (2) it is stated that the right of the adopted son is to "a fourth of a son's share" or to "a fourth part of a share" or "one-fourth of a share as compared with the full share taken by the begotten son." Mr. Mayne sets out the various **[105]** views of the subject which have been taken, and adds, relying on West and Bühler, p. 373, that in Bombay the rule has been construed to mean that the adopted son takes a fourth of the legitimate son's share. Mr. Jogendra Chandra Siromani, in his Commentaries on Hindu Law, takes the fourth to mean a fourth of the legitimate son's share. Dr. Jolly's opinion is also in favour of this interpretation. And in the very recently published Tagore Law Lectures on adoption by Mr. G. C. Sarkar the same view is maintained. In Steele's book it is said that the proportion varies according to caste custom; but, in the case before us, no question has been raised with reference to any such custom.

As regards other authorities bearing on the subject, there is the answer of the Shastri quoted in West and Bühler in the case from Dharwar (3), and the present case comes from the same part of the Presidency. There is also the answer of another Shastri to the same effect, which apparently was acted upon by the Sadar Adalat, and is also mentioned by West and Bühler (4). And lastly, there is the decision of the High Court of Madras in *Ayyavu Muppanar* v. *Niladatchi Ammal* (5) based principally on the authority of the Sarasvati Vilasa. All these authorities, judicial and *quasi*-judicial, concur in the opinion that the right of the adopted son extends to only one-fifth of the whole estate, where there is one "legitimate son" born after the adoption.

It appears to us, upon a review of all the authorities above referred to, that we ought to hold that in Western India, both in the districts governed by the Mitakshara and those specially under the authority of the Vyavahara Mayukha, the right of the adopted son, when there is a legitimate son born after the adoption, extends only to a fifth share of the father's estate.

The Subordinate Judge in this case awarded a fourth share to the plaintiff, and the defendant in his appeal to the District Court did not raise any question about the correctness of that award. In this Court, however, Mr. Manekshah has taken the point, and relied on the passage in Mayne's Hindu Law already quoted. We think, under the circumstances, and having regard **[106]** to the nature of the question, that the defendant may be allowed the benefit of our opinion, but he cannot be allowed the costs of this appeal. The decree will, therefore, be varied by substituting a fifth share instead of a fourth share, and the appellant must bear his own costs in this Court.

Decree varied.

(1) W. and B., p. 373.
(2) *Vide* pp. 388. 773, 935, also p. 1187.
(3) P. 372 (3rd Ed.).
(4) P. 373.
(5) 1 M H.C.R. 45.

1892

FULL BENCH.

17 B. 106 (F.B.).

17 B. 106 (F.B.).

APPELLATE CIVIL—FULL BENCH.

Before Sir Charles Sargent, Kt., Chief Justice, Mr. Justice Bayley, Mr. Justice Birdwood, Mr. Justice Jardine and Mr. Justice Farran.

UMARKHAN MAHAMADKHAN DESHMUKH (*Original Plaintiff*), *Appellant v.* SALEKHAN AND OTHERS (*Original Defendants*), *Respondents.**

Interest—Enchanced rate in default of payment—Penalty—Liquidated damages—Contract Act (IX of 1872), s. 74.

A proviso for retrospective enhancement of interest, in default of payment of the interest at a due date, is generally a penalty which should be relieved against, but a proviso for enhanced interest in the future cannot be considered as a penalty, unless the enhanced rate be such as to lead to the conclusion that it could not have been intended to be part of the primary contract between the parties.

[**F.**, 2 C.W.N. 333 (334); **Appr.**, 2 C.W.N. 234 (237); **R.**, 15 A. 232 (242) (**F.B.**); 22 C. 658 (667); 26 C. 300 (307, 308); 30 C. 15 (17)=7 C.W.N. 152; 18 M. 175 (177); 25 M. 343=11 M.L.J. 421 (422); 36 M. 229=18 Ind. Cas. 417=24 M.L.J. 135=13 M.L.T. 20; 17 C.L.J. 590 (593)=20 Ind. Cas. 516; 9 Ind. Cas. 406 (410), 1 N.L.R. 9 (13).]

THIS was a second appeal from the decision of Rao Bahadur Ganpat Amrit Mankar, First Class Subordinate Judge of Thana, with appellate powers.

The plaintiff, Umarkhan Mahamadkhan Deshmukh, sued to recover from the defendants a sum due under a mortgage-bond.

The portion of the mortgage-bond material for the purpose of this report was as follows:—

"* * And as to the assessment and dues due to the Sarkar together with *zamindar's* cesses which are now payable and which may hereafter, on a survey being made, be decreased or increased, the same are mine. I will be paying the same as I have been paying them up to this time. You have nothing to do with the (payment of the) *dhara* (*i.e.*, assessment); should you perchance **[107]** have to pay the assessment, then interest on whatever amount you may have to pay on account of such *dhara* is to be calculated at the rate of one rupee per cent. per month, and should the balance out of the interest in *bhat* (paddy) remain unpaid, the interest in *bhat* is to be calculated at the rate of a quarter as much, that is, 25 per cent., *vadh savai pramane*. As to these, together with the principal sum, whatever the total amount may be found to be due to you on making the account, I will pay off the same at once. * * * *"

The defendant Salekhan admitted the execution of the mortgage-bond, but disputed the plaintiff's right to recover the amount claimed.

The High Court remanded the case for the decision on certain issues, including the following:—

"Whether the high rate of interest agreed to be paid on interest not paid in any given year than on the principal, rendered the contract to that extent a penal one."

The above issue was found by the lower appellate Court in the affirmative, and the plaintiff appealed against the finding.

Mahadeo Chimnaji Apte, for the appellant.

Ghanasham N. Nadkarni, for the respondents.

* Second Appeal No. 356 of 1890.

1892

—

FULL BENCH.

—

17 B. 106 (F.B.).

After argument the Appeal Court (Sargent, C. J., and Birdwood, J.) made the following order of reference :—

Having regard to the conflict of decisions between *Pava* v. *Govind* (1) and *Raghunathrav* v. *Yashvant* (2) on the one hand and *Dullabhdas* v. *Lakshmandas* (3) on the other, we think it right to refer it to a Full Bench to decide—

Whether a clause in bond enhancing the rate of interest on default of payment of the principal debt and interest at the time fixed is to be regarded as a penalty ?

The case subsequently came on for argument before a Full Bench consisting of SARGENT, C. J., BAYLEY, BIRDWOOD, JARDINE and FARRAN, JJ.

[108] *Mahadeo Chimnaji Apte*, for the appellant.—The stipulation in the document with respect to the payment of interest on interest is not a penalty. The bond itself was passed for the amount due upon a sum under a former bond. The stipulation amounts to an agreement to pay compound interest. It is as damages and not as a penalty that higher interest is claimed on the balance of interest, which was to be paid in kind and not in cash. We admit that, if the enhanced rate be claimed from the date of the bond, it would be a penalty, but it is not so where it is claimed from the date of default. The agreement in question is of the latter kind. There is no conflict in the Bombay decisions so far as the first proposition is concerned ; but with respect to the second, there is. We contend that if a higher rate is to run from a subsequent date, it is not a penalty, having regard to the provisions of the Indian Contract Act (IX of 1872), s. 74—*Rasaji* v. *Sayana* (4) decided before the Indian Contract Act came into force ; *Pava* v. *Govind* (1) ; *Dallabhdas* v. *Lakshmandas* (3) ; *Raghunathrav* v. *Yashvant* (2) ; *Mackintosh* v. *Crow* (5) ; *Nanjappa* v. *Nanjappa* (6). The latter two rulings are expressly dissented from in *Baij Nath* v. *Shah Ali* (7), which lays down that a higher rate of interest is not of the nature of penalty under any circumstances. The same principle is laid down in *Basavayya* v. *Subbarazu* (8) ; *Rai Balkishen Das* v. *Raja Run Bahadursingh* (9) ; *Appa Rau* v. *Suryanarayana* (10) ; *Sajaji Panhaji* v. *Maruti* (11) ; *Joshi Kalidas* v. *Koli Dada Abhesingh* (12) is not applicable, because there the agreement was to pay double the amount of the entire debt on default of payment of one instalment, and, therefore, it was held to be in the nature of a penalty—*Arulu* v. *Wakuthu* (13) ; *Adanky Ramchandra Rao* v. *Indukuri* (14). In the last case the enhanced rate of interest was 75 per cent., and yet it was held to be not a penalty.

[109] *Ghanasham N. Nadkarni*, for the respondents.—This is a penalty and not compound interest. The intention to pay compound interest must be clear on the face of the document. A Court of equity will not give effect to the clause in this mortgage—*Peachy* v. *Duke of Somerset* (15). The bond provides that a particular rate of interest shall be paid on the principal, but if the interest is unpaid, a higher rate of interest shall be paid on the balance of interest remaining unpaid. This is not compound interest. The clause in the bond is a threat to the debtor for the purpose of securing regular payments of interest, and ought to be relieved against—

---

(1) 10 B.H.C.R. 382. (2) P. J. for 1882, p. 223. (3) 14 B. 200.
(4) 6 B.H.C.R. A.C.J. 7. (5) 9 C. 689. (6) 12 M. 161.
(7) 14 C. 248. (8) 11 M. 294. (9) 10 I.A. 162.
(10) 10 M. 203. (11) 14 B. 274. (12) 12 B. 555.
(13) 2 M.H.C.R. 205. (14) 2 M.H.C.R. 451.
(15) White and Tudor's Leading Cases, Vol. II, p. 1245.

1892

FULL BENCH.

17 B. 106 (F.B.).

Bansidhar v. *Bu Ali Khan* (1) ; *Khurram Singh* v. *Bhawani Baksh* (2) ; *Dip Narain Rai* v. *Dipan Rai* (3) ; *Rasaji* v. *Sayana* (4). The parties did not really contemplate that the enhanced rate should be levied. The rule of equity laid down in *Sloman* v. *Walter* (5) should be followed. Section 74 of the Indian Contract Act (IX of 1872) supports our contention.

The earlier cases decided by the Bombay Court make no distinction between a condition to pay enhanced rate from the date of the document and to pay such a rate from a subsequent date—*Pava* v. *Govind* (6) ; *Raghunathrav* v. *Yashvant* (7) ; Coote on Mortgage, p. 967 ; *Dickson* v. *Longh* (8) ; *Tikamdas* v. *Ganga* (9). The idea of making a distinction with respect to a clause being penal or otherwise was for the first time started in *Dullabhdas* v. *Lakshmandas* (10). Section 74 of the Indian Contract Act (IX of 1872) does not interfere with the Court's equitable jurisdiction.

JUDGMENT.

The judgment of the Full Bench was delivered by

SARGENT C.J.—The question raised by this reference is one on which there has been a great diversity of judicial decision and opinion in the several High Courts of India. As to this Court, **[110]** however, we cannot doubt that until the Judges who decided the cases of *Dallabhdas* v. *Lakshmandas*(10) and *Sajaji* v. *Maruti*(11) reviewed the decision in *Rasaji* v. *Sayana* (4), *Motoji* v. *Shekh Husen* (12) and *Pava* v. *Govind* (6) by the light of the more recent decisions of the other High Courts, it has been always considered that an enhancement of the rate of interest in default of payment of the principal sum and interest at the day fixed in the bond was in the nature of a penalty whether the enhancement was retrospective taking effect from the date of the loan, or was prospective from the date of default of payment. An examination of the facts in *Motoji* v. *Shekh Husen* and *Pava* v. *Govind* can leave no doubt, we think, that the Court was in both cases dealing with prospective enhancement of interest, and in *Raghunatharav* v. *Yashwant* (7), where it is plain that the question was as to the enhancement of interest from the day fixed for payment of the instalments, Melvill and West, JJ., treated as well settled by the decisions in *Rasaji* v. *Sayana*, *Pava* v. *Govind* and *Tikamdas* v. *Ganga* (9) that the agreement to pay such increased interest was a penalty, and ought not to be enforced.

The effect of the recent decisions in *Dallabhdas* v. *Lakshmandas* and *Sajaji* v. *Maruti* is doubtless to distinguish between prospective and retrospective enhancement, and to hold that the latter only is in the nature of a penalty,—a distinction apparently suggested to the Court by the judgment of Wilson, J., in *Mackintosh* v. *Crow* (13) disapproving of the decision of Kemp and Pontifex, JJ., in *Bichook Nath* v. *Ram Lochun* (14). That learned Judge treated the question as one to be determined exclusively by s. 74 of the Contract Act, and whilst admitting that retrospective enhancement of interest may be a penalty, observed that " where the contract is merely, that if the money is not paid at the due date, it shall

(1) 3 A. 260. (2) 3 A. 440. (3) 8 A. 185.
(4) 6 B.H.C.R.A.C.J. 7. (5) White and Tudor's Leading Cases, Vol. II, p. 1257.
(6) 10 B.H.C.R. 382. (7) P. J. 1882, p. 223.
(8) Irish Reports, Vol. XVIII, p. 518. (9) 11 B.H.C.R. 203.
(10) 14 B. 200. (11) 14 B. 274. (12) 6 B.H.C.R. A.C.J. 8.
(13) 9 C. 689. (14) 11 B.L.R. 135.

1892

FULL BENCH.

17 B. 106 (F.B).

thenceforth carry interest at an enhanced rate, he did not see how it could be said that there is any sum named as to be paid in case of breach. No one can say [111] at the time of the breach what the sum will be." In *Mackintosh* v. *Hunt* (1) Garth, C.J., and Macpherson, J., had already decided that s. 74 of the Contract Act was not applicable to the case of prospective enhancement of interest. In *Baij Nath* v. *Shah Ali* (2) however, we find Mitter and Macpherson, JJ., holding that the Contract Act is not applicable to either class of cases whether the interest be retrospective from the date of the loan or prospective after default, because they say "in neither case is a sum named in the contract as the amount to be paid in case of breach."

We agree with this view of the above section of the Contract Act, the sole object of which would appear to have been to provide for the class of cases to which *Kemble* v. *Farren* (3) belongs, and in which the distinction between "liquidated damages" and "penalty" has given rise to so much difference of opinion in the English Courts. They are fully discussed by Sir G. Jessel and the rest of the Court in *Wallis* v. *Smith* (4). Assuming, then, that the question under consideration has to be decided, as we think it must, independently of s. 74 of the Contract Act, is the Court precluded by s. 2, Act XXVIII of 1855, from affording relief in any case? The Calcutta Court in *Baji Nath* v. *Shah Ali* (2) express the opinion that the only law applicable is s. 2 of Act XXVIII of 1855, which says that "in any suit in which interest is recoverable the amount shall be adjudged or decreed by the Court at the rate (if any) agreed upon by the parties," and that the decision of the Privy Council in *Balkishen Dass Rai* v. *Raja Run Bahadhur Singh* (5) supported that view. In that case the question turned upon the construction of a compromise or *solehnamah* embodied in a consent decree, and the Privy Council differing from the High Court (see page 165) expressed an opinion that neither the proviso that an enhanced interest at 12 per cent. instead of 6 per cent. should be paid from the date of the compromise in default of payment of the first instalment of the debt at the due date, nor the proviso for the same enhancement of interest on the [112] entire decretal money from the date of default of payment of any instalment other than the first until realization, was a penalty from which the debtor ought to be relieved. But we cannot agree with the Calcutta Court that it supports the view taken by that Court with respect to the application of s. 2, Act XXVIII of 1855. The Privy Council do not allude to the Act in their judgment, but they treat the question exclusively as one, whether the proviso for enhancement was a penalty to be relieved against or an alternative stipulation. However, the effect of the above Act was considered by Sir M. Westropp in *Pava* v. *Govind* (6) where he says the equitable jurisdiction to relieve against penalties was not taken away by Act XXVIII of 1855,—a view of the Act which is in accordance with that expressed by Pontifex, J., in *Bichook Nath* v. *Ram Lochun* (7), and which has always been acted on in this Court.

Passing, then, to the consideration of the question whether equitable relief should be afforded by the Court against a proviso for enhancement of interest in default of the payment of the principal sum, we cannot agree with the opinion expressed by the Calcutta Court in *Baij Nath* v. *Shah Ali*, that the decision of Mr. Justice Wilson

(1) 2 C. 202 (206). (2) 14 C. 248 (254). (3) 6 Bing. 141.
(4) 21 Ch. Div. 243. (5) 10 I. A. 162. (6) 10 B. H. C.R. 382.
(7) 11 B.L.R. 135.

1892

FULL BENCH.

17 B. 106 (F.B.).

and all the other similar cases cited by him in his judgment in *Mackintosh* v. *Crow* (1) must be considered as necessarily overruled. Every case of this nature, as pointed out by Pontifex, J., in *Bichook Nath* v. *Ram Lochun* (2), must depend on its own circumstances. The instrument which their Lordships had to construe in *Balkishen Dass Rai* v. *Raja Run Bahadur Singh* (3) was of a very special character, and their decision that the provisos providing for an enhanced rate of interest, retrospective and prospective, were not of the character of a penalty, but alternative stipulations, can only be regarded as a decision on the language of that particular instrument. The English cases show that it is regarded as settled law that where an ascertained definite sum of a less amount is to be paid at a certain day, in default of which a large sum is to be paid, the Court will treat the latter as a penalty. It is so stated by the Judges in *Astley* v. **[113]** *Weldon* (4). Sir G. Jessel assumed it to be so settled in *Wallis* v. *Smith* (5), and Lord Justice Lindley in his judgment in that case makes the following remark :—"Whether relief was given on the theory of oppression, or on the theory that the parties could not have meant what they said, or whether by reason of the usury law. But it has long been settled that where a person agrees to pay a larger sum if he does not pay a small one, he does not mean what he says, and the contract is not to have the effect that one would suppose it was intended to have." It is in virtue of this rule that it had been decided in *Holles* v. *Wyse* (6) and *Strode* v. *Parker* (7), that where the interest in a mortgage is fixed at a certain rate to be paid at fixed intervals, a proviso that if the interest is not paid punctually a higher rate shall be charged, is a penal clause, and will not be enforced. However, in *Burton* v. *Slattery* (8), the principal debt was payable by instalments with interest at 5 per cent. with a proviso that if not paid punctually the debtor was to pay 8 per cent. and the House of Lords directed the account to be taken on the basis of 5 per cent. on the instalments up to due date, but 8 per cent. subsequently up to payment. No reasons are given by the House of Lords for their decision, and it cannot, therefore, be said with certainty whether they considered the proviso for prospective enhanced interest to be not in the nature of a penalty, or a reasonable one which should not be relieved against. The decision in *Mackintosh* v. *Crow* (1), where the interest after default in payment at due date was thenceforth to be 10 per cent. may be supported on the latter ground, even if the proviso be regarded as a penalty.

Upon this review of the authorities we think the safer conclusion is that a proviso for retrospective enhancement of interest, in default of payment of the interest at due date, is generally a penalty which should be relieved against, but that a proviso for enhanced interest in the future cannot be considered as a penalty, unless the enhanced rate be such as to lead to the conclusion that it could not have been intended to be part of the **[114]** primary contract between the parties, as may well be deemed to have been the case in *Bichook Nath* v. *Ram Lochun* (2), and *Pava* v. *Govind* (9).

JARDINE, J.—I concur in the general conclusion at the end of the learned judgment of the Chief Justice as an answer to the question which is propounded in general terms by the Division Bench. As one of the

(1) 9 C. 689.
(2) 11 B. L. R. 135.
(3) 10 I. A. 162.
(4) 2 B. & P. 346.
(5) 21 Ch. Div. 274-5.
(6) 2 Vern. 289.
(7) 2 Vern. 316.
(8) 5 Brown's Parliamentary Cases, 233.
(9) 10 B.H.C.R. 382.

Judges who decided *Dallabhdas* v. *Lakshmandas*(1) and *Sajaji* v. *Maruti*(2) I wish to add that, in my opinion, this conclusion does not conflict with those decisions. In the latter case we observed :—" As laid down by the Privy Council in *Dimech* v. *Corlett* (3), the hinge on which the decision in every particular case turns, is the intention of the parties collected from the language they have used." In dealing with the authorities, the expressions of every Judge must be taken with reference to the case on which he decides—*Richardson* v. *Mellish* (4). I would further add my concurrence in the view expressed that the equitable jurisdiction to relieve against penalties is not taken away by Act XXVIII of 1855—*Pava* v. *Govind* (5), and I think it unnecessary to express a final opinion on the scope of s. 74 of the Indian Contract Act, 1872.

Decree confirmed.

---

17 B. 114.

APPELLATE CIVIL.

Before Mr. Justice Jardine and Mr. Justice Telang.

GOJABAI AND ANOTHER (*Original Defendants*), *Appellants v.* SHRIMANT SHAHAJIRAO MALOJI RAJE BHOSLE (*Original Plaintiff*), *Respondent.** [4th April, 1892.]

Hindu law—Inheritance—Stridhan—*Devolution of* stridhan *belonging to a childless widow—Grandson—Co-widow—Husband's nephew*—Sapindas.

A childless Hindu widow died, possessed of *stridhan* consisting of ornaments given to her on her marriage and of a house purchased by her out of her own separate income. She left her surviving (1) a co-widow; (2) the plaintiff, who was grandson of another co-widow; and (3) a nephew (*i.e.*, brother's son) of the husband. She had been married in one of the approved forms.

[115] *Held*, that the plaintiff was a nearer *sapinda* of the deceased than either her co-widow or her husband's nephew, and, as such excluded both from inheriting the deceased's *stridhan*.

[Appr., 30 B. 431 (447,448) (**P.C.**) = 3 A.L.J. 484 = 8 Bom.L.R. 446 = 4 C.L.J. 9 = 10 C. W.N. 802 = 33 I.A. 176 = 16 M.L.J. 446 = 1 M.L.T. 211 ; **R.**, 30 B. 607 (609) = 8 Bom.L.R. 685 ; 34 B. 553 = 12 Bom.L.R. 545 (552) = 7 Ind. Cas. 459 ; 36 B. 339 = 14 Bom.L.R. 89 = 14 Ind. Cas. 438 ; 25 C. 354 (366,368) ; 39 C. 319 = 15 C.L.J 23 = 15 C.W.N. 1036 = 11 Ind. Cas. 872 ; 32 M. 512 (516) = 3 Ind. Cas. 541 = 19 M.L.J. 656 = 6 M.L.T. 183 ; 36 M. 116 (118) = 12 Ind. Cas. 128 (129) = 21 M.L. J. 850 = 10 M.L.T. 494 (495) = (1911) 2 M.W.N. 168 ; 5 Bom.L.R. 244 (246) ; 7 Ind. Cas. 543 = 6 N.L.R. 103 (107) ; 2 S.L.R. 59 (63) ; **D.**, 6 Bom. L.R 17 (20).**]**

APPEAL from the decree of L. J. Fernandez, First Class Subordinate Judge of Poona, in suit No. 161 of 1888.

The plaintiff sued to recover certain property as heir of Anandibai, widow of Shahaji Raje Bhosle, Chief of Akalkot. The plaintiff was the grandson of a co-widow of Anandibai.

The property consisted of ornaments given to Anandibai on her marriage, and of a house purchased by her out of her own separate income.

Anandibai died at Poona on the 19th April, 1888, leaving her surviving (1) a co-widow, Kamaljabai ; (2) the plaintiff, who, as above stated, was the grandson of another co-widow ; and (3) one Tulajirav, who was her husband's nephew.

---

* Appeal No. 57, 1890.

(1) 14 B. 200. (2) 14 B. 274. (3) 12 M. P.C. C. 229.
(4) 2 Bing. 248. (5) 10 B.H.C.R. 382.

1892
APRIL 4.
APPELLATE CIVIL.
17 B. 114.

The defendants set up a deed of gift, as well as a will, purporting to have been passed by the deceased Anandibai in their favour, and also contended that the plaintiff was not entitled to inherit the deceased's *stridhan* in perference to Kamaljabai or Tulajirav.

The Subordinate Judge held that both the deed of gift and the will relied upon by the defendants were fabrications, and that the plaintiff was the heir of the deceased Anandibai. He, therefore, decreed the plaintiff's claim.

Against this decision the defendants appealed to the High Court.

Vasudev G. Bhandarkar, for the appellants:—The property in dispute was Anandibai's *stridhan*. She having died childless, the question is, who is her heir? We contend that either her co-widow or her husband's nephew would be a nearer heir than the plaintiff, who is a grandson of another co-widow. The Mitakshara states in chap. II, s. xi, pl. 11, that the *stridhan* of a childless woman devolves first on the husband, and failing him, on *tat-pratya-sannah*. This expression may mean either "her nearest relations," or his nearest relations. If we look to the context, it would have to be interpreted in the **[116]** former sense. And this is the interpretation put upon the words by the Mayuka in chap. IV, s. x, pl. 28. The language of the Mitakshara being vague and ambiguous, the rule as laid down by the Mayuka, which follows the Mitakshara in this matter, should be adopted. According to the Mayuka, on failure of the husband a childless woman's *stridhan* passes to her nearest kinsmen in her husband's family. In chap. IV, s. x, pl. 30, the Mayuka states who are her nearest kinsmen. Reading pl. 30 with placitum 28, the rule to be deduced is that the heirs to the *stridhan* of a childless widow are, next to the husband, the kinsmen enumerated in placitum 30, who belong to the husband's family. According to this interpretation, Tulajirav, who is the husband's nephew, is the heir to Anandibai's *stridhan*, and not the plaintiff. Even if the words *tat-pratya-sannah* be taken to mean the husband's relations, they should be taken in the sense in which a commentator like Kamalakar has understood them, *viz.*, as referring to the heirs specified in the Mitakshara. See West and Buhler, p. 518. This appears to be a reasonable interpretation, as the author of the Mitakshara would not have used the vague words "husband's heirs," unless they were meant to refer to the well-known line of heirs which would make them definite. The Smriti Chandrika also gives a similar rule of succession in chap. IX, s. 3, pl. 38. According to this interpretation, Anandibai's co-widow would be the heir.

Latham, Advocate-General (with him *Ghanasham Nilkanth*) for the respondent:—The intereprotation sought to be put on the Mitakshara is quite novel. The rule, as generally understood, is that, if a woman dies without issue, the heirs to her *stridhan* are the *sapindas* of the husband. A step-son precedes a co-widow—West and Buhler, 521; Mayne's Hindu Law, s. 622; Banarji's Tagore Law Lectures, pp. 375, 377. The plaintiff is, therefore, the heir to Anandibai's *stridhan*.

Vasudev G. Bhandarkar, in reply, cited *Bachha Jha* v. *Jagmon Jha* (1). In the present case the step-son pre-deceased Anandibai. The point is not covered by any authority.

JUDGMENT.

[117] TELANG, J.:—The only point of law which arises in this case relates to the devolution of Anandibai's property after her death. In the

(1) 12 C. 348.

Court below, that property was dealt with as forming part of Anandibai's *stridhan*, and it has been similarly dealt with in the argument before us. We must, therefore, treat it on the same footing. It must also be assumed, as in the absence of all evidence it was rightly assumed by the Subordinate Judge, that Anandibai's marriage was in one of "the approved" forms (1).

Looking, then, at the case on this basis, the questions which arise for consideration are, first, whether the plaintiff, as grandson of Anandibai's husband, has any right at all to Anandibai's *stridhan*; and, secondly, whether, if he has such a right, that right is preferable to the right of Anandibai's fellow-widow Kamaljabai or her husband's nephew Tulajirav.

Now the general rule is that laid down in the Mitakshara, chap. II, s. xi, pl. 25: "on failure of grandson, also the husband and other relatives above mentioned are successors to the wealth" (2). The "other relatives" thus vaguely indicated here are more definitly described in pl. 11, where it is said that, "on failure of him, it goes to his nearest kinsmen (*sapindas*) allied by funeral oblations" (3). According to the rule as thus expressed, the points to be determined in this case are, whether the plaintiff is a *sapinda* of Anandibai's husband, and, if so, whether he is a nearer *sapinda* than Kamaljabai or Tulajirav. On both points there can be no doubt. The definition of *sapinda*, which must be taken to be the one applicable in this Presidency, clearly and in terms (4) includes a grandson, and indeed no definition of that term excludes him. And it is clear that a man's lineal descendants are nearer *sapindas* of his than any collateral relatives. Therefore, accerding to the doctrine of the Mitakshara, as expressed in the words extracted above, it follows that the plaintiff excludes Kamaljabai as well as Tulajirav from inheriting the *stridhan* of Anandibai.

[118] It was, however, argued that the true meaning of the Mitakshara in the passage above extracted must be taken to be different from what is expressed in Colebrooke's translation; and that when it is correctly interpreted, the Mitakshara is in favour, not of the husband's nearest kinsmen inheriting a woman's property, but the woman's nearest kinsmen in the husband's family doing so. And for this interpretation, reliance is placed on the passage in the Vyavahara Mayukha (5), dealing with this matter. Although, as will presently be seen, it is not quite necessary to decide this point in the case before us, I may say, seeing that it has been argued, that the inclination of my own opinion is in favour of Mr. V. G. Bhandarkar's contention. For, I think, our general principle should be to construe the Mitakshara and the Mayukha so as to harmonize with one another, wherever and so far as that is reasonably possible; *cf.* *Krishnaji Venkatesh* v. *Pandurang* (6). And on the point now under consideration, it is possible to harmonize them, if both the Mitakshara and Mayukha are understood to refer to the same heirs, only by different descriptions—the Mitakshara describing them as *sapindas* of the husband, the Mayukha as *sapindas* of the wife in the family of the husband. But, even accepting to the full Mr. Bhandarkar's contention on this point, and construing the Mitakshara in the sense which Nilakantha places upon

(1) See West and Buhler (3rd Ed.), p. 521; and see, too, *Gangaram* v. *Balia*, P. J. for 1876, p. 31.

(2) Stokes' Hindu Law Books, p. 464.

(3) Stokes Hindu law, p. 461. I have retained Colebrooke's words here, but the rendering here given of '*Sapindas*' is not correct for this Presidency. See *Lallubhai* v. *Mankuvarbai*, 2 B. 423 *et seq.* = 5 B. 121.

(4) See *Lallubhai* v. *Mankuvarbai*, 2 B. 389 (423).

(5) See Stokes' Hindu Law, p. 105; Mandlik's Hindu Law, pp. 97-98.

(6) 12 B. H. C. R. 65.

1892
APRIL 4.
APPELLATE CIVIL.
17 B. 114.

its language (1), I do not see how we can properly arrive at a different conclusion from that above stated. The wife having, by her marriage, been born "again in the husband's family" (2) and having become "half the body of the husband" (3), the *sapindas* of the husband necessarily become her *sapindas*, and their degrees of propinquity to the husband and wife must be held **[119]** to be identical (4), unless some specific reason to the contrary is shown. Now we have seen that the plaintiff is the nearest *sapinda* of Anandibai's husband, and the question, therefore, is whether any specific reason can be shown for holding him not to be the nearest *sapinda* of Anandibai. It is said that one such reason is furnished by the text of Sumantu quoted in the late Rao Saheb Mandlik's Hindu Law (5). It appears to me, however, that Mr. Bhandarkar's ingenious argument on this point clearly involves a fallacy. The text itself, it is to be first remembered, makes no reference to the *sapinda* relationship at all, and does not profess to modify the definition of it. It only enumerates certain relatives, and states that they are within the prohibited degrees for purposes of marriage. It is true, as Mr. Bhandarkar argued, that the definition of the term "*sapinda*," which has been applied in the rules regarding inheritance, is itself originally given in the section relating to marriage. But it does not, therefore, follow that a special rule about particular relations, which in terms refers to marriage only, but says nothing about *sapindas* generally, or the ground of the *sapinda* relationship, can be used to limit that definition of *sapindas* for all purposes whatever. In reference to the text in question, Mr. Mandlik has expressed an opinion, that "the preponderance of authority, at any rate on this side of India," is in favour of the view that "*sapinda* relationship in the case of the step-mother . . . . . extends only to those relatives through the step-mother who are specifically mentioned in the above text." For the purposes of the present case, it is quite unnecessary to examine the authorities relied on for this position. Assuming it to be correct, as I am inclined to think it is, it is plain that Mr. Mandlik himself did not intend it to apply to matters of inheritance, but only to marriage (6). And when it is remembered that step-brothers (7), for instance, are not named in Sumantu's text, it is easy to perceive that that text cannot **[120]** be properly regarded as exhausting the *sapinda* relationship through a step-mother for purposes of inheritance. Again, it is laid down by Manu in a familiar text (ch. IX, pl. 183 (8), that the son of a man by one of his wives is a son to all his wives. Sumantu's own text, too, says that the wives of a man's father are all mothers; and they cannot all be his mothers without his being the son of them all, and his son their grandson. And such

---

(1) The Viramitrodaya adopts Vijnaneshwara's mode of describing the heirs. And see West and Buhler, p. 517 and notes. The Madana Parijata, p 666 (Bibliotheca Indica Ed.) adopts the same mode as that of the Mayukha.

(2) *Cf. Sri Raghunadha* v. *Sri Brozo Kishoro*, 3 I A. 154,(191)=1 M. 69,(81); *Lallubhai* v. *Cassibai*, 5 B. 110, (121); and see Mr. Justice Banarji's Tagore Lectures, p. 444 for a reference to a Smriti text on this point.

(3) 2 B. 388,(423); *cf.* Banarji's Tagore Lectures, p. 138. There appears to be some mistake there in the citation from Manu, but it is not material for present purposes.

(4) *Cf.* West and Buhler, p. 518; also 5 B. 121, and Banerji's Lectures, p. 436.

(5) P. 352.

(6) See Mandlik's Hindu Law, pp. 346, 357, 389—91.

(7) As to whose rights of inheritance, see Stokes' Hindu Law Books, p. 445 and p. 89.

(8) See Manu by Buhler in Sacred Books of the East, p. 365, and note therewith which *cf.* West and Buhler, 522.

being the true character of the relationship, it would plainly be impossible to give any effect to Mr. Bhandarkar's argument even if it were in itself of any validity. Further, we have the cases collected in West and Buhler at p. 521 *et seq.*, showing that a step-son (1), a step-daughter-in-law, and a half-brother of the husband are included within the *sapinda* relationship. And in *Motiram* v. *Mayaram* (2) the son of the step-daughter of a widow was held to be the heir to such widow. Lastly, Mr. Bhandarkar's own argument proceeds upon the footing that the rival widow is a *sapinda*. It is impossible, then, to hold that a rival widow's grandson being within the numerical limits of the *sapinda* relationship, is not also a *sapinda*. And upon the whole I am of opinion that the reasons for holding the rival wife's grandson to be a *sapinda* are so strong that to hold otherwise would be to afford an illustration of a *dictum* attributed to Sir J. Colville, to the effect that a certain proposition may be absurd logic, but it may nevertheless be good Hindu law. I am bound to say that I entirely deny the justice of that *dictum* and what it implies. And I cannot sanction a doctrine to which, when coupled with other established rules, it will be fairly applicable.

This point has been so fully discussed that the next argument urged on behalf of the defendants can be very briefly disposed of. It is said that the view of Kamalakar, the author of the Vivada Tandava, is unfavourable to the recognition of *sapinda* relationship between a woman and the grandson of her rival wife. And this argument is based on the absence of all mention of the son or grandson of the rival wife in the summary of [121] Kamalakar's view as presented in West and Buhler's Digest (3). The whole discussion there, however, shows, in my opinion, that this is not in accordance with the view of the authors of the Digest, who, it is to be remarked, subsequently include the step-son as an heir coming in according to the principles expounded by them. Nor is it the view of Dr. (now Mr. Justice) Gurudas Banerji, as shown in the passage from his Tagore Lectures (4) to which the Advocate-General drew our attention—a passage which is in substance, and in some parts almost in identical words, adopted by Mr. J. S. Siromani in his Commentary on Hindu Law (5). And when we look at the Vivada Tandava itself, the reason of the omission on which Mr. Bhandarkar has founded his argument becomes quite clear. The author has dealt with the right of the offspring of the rival wife, not under the exposition of the words 'husbands *sapindas*' but in the earlier portion dealing with the woman's own offspring. He there actually cites the text of Manu, IX. 183, already quoted, and naturally, from that point of view, treats of the rival wife's children, immediately after he has dealt with the rights of the woman's own offspring. And the author of the Madana Parijata (6), (who is also the author of the famous commentary on the Mitakshara named the Subodhini), treats the subject in the same manner (7).

The net result of the whole discussion, therefore, appears to be this that, assuming the true contruction of the Mitakshara to be such as the

(1) In *Jeencowree Chatterji* v. *Dinonath Banerji*, 3 W. R., 49, an opinion is expressed in favour of a step-son by adoption being entitled to a woman's *stridhan*.
(2) P. J. for 1880, p. 119.
(3) Pp. 517-8.
(4) Pp. 375—7 ; see also S. C. Sarkar's Vyavastha Chandrika, Vol. II, p. 521.
(5) P, 396.
(6) See about him, Stokes Hindu Law Books, p. 177 ; and Mandlik's Hindu Law, Introduction, pp. lx. lxiv, lxvii, lxxii.
(7) See p. 667 (Bib.) Ind. Ed.].

1892
APRIL 4.
APPELLATE CIVIL.
17 B. 114.

Vyavahara Mayukha propounds, and assuming, consequently, that the nearest *sapindas* to whom the property of a childless woman should go, are the nearest *sapindas* not of the husband, but those of the woman herself, in the husband's family, there can still be no doubt that the grandson of a rival wife belongs to the class so designated; that, according to the views of some writers, he comes in next after the offspring of the woman herself, and before her husband; and that, according to the view of others, he would come in after the husband, but **[122]** before his other wives and such other wives, daughters, and of course before other more distant heirs including the husband's brother's son. It was said however, that as the inheritance goes to those nearest to the woman whose property is in question in her husband's family, we should not accept the order in which heirs succeed to the husband, because that order is not based on nearness of relationship, which is what nearness must be held to signify for the purpose of the rule under consideration. The arguments urged in support of this contention are those stated by West and Buhler, and are, in their opinion, outweighed by the argument derived from that "identity of the wife with her husband," which they justly call "a leading principle of the Mitakshara," and which may even be called a leading principle of the whole of the Hindu Law. The opinion expressed by West and Buhler is concurred in by Dr. Banerji (1) in his Tagore Lectures, and also by Mr. J. S. Siromani (2), and appears to me to be worthy of acceptance. And I may also add that, even if we rejected the guidance afforded by the principle of the identity of husband and wife, it would, in my view, be difficult to justify any application of the principle of nearness of relationship which would make either the rival widow or the husband's brother's son a nearer relation than the husband's own son's son.

But Mr. Bhandarkar has raised a further point. He cites the text of Brihaspati (3), which is quoted in the Vyavahara Mayukha **[123]** and from that text asks the Court to draw the conclusion that the husband's brother's son takes precedence over the other relatives of the husband, and the relatives of the widow in the husband's family such as the plaintiff. It is, however to be remarked that that text is nowhere cited in the Mitakshara, and the rule stated by Vijnaneshwara is not consistent with it. In truth, even the rule which Nilakantha himself deduces from Yajnavalkya's general text is not in harmony with the enumeration of heirs contained in the text of Brihaspati now under consideration. And yet the Mayukha does not say how the two are to be made to stand together. The learned authorsof the Digest have

(1) P. 377.

(2) Commentary on Hindu law, p. 386; see also S. C. Sarkar's Vyavastha Chandrika, Vol. II, p. 522.

(3) See with regard to that text the notes at Stokes' Hindu Law Books, p. 106, and also Banerji's Tagore Lectures, p. 433. That text also forms the subject of some remarks in the late Professor Goldstucker's paper on the deficiencies in theadministration of Hindu Law (see Goldstucker's Remains, Vol. II, p. 157). The translation given by Professor Goldstucker, it will be noticed, does not agree with those given by Borradaile or Rao Saheb Mandlick. Probably, no doubt, Professor Goldstucker when translating the passage as quoted in the Daya Bhaga (see Stokes' Hindu Law Books, p. 257) would accept Jimuta Vahana's exposition of it almost as a matter of course. The Viramitrodaya's interpretation, which agrees with Jimuta Vahana's, is referred to further on. That work emphatically declares that it "would be contrary to immemorial custom" if the sister's son and the rest were allowed to be heirs, although the son of a co-wife was living (p. 243); see also Burnell's Varadaraja, p. 51, and Vyavastha Chandrika, p. 539.

placed the heirs enumerated by Brihaspati after the husband, and before the woman's *sapindas* in her husband's family. This certainly appears to be warranted by the express words of the Mayukha contained in placitum 30 (1). Yet it is not quite reconcileable with the previous declaration in placitum 28, that "if there be no husband, then the nearest to her in his family takes" the woman's property. It is quite plain that some of the persons referred to in Brihaspati's text do not answer to this description at all; while of those that do, the husband's brother's son is not obviously nearer than the husband's younger brother, and yet according to Brihaspati's text the former would stand before the latter. It cannot, therefore, be assumed to be *quite* clear, according to the view of the Mayukha (2), that Brihaspati's list states the true order of succession as between the heirs enumerated, or that all those heirs take precedence over the ones included under the designation "nearest to her in her husband's family." Mr. J S. Siromani indeed, in his Commentary on Hindu Law, says (p. 389): "Taking all that the author says in the chapter into consideration, it seems that in the above list the relatives on the father's side succeed in the case of a woman married in the disapproved forms of marriage; and in the case of a woman married in any of the approved forms of marriage, the inheritance goes to the relatives [124] on the side of the husband in the above list." But he himself adds that "this point again is not free from doubt." And, besides, it is to be remarked, that it is not easy to provide for the son-in-law in a distribution made on the principle here indicated.

Mr. Bhandarkar in the course of his reply referred us to the case of *Bachha* v. *Jugmon* (3), in which the Court discusses some of the questions arising with reference to this text of Brihaspati. The Court there was "inclined to think that what the author perhaps meant to lay down was that the succession of the heirs mentioned in Brihaspati's text is to be taken subject to the rule of law laid down by him in accordance with the Mitakshara (see Shama Churn's Vyavastha Chandrika, Vol. II, pp. 537-8." If so, the text fails to support Mr. Bhandarkar's argument. The judgment in a previous passage had said that "on a careful consideration of the Vyavahara Mayukha itself (Chap. IV, s. 10, pl. 22-8), it seems to be doubtful whether the author really meant" the "succession to be regulated in the order in which the said heirs are enumerated" in Brihaspati's text. If that view is correct, and it seems to be identical with that which has just been set out from Mr. J. S. Siromani's work, the result is nearly the same as it is on the construction of that text which prevails in the Bengal school as laid down by Dr. Banarji (see Lectures, pp. 386, 428—433), and does not help the appellants before us. But Mr. Bhandarkar argued that the heirs specifically named in Brihaspati's text ought to be given precedence over those who come in under the general designation, each group of them taking precedence in the class (*viz.*, that of husband's kinsmen or parents' kinsmen) to which it belonged. There is, however, no authority for this view. In West and Buhler's Digest the precedence is given to the whole of the enumerated heirs, and the ground for such precedence has already been stated. If they are not treated as one class, there is apparently no other ground for the preference than is indicated by

(1) Stokes, p. 106.
(2) Mr. Justice Banarji rather inclines to the contrary opinion. He also points out (p. 386) that the Bengal lawyers consider the text merely as generally laying down the right to inherit, *not* the order of succession; (see, too, pp. 428, 433).
(3) 12 C. 348 (355).

1892
APRIL 4.
APPELLATE CIVIL.
17 B. 114.

the principle mentioned in the Vyavahara Mayukha, Chap. IV, s. VIII, placitum 18. But that principle as there expressed appears to be intended to apply only where there is a "compact [125] series." This Court in *Mohandas* v. *Krishnabai* (1) declined to apply it in the case of *bandhus*, so as to give to the *bandhus* expressly named a preference over those who come in under the general definition. I think this is the authority which would be more applicable in the matter before us, and no such preference of the designated persons can, therefore, be allowed in this case.

It is to be remarked also that the text under consideration, in order to be accurately applied, has to be restricted by limitations which are not stated in it. Nilakantha supplies one restriction, which may be accepted as implied in the provisions of the text itself. But when he, by adding another similar restriction, postpones these enumerated heirs to the husband and the parents, he has no warrant for so doing in what is expressed, or even in what is implied in that text. There is thus a good deal of difficulty in the practical application of the passage of the Mayukha which Mr. Bhandarkar has relied upon. A further point is suggested by the mode in which the Viramitrodaya deals with this text of Brihaspati. According to the interpretation there given, the grandson of the rival wife is actually specified as an heir in this very text. It is not necessary to examine the process by which this result is reached. The result itself, however, is thus clearly stated by Mitra Misra, after setting forth his exegetical gloss on Brihaspati's text. "Hence on failure of heirs down to the daughter's son, first the *aurasa* inherits, after him his sons and grandsons..... In their default, *the son of a rival wife, her son and grandson*, (become heirs in their order) ; by reason of their being, under the circumstances, the givers of the *pinda* and the liquidators of the debts, by reason of the text of Manu cited above" (2). It seems [126] to me probable that Nilakantha did not understand the text in the same manner as Mitra Misra. But as he merely sets out the text without any gloss on its terms, it is not possible to give a very confident opinion on this point.

Besides the difficulties above glanced at, it is worthy of remark that this particular passage in the Mayukha, and the text of Brihaspati on which it is based, do not, as far as I have been able to see, appear to have been anywhere relied upon in any of the *responsa prudentum* collected in West and Buhler's Digest (3). The son-in-law who comes in under this passage, and who could hardly come in under the other rules, and whose case, therefore, would afford a crucial test on this point, has no place in the list of *sapindas* whose cases are enumerated in West and Buhler. But whatever may be the proper conclusion to be derived from a consideration of the various circumstances now dwelt upon, and whatever may

---

(1) 5 B. 597.

(2) Mr. Justice Banarji speaks of the "order of succession" in the Viramitrodaya and the Mayukha and Smriti Chandrika being the same (Tagore Lectures, p. 374), *sed quare*. The translator of the Smriti Chandrika (p. 135) refers to Brihaspati's text as translated at II Colebrooke's Digest, p. 621. That translation agrees in all important respects with the translation in Mr. Justice Banarji's Lectures, pp. 373-4, and both are based on Mitra Misra's and other writers' interpretation of the text, not "on additions not borne out by the Sanskrit text" as Mr. Krishna Swami Iyer supposed. As to the Smriti Chandrika itself, on which Mr. Bhandarkar relied, see Vyavastha Chandrika, pp. 541-2 ; and *Wooma Daee* v. *Gokoolanund Dass*, 3 C. 587 (594).

(3) *Cf.* as to this *Lallubhai* v. *Mankuvarbai*, 2 B. 388 (419).

be the rule which ought to be applied in cases where the Mayukha is the governing authority, it seems to me that in dealing with this case, coming from a district in which the Mitakshara is the paramount authority, we are not bound to apply this exceptional and anomalous rule of the Mayukha, and more especially so because that rule forms part of a scheme of succession to *stridhan*, which in most important particulars is entirely different from the scheme of the Mitakshara. According to this latter scheme, as already shown, the plaintiff is a nearer *sapinda* of Anandibai and her husband than either Kamaljabai or Tulajirav, and, therefore, the defendants cannot avail themselves of any *jus tertii* to resist the claim of the plaintiff to Anandibai's property. That claim has been properly allowed by the Subordinate Judge, and his decree must be confirmed with costs.

JARDINE, J.—The question of Hindu law which was argued before us has been dealt with by my brother Telang in an exhaustive judgment in which I concur. I now proceed to give the decision of the Court on the questions of fact, of which two were argued. (His Lordship then discussed the facts of the case, which are not material to this report.)

---

17 B. 127.

[127] CRIMINAL REVISION.

Before Mr. Justice Birdwood and Mr. Justice Parsons.

QUEEN-EMPRESS *v.* BABAJI.* [8th April, 1892.]

Penal Code (Act XLV of 1860), s. 500—Defamation—Statement by a witness—Privileged.

A witness cannot be prosecuted for defamation in respect of statements made by him when giving evidence in a judicial proceeding.

[**Diss.**, 32 C. 756 (758)=2 C.L.J. 105=9 C.W.N. 911=2 Cr. L.J. 459; 14 P.R. 1893 (Cr.); **N. F.**, 13 Cr. L.J. 275; 13 Cr. L.J. 494=15 Ind. Cas. 494=5 P.R. 1913 =244 P.L.R 1912=31 P.W.R. 1912 (Cr.); **F.**, 17 B. 573 (575); **R.**, 29 A. 685=4 A.L.J. 605=27 A.W.N. 235=6 Cr.L.J. 197; 19 B. 51 (62); 19 B. 340 (347); 27 C. 262 (263); 14 Ind. Cas. 659=23 M.L.J. 39=(1912) M.W.N. 476; L.B.R. (1893—1900), 206; L.B.R. (1893—1900), 247 (248); 1 L.B.R. 84 (85); 3 L.B.R. 265 (269); 11 M.L.T. 416=(1912) M.W.N. 393.]

THE accused was examined as a witness in a suit pending in the Mamlatdar's Court. In his deposition he stated that the complainant had once been convicted of an offence by a Criminal Court.

For this statement the complainant prosecuted the accused on a charge of defamation, under s. 500 of the Indian Penal Code, before a Bench of Magistrates at Poona.

The accused was convicted of defamation, and sentenced to pay a fine of Rs. 15, or, in default, to suffer simple imprisonment for fifteen days.

The High Court sent for the record and proceedings of this case in the exercise of its revisional jurisdiction.

There was no appearance for the Crown, or for the accused.

The judgment of the Court (BIRDWOOD and PARSONS, JJ.) was as follows:—

JUDGMENT.

In *Baboo Gunnesh Dutt* v. *Mugneeram* (1), the Privy Council decided that witnesses cannot be sued in a Civil Court for damages in respect of

---

* Criminal Revision No. 138.

(1) 11 B.L.R. P.C. 321.

1892
APRIL 8.
—
CRIMINAL REVISION.
—
17 B. 127.

evidence given by them upon oath in a judicial proceeding. The judgment in that case contains the following observations:—

"Their Lordships hold this maxim, which certainly has been recognized by all the Courts of this country, to be one based upon principles of public policy. The ground of it is this, that it concerns the public, and the administration of justice, that witnesses giving their evidence on oath in a Court of Justice should not have before their eyes the fear of being harassed by [128] suits for damages; but that the only penalty they should incur, if they give evidence falsely, should be an indictment for perjury."

With reference to this judgment, Mr. Justice Shepherd observed in *Manjaya* v. *Shesha Shetti* (1) that public policy must no less require that witnesses should not be exposed to the fear of prosecution, except the prosecution for perjury. And the learned Chief Justice of the Madras High Court applied in that case (which, like the present, was one where a witness was prosecuted for defamation in respect of a statement made by him when giving evidence in a judicial proceeding), the observations of Cockburn, C.J., in *Seaman* v. *Netherclift* (2) and of Field, J., in *Goffin* v. *Donnelly* (3) as to the rules of public policy which subordinated the interest of the individual to that of a higher interest, *viz.*, public justice. With reference to the case of *Hinde* v. *Baudry* (4) Sir Arthur Collins remarked:—

"The Judges there said that the principle of public policy guards the statements of a witness against an action, whether the statements are malicious or not. I think the same observation will apply if the criminal law is set in motion and proceedings are taken under s. 500 of the Indian Penal Code. If the petitioner gave false evidence, he can be punished for that offence. I therefore hold that the petitioner was wrongfully convicted of defamation."

Following this ruling, and having regard also to *Dawan Singh* v. *Mahip Singh* (5) and *Bhikumber Singh* v. *Becharam Sirkar* (6), we reverse the conviction and sentence, and acquit the accused of the offence of defamation of which he has been convicted, and we direct that the fine, if paid, be refunded to him.

---

17 B. 129 = Chitty's S.C.C.R. 320.

[129] ORIGINAL CIVIL.

Before Mr. Justice Bayley (Acting Chief Justice), and Mr. Justice Farran.

J. G. SMITH AND OTHERS (*Plaintiffs*) *v.* LUDHA GHELLA DAMODAR (*Defendant*).* [15th July, 1892.]

Contract—Construction—Custom or usage qualifying contract—Evidence—Evidence Act I of of 1872, s 92, proviso 5—Shipment, meaning of—Arbtiration—Appointment of umpire by arbitrators—Mode of appointment prescribed by contract—Delegation by arbitrators of their right to appoint umpire.

On 18th April, 1890, the defendant signed a contract (No. 3053) to buy from the plaintiffs 25 bales grey dhoties "June shipment, in four lots, with an interval of four weeks." These goods were not supplied, as they could not be

---

* Small Cause Court Suit No. 25439 of 1891.

(1) 11 M. 477. (2) 2 C.P.D. 53. (3) 6 Q.B.D. 307.
(4) 2 M. 13. (5) 10 A. 425. (6) 15 C. 264.

obtained at the price limited. On 24th September, 1890, the defendant gave the plaintiffs an order at an increased limit of price in the following terms:—"Please telegraph your Manchester friends to purchase on my account 25 bales grey dhoties relating to No. 3053 at an all round advance of 1*d.* per pair on original limits for November, December, January shipments, in three monthly lots, about 8 bales to be shipped in each month." This order was accepted and the goods were shipped as follows :—6 bales were handed to the carriers (the S & N. W. Railway Co.) in Manchester on the 28th November, 1890, and were shipped at Birkenhead on the 9th December, 1890; 6 bales were handed to the same carriers on the 4th December, 1890, and were shipped on the 13th December, 1890 ; 10 bales were handed to the same carriers on the 23rd December and 1 bale on the 24th December, and these 11 bales were shipped on the 6th January, 1891. The defendant refused to accept the goods. He contended that the documents of 18th April and 24th September should be read together, and that the final contract was for November, December, January shipments, in three monthly lots, at intervals of four weeks. He also contended that the shipment on the 9th December, 1890, was a late shipment, and that he was not, therefore, bound to accept the goods under the contract. As to this last contention the plaintiffs alleged that by the custom of Bombay in the case of contracts made with members of the Native Piece-goods Association the date of the carrier's weight note was to be regarded as the date of shipment, and that, under such a contract as the one in question, delivery to the Railway Company or other inland carrier was equivalent to shipment. This custom, it was alleged, originated in consequence of the above Association having agreed that all piece goods ordered out by its members should be conveyed to Bombay by certain lines of steamers, only and by no others. It was stated that, unlesssome such custom existed, it would in many instances be impossible for Bombay merchants to carry out their contracts, as no steamers of the selected lines might be available. The Judge of the Court of Small Causes at the hearing found that the alleged custom existed, and was generally accepted and understood by merchants and dealers in Bombay. On reference to the High Court,

[130] *Held*—

(1) that the contract finally agreed on was that 25 bales relating to No. 3053 (*i.e.* the document of the 18th April) should be purchased on defendant's account at an all round advance of 1*d.* per pair on the original limits. Such bales to be shipped in the manner and at the times mentioned in the document of the 24th September 1890;

(2) that evidence of the alleged custom or usage of trade was not admissible under s. 92, proviso (5), of the Evidence Act (I of 1872) to explain or vary the natural and ordinary meaning of the words in the contract. The parties contracted for a shipment on board of a ship or steamer, and to allow evidence of a usage that delivery to a Railway Company at an inland town should be regarded as equivalent to shipment on board a vessel at a seaport town would be to allow evidence of a usage repugnant to, or inconsistent with, the express terms of the contract.

The contract in question provided that disputes between the parties were to be referred to the arbitration of two merchants, and that should the arbitrators be unable to agree, they should appoint an umpire. The plaintiffs and defendant referred their dispute to two arbitrators. These arbitrators disagreed in their report, and referred the case to the Bombay Chamber of Commerce for the appointment of an umpire. The Chamber of Commerce appointed an umpire, who made his award.

Held, that the appointment of the umpire was invalid. The arbitrators could not delegate the power of appointment conferred on them by the contract.

[R., 30 B. 1 (15) = 6 Bom. L.R. 948.]

CASE stated for the opinion of the High Court by C.W. Chitty, Chief Judge of the Small Cause Court, Bombay, under s. 69 of the Presidency Small Cause Court Act, XV of 1882.

The case was stated as follows :—

1. In this case the plaintiffs sue to recover Rs. 2,000, part of a sum of Rs. 2,112-1-3, as damages sustained by them in consequence of the defendant's failure to take delivery of, and pay for, 25 bales grey dhoties, which he had agreed to purchase from the plaintiffs.

1892
JULY 15.
—
ORIGINAL
CIVIL.
—
17 B. 129 = Chitty's S. C. C R. 320.

2. The contract with the plaintiffs was admitted by the defendant, though question was raised as to the proper construction to be put upon it. On the 18th April 1890, the defendant signed a contract (No. 3053) on the printed form of the plaintiffs' office for the purchase of 25 bales grey dhoties, "June shipment, in four lots, with an interval of four weeks." The goods could not be obtained at the defendant's limits, and so were not supplied. On the 24th September, 1890, the defendant gave to the [131] plaintiffs an order, at an increased limit, in the following terms :—" Please telegraph your Manchester friends to purchase on my account 25 bales grey dhoties relating to No. 3053 at an all round advance of 1*d*. per pair on original limits for November, December, January shipment, in three monthly lots, about 8 bales to be shipped in each month. Reply in 10 days."

3. The last mentioned order was accepted, and the goods supplied and shipped as follows :—6 bales were handed to the carriers (the S. & N. W. R. Company) in Manchester on the 28th November, 1890, and shipped at Birkenhead on the 9th December, 1890, per S.S. "Clan Graham;" 6 bales were handed to the same carriers on the 4th December, 1890, and shipped per S. S. " Branksome Hall," on the 13th December, 1890 ; 10 bales were handed to the same carriers on the 23rd December and 1 bale on the 24th December, and these 11 bales were shipped per S. S, " Werneth Hall" on the 6th January, 1891.

4. The defendant contended that the documents of the 18th April and 24th September must be read together, and that the final contract was for November, December and January shipments, in three monthly lots, at interval of four weeks. This can hardly have been intended, the two arrangements being inconsistent and incapable of being taken as one ; *e.g.* if goods were shipped on 1st November, (which would satisfy the term " November shipment"), the next shipment would have to be made on the 29th November, and not in December at all, and the third in December and not in January. It was further contended on behalf of the defendant that the shipment per S.S. "Clan Graham" was a late shipment, and that, consequently, the defendant was not bound to accept the goods under the contract.

The question whether the said shipment was late or not depends on the further question, whether or not by the custom of Bombay, in the case of piece-goods ordered out by members of the Native Piece-goods Association and shipped by one of the Conference steamers, the date of the carrier's weight note must be regarded as the date of the shipment. This was the main point in issue in the case, and my finding on it is given in the following paragraphs.

[132] 5. It was proved before me that, some six years ago, the Native Piece-goods Association took for the first time to arranging their own freight contracts, and by an agreement with four lines of steamers, (which has since been renewed from time to time as required), they agreed that all piece-goods ordered out by members of the Association should be conveyed to Bombay by steamers of those four lines only and no others. It was after, and in consequence of, this action on the part of the piece-goods dealers that the alleged custom arose. The reason for it is obvious, as, unless some such custom existed, or express provision were made to meet the case, it would in many instances be impossible for merchants in Bombay to carry out their contracts. Goods, for instance, ordered for a January shipment might be sent to Birkenhead early in the month, and, because no Conference steamer was ready before the 31st,

might be detained in Birkenhead until February, and so the contract would not be complied with. To meet this difficulty it is alleged that it has, for the last six years or thereabouts, been the custom to treat the date of the carrier's weight notes in Manchester as the date of shipment for the purposes of carrying out such contracts. As to the existence of such a custom, a large body of evidence was given before me by gentlemen, partners or assistants of trading firms in Bombay. Their testimony was unanimous as to such custom obtaining in Bombay; while, on the other hand, not a single witness was called on the part of the defendants to disprove it. Of course, the onus lies on the plaintiffs to prove a custom on which they rely; but it seems curious that, if no such custom existed, ample testimony should not be found to meet that given on the plaintiffs' behalf.

6. It was contended for the defendant that no specific instances could be shown where such custom had been objected to and had been forced on an unwilling party. Though, no doubt, such evidence would be valuable, I did not consider it absolutely essential. If it were a custom which in itself was so reasonable and universally accepted that no one had ever disputed, it could never be proved in a Court of law. At the same time almost all the witnesses stated that complaints had been made in their office by dealers on account of late shipments, but that the dates of the carrier's weight notes were always accepted by such **[133]** dealers as equivalent to the date of shipment. Then, again, it was contended that the fact that some firms insert a clause in their contracts expressly stipulating that the date of the carrier's weight notes should count as the date of shipment showed that no such general custom existed. The evidence before me, however, went to show that such a practice was by no means universal, and that when inserted, it was so inserted *ex majore cautela*, and not in any way from ignorance of, or disregard for, the general custom. On the evidence, therefore, before me I am clearly of opinion that the custom, as alleged, does exist and has existed for some years past, and been generally accepted and understood by both merchants and dealers in Bombay.

7. It was contended on behalf of the defendant by his counsel, (but not till he commenced to open his case), that evidence of such a custom was inadmissible under s. 92 of the Evidence Act. The objection was taken, it is true, by the pleader for the defendant during the examination *de bene esse* of one of the plaintiffs' witnesses on the 14th January, 1892, but was not then pressed, and was never taken during the hearing of the plaintiffs' case. It cannot, I think, be successfully maintained, and if not, it follows that the first shipment by S S. "Clan Graham" was in time, and that the defendant was not justified in refusing the goods.

8. The goods on arrival in Bombay were tendered to the defendant in the usual course, and he refused to accept them on the ground of late shipment. Much correspondence ensued, the plaintiffs insisting on an arbitration in terms of their contract. The goods were, in fact, surveyed *ex parte* by Mr. Black on behalf of the plaintiffs, but the plaintiffs afterwards consented to cancel that report, and the matters in dispute—*i.e.*, defective quality and late shipment—were referred to two arbitrators, Mr. O. Schilizze for the plaintiffs and Mr. Purshotam Kuverji for the defendant. On the 4th of August, 1891, after these gentlemen had held their survey, but before they made their report, the defendant wrote, saying the notice for arbitration was too short; that contrary to

1892
JULY 15.

ORIGINAL CIVIL.

17 B. 129 = Chitty's S. C C. R. 320.

arrangement Mr. Black's report had been shown to the arbitrators, and that he repudiated the arbitration proceedings. **[134]** There is, I may mention, no evidence of any such arrangement as alleged. On the 5th August 1891, the arbitrators published their report, but as they disagreed they referred it to the Chamber of Commerce, in the usual way, to appoint an umpire. Mr. J. S. Symons, of Finlay, Muir & Co., was accordingly appointed, and, after survey, reported that the goods were a fair tender against the contract; that the dates of the carrier's notes must be taken as the dates of shipment, and that the slight irregularity must be met by the adjustment proposed in plaintiffs' letter of the 27th April 1891, *i.e.*, to allow interest and exchange on the shipment as of intervals of 30 days. It was proved before me that the defendant would not be in any way prejudiced by the third shipment being made too early; especially if, as suggested by Mr. Symons, an allowance was made to him in terms of the plaintiffs' letter of 27th April 1891, in respect of interest and exchange.

9. The defendant declined to be bound by the said award, and the plaintiffs accordingly filed this suit.

10. As to the amount of damages, there was practically no dispute raised before me. It also appeared that, if the calculation were made on the basis suggested by the said letter of 27th April 1891, and Mr. Symon's award owing to the difference of exchange, the result would be to slightly increase the sum due to the plaintiffs, and it would not, therefore, affect the amount of their claim in this suit, which cannot exceed Rs. 2,000.

11. The defendant's Counsel requested me to state a case for the opinion of their Lordships on the questions of law arising in the case. In accordance with the practice, of late adopted by Mr. Hart, I set out the questions submitted on behalf of the defendant, which are as follows:—

(1) What is the proper construction of the two documents of the 18th April and the 24th September 1890?

(2) Did the plaintiffs carry out the contract by shipping goods on the 9th and 13th December and 6th January 1891?

(3) Is evidence admissible to prove that the words 'shipment' and 'to be shipped' have any other meaning than their plain, ordinary and accepted meaning?

[135] (4) If so, has the mercantile usage in Bombay—under which plaintiffs contend that, in contracts for Manchester goods, shipment means and includes delivery to carrier at Manchester—been proved in absence of proof of specific instances?

(5) If the first shipment was not in time under the contract, was defendant bound to take delivery of the two later shipments?

(6) If evidence of the custom was admissible, and the date of the carrier's weight note is to be taken as the date of shipment, was defendant bound to take delivery of the third shipment, those goods being admittedly delivered to the carrier on 23rd and 24th December, 1890?

(7) Does the arbitration clause in the contract preclude defendant from setting up any legal defences he may have to the action?

(8) Was the reference made by the arbitrators of the matters in dispute to the Chamber of Commerce within the terms of the arbitration clause?

(9) Is the defendant bound by the award made by Mr. Symons?

(10) Had not the defendant the right to withdraw from arbitration any time before award, and if so, did not his attorney's letter of 4th August, 1891, operate as a withdrawal?

1892
JULY 15.
ORIGINAL CIVIL.
17 B. 129 = Chitty's S. C. C. R. 320.

(11) Whether, the plaintiffs not having filed this suit on the award, the parties are not relegated to their legal rights under the contract?

12. Some of these questions appear to me to be open to objection, and they do not state exactly the points requiring decision. The first must be regarded only so far as it deals with the dates and mode of shipment. The second deals with a question of fact depending on my finding on the above-mentioned custom. The third was taken late, but is open to no objection. The fourth is a question of fact. The answer to the fifth is too obvious to require remark. The last five deal with the question of arbitration. With regard to that it may be mentioned that the defendant by his letter of the 4th August, 1891, declined to be bound by the award, and also that, though the contract provided **[136]** for the umpire to be chosen by the arbitrators, he was, in fact, chosen by the Chamber of Commerce, to whom the arbitrators referred the matter in the usual course for that purpose.

13. The questions of law arising on the above facts, and requiring decision, seem to me to be as follows :—

(1) What is the proper construction of the two documents of the 18th April 1890 and 24th September 1890, especially with regard to the time and mode of shipment?

(2) Is evidence admissible to prove that the words "shipment" and "to be shipped" have any other meaning than their plain, ordinary and accepted meaning?

(3) If such evidence is admissible, and the date of the carrier's weight note is to count as the date of shipment, was defendant bound to take delivery of the third shipment, the goods being admittedly delivered to the carriers on the 23rd and 24th December 1890?

(4) Is the defendant bound by the award of Mr. J. S. Symons, having regard to the informality in his appointment as umpire, or having regard to defendant's contention in his letter of the 4th August 1891?

(5) Are the plaintiffs precluded from relying on such award, because their particulars of claim were not calculated on the basis so awarded?

14. I have reserved judgment in this case, until the decision of their Lordships on the above questions has been received.

Rivett-Carnac, for defendant :—Shipment means placing on board ship, not delivering to the carrier. He cited *Bowes* v. *Shand* (1); Contract Act (IX of 1872), s. 28, exception 1.

Scott, for plaintiffs, *contra*;—He cited Specific Relief Act (I of 1877), s. 21; Contract Act (IX of 1872), *Re Rouse and Meier* (2); *Koegler* v. *The Coringa Oil Co.* (3); *Re Hopper* (4); *Ireland* v. *Livingston*(5); Benjamin on Sales, (4th Ed.), p. 578; **[137]** *Spicer* v. *Cooper*(6); Smith's Leading Cases (9th Ed.), Vol. 1, p. 589; *Simpson* v. *Crippin*(7); *Brandt* v. *Lawrence* (8).

JUDGMENT.

BAYLEY, C. J.—Upon this reference under s. 69 of the Presidency Small Cause Courts Act (XV of 1882) the first question to be considered is what is the proper construction of two documents, dated the 18th April, 1890, and 24th September, 1890, by which the defendant agreed to purchase 25 bales of grey dhoties, and which on their arrival in Bombay the defendant refused to take delivery of, and pay for.

(1) 2 Ap. Ca. 455. (2) L.R. 6 C. P. 212. (3) 1 C. 42.
(4) L. R. 2 Q.B. 367. (5) 5 Eng. & Ir. App. 395. (6) 1 Q. B. 424.
(7) L.R. 8 Q. B. 14. (8) 1 Q.B.D. 344.

1892

JULY 15.

ORIGINAL CIVIL.

17 B. 129 = Chitty's S. C. C. R. 320.

On the 18th April, 1890, the defendant signed a contract, No. 3053, on the printed form of the plaintiffs' office for the purchase of 25 bales grey dhoties "June shipment, in four lots, with an interval of four weeks." It is stated in the case that the goods could not be obtained at the defendant's limits, and so were not supplied. On the 24th September, 1890, the defendant gave to the plaintiffs an order, at an increased limit, in the following terms:—"Please telegraph your Manchester friends to purchase on my account 25 bales grey dhoties relating to No. 3053 at an all round advance of 1*d*. per pair on original limits for November, December, January shipment, in three monthly lots, about 8 bales to be shipped in each month." In the original document of the 24th September, 1890, which was handed to us during the argument, the word "each" in that sentence is underlined.

The last mentioned order was accepted, and the goods were supplied and shipped as follows:—6 bales were handed to the carriers (the S. & N. W. Railway Company) in Manchester on the 28th November, 1890, and shipped at Birkenhead, on the 9th December following, per S. S. "Clan Graham:" 8 bales were handed to the said carriers on the 4th December, 1890, and shipped per S. S. "Branksome Hall" on the 13th of that month; 10 bales were handed to the same carriers on the 23rd December and 1 bale on the 24th December, and these 11 bales were shipped per S. S. "Werneth Hall" on the 6th January, 1891.

The case stated that the defendant contended that the documents of the 18th April and 24th September must be read **[138]** together, and that the final contract was for November, December and January shipments, in three monthly lots, at intervals of four weeks.

I think that such contention is quite untenable. The provision as to the interval of four weeks referred solely to the contemplated June shipment, mentioned in the first document, the goods for which could not be obtained at the defendant's limits, and so were not supplied. The times and mode of shipment of the 25 bales were those specified in the document of the 24th September, *viz.*, for November, December, and January shipment, in three monthly lots, about 8 bales to be supplied in each month. The second document refers to the previous one, and the contract finally agreed on was to purchase, on defendant's account, 25 bales relating to No. 3053 (*i.e.*, the document of the 18th April) at an all round advance of 1*d*. per pair on the original limits, such bales to be shipped in the manner and at the times mentioned in the document of the 24th September.

It was stated in the House of Lords, in *Bowes* v. *Shand* (1), to be perfectly well settled that the construction of a contract, unless there be something peculiar to the words by reason of the custom of the trade to which the contract relates, is for the Court, *i.e.*, as distinct from the jury.

Mercantile contracts of sale often contain a stipulation that goods are to be shipped within or during a certain time specified in the contract, and it has been held by the highest authority that it is a condition precedent that the goods shall be so shipped, the time of shipment forming part of the description of the goods. Some difficulty has been found in the interpretation of the expression "to be shipped," or "shipment," within a certain time. But it was finally settled, in the case just cited, that such expressions mean that the goods shall be placed on board ship during the

(1) 2 Ap. Ca. 455 (462).

time specified, according to the natural meaning of the words, in the absence of any trade usage to alter that meaning.

This view was arrived in *Bowes* v. *Shand* (1) in 1877, but not till after very eminent Judges had previously come to a **[139]** different conclusion as to the correct construction of the contract in dispute in that case. The two contracts there were made in London for the sale of 600 tons of rice (each for the sale of 300 tons of rice) to be supplied at Madras or Coast during the months of March $\frac{\text{and}}{\text{or}}$ April, 1874, per "Rajah of Cochin." All the rice had been put on board, and bills of lading given for it in February, except as to 4 tons of rice, which were put on board in March. In an action for refusing to accept the rice, the defence was that it had not been shipped during the months of March $\frac{\text{and}}{\text{or}}$ April. The House of Lords reversing the judgment of the Court of appeal (reported at 2 Q. B. D., 112) held that the contract had not been complied with; that its words must be construed in their plain and ordinary sense; that evidence of any usage in the particular trade must, to affect their meaning, be very clear and consistent, and such evidence not having been given the plaintiffs could not recover on the contract.

In the present case it was contended by the defendant that the shipment of the first of the three monthly lots per S. S "Clan Graham" at Birkenhead on the 9th December, 1890, was a late shipment, not having been shipped in November, and that, consequently, he was not bound to accept the goods under the contract.

The plaintiffs met, or endeavoured to meet, that objection by alleging and calling evidence to prove that for the last six years, or thereabout, it had been the custom in Bombay, in the case of piece-goods ordered out by members of the Native Piece-goods Association (to which, as admitted during the argument before us, the defendant belonged) and shipped by one of the Conference steamers, to treat the date of the carrier's weight notes in Manchester as the date of shipment for purposes of carrying out such contracts. The Chief Judge states that a large body of evidence was given before him by gentlemen, partners or assistants of trading firms in Bombay, and that their testimony was unanimous as to such custom obtaining in Bombay; while, on the other hand, not a single witness had been called on the part of the defendant to disprove it. The Chief Judge, on the evidence before **[140]** him, was clearly of opinion that the custom as alleged did exist, and had existed for some years past, and been generally accepted and understood by both merchants and dealers in Bombay.

I am clearly of opinion that evidence of such a custom or usage of trade is not admissible to explain or vary the natural and ordinary meaning of the words in the contract in the present case.

By s. 92, proviso (5), of the Indian Evidence Act (I of 1872), 'any usage or custom, by which incidents not necessarily mentioned in any contract are usually annexed to contracts of that description, may be proved, provided that the annexing of such incidents would not be repugnant to, or inconsistent with, the express terms of the contract.'

As already noticed, the document of the 24th September refers to the one of the 18th April, and by one of the clauses of the printed portion of the document of the 18th April "all goods, except metals, are to be shipped per steamers in accordance with indenter's freight contracts." I think that by 'shipment' in the document of the 24th September is meant

(1) 2 Ap. Ca. 455 (462).

1892
JULY 15.
ORIGINAL CIVIL
17 B 129 = Chitty's S. C. C. R. 320.

the same as "to be shipped per steamers" in the earlier document. The parties had, in my opinion, contracted for a shipment on board of a ship or steamer, and to ask that delivery to the Railway Company at an inland town may be treated as equivalent to shipment on board a vessel at a sea-port town is, in my opinion, 'repugnant to, or inconsistent with, the express terms of the contract,' and that evidence of any such custom or usage of trade is, in a contract like the present, clearly inadmissible.

Reference was made during the argument in this Court to s. 98 of the Evidence Act, which states that, 'evidence may be given to show the meaning of * * * local and provincial expressions * * * and of words used in a peculiar sense.'

The evidence in the present case does not, from the statement of it by the Chief Judge, appear to have been given for the purpose of showing that the word 'shipment' was 'used in a peculiar sense,' but to prove a custom to treat the date of the carrier's weight notes in Manchester as the date of shipment at Birkenhead [141] or Liverpool for purposes of carrying out such contracts as the present one.

The defendant here, a Hindu, had stipulated, by a document written in the English language, for shipment in three monthly lots in three specified months, and such he was entitled. As stated by the Lord Chancellor (Lord Cairns) in *Bowes* v. *Shand*(1), 'it is a mercantile contract, and merchants are not in the habit of placing upon their contracts stipulations to which they do not attach some value and importance.* * *?

The portions of the Indian Evidence Act which I have quoted merely reproduce the English law on the subject; the Act itself, to use the language of Sir James F. Stephen, who framed it, being 'little more than an attempt to reduce the English law of evidence to the form of express propositions arranged in their natural order, with some modifications rendered necessary by the peculiar circumstances of India.' (Introduction to the Indian Evidence Act, p. 2.)

The next point for consideration is that raised in the fourth question put by the Chief Judge, *viz.*, is the defendant bound by the award of Mr. J. S. Symons, having regard to the informality in his appointment as umpire, or having regard to defendant's contention in his letter of the 4th August, 1891?

In the document of the 18th April it is provided that disputes of whatever nature are to be referred to the arbitration of two merchants, and that, should the arbitrators be unable to agree, they shall appoint an umpire.

The arbitrators published their report, but as they disagreed they referred it to the Chamber of Commerce (the Chief Judge states 'in the usual way') to appoint an umpire. Mr. Symons was accordingly appointed and made his award.

I think that such appointment was clearly bad. By the document of the 18th April one of each of the two merchants who were to act as arbitrators was to be appointed by each party, and such arbitrators, if unable to agree, were to appoint an umpire. The arbitrators were themselves to exercise the authority thus [142] conferred upon them, and could not delegate such power to any one else. Consequently, the appointment of an umpire in a manner totally different from that which the parties had agreed for, was, in my opinion, an invalid appointment. The case of *Re Hopper* (2) relied upon by Mr. Scott for the plaintiffs in the argument before us, is no authority in support of the validity of the appointment of

(1) 2 Ap. Ca. 463.

(2) L.R. 2 Q.B. 367.

Mr. Symons by the Chamber of Commerce. In that case two arbitrators, not being able to agree in the appointment of an umpire, cast lots as to which of two persons, nominated by them, should be appointed umpire. There was, therefore, as Cockburn, C.J., said in his judgment (page 375), a concurrent judgment as to the fitness of the person who was finally appointed, and when the arbitrators have come to such a concurrence, and the only difference between them is as to which of the two they shall appoint, and the appointment is settled by lots, such a case falls directly within the decision of *Neal* v. *Ledger* (1), a case upheld by the Court of Common Pleas in *European and American Steam Navigation Company* v. *Croskey* (2).

In the present case the arbitrators nominated no one as umpire, but left that duty to be performed by third parties, *viz.*, the Chamber of Commerce.

Such being my view, the fifth question raised by the Chief Judge requires no answer.

The questions of law referred by the Chief Judge for our decision, I would, therefore, answer thus:—

To question

1. That the proper construction of the two documents of the 18th April and 24th September 1890, is that 25 bales grey dhoties relating to the O/3053 (*i.e.*, the document dated 18th April), at an all-round advance of 1*d.* per pair on the original limits, were to be shipped in the steamers in November, December, January, in three monthly lots, about 8 bales to be shipped in each of those months.
2. That, with regard to this particular contract, evidence was not admissible to prove that the words "shipment" and "to **[143]** be shipped" have any other meaning than their plain and ordinary meaning.
3. This question does not require to be answered.
4. That the defendant is not bound by the award of Mr. J. S. Symons, having regard to the informality in his appointment as umpire.
5. This question does not arise.

FARRAN, J.—I agree in the answers which the Chief Justice proposes to give to the questions in this case, and do not, as to the first question, wish to add anything to what he has said.

The second question is a very important one, and I desire to add a few words, expressing my reasons for the opinion I have arrived at regarding it. That question as propounded is, I think, too wide to justify us in answering it in its actual words. It must be read in connection with the facts stated in the case, which narrow it to this:—Whether evidence of a usage in the Bombay piece-goods trade is admissible to explain the phrase "November, December, January" shipment and "bales to be shipped in each month" so as to alter its meaning into "November, December and January delivery to railway carriers at Manchester" and "bales to be so delivered in each month." Such evidence can only be tendered under s. 92, proviso (5), or under s. 98 of the Evidence Act. Under the earlier section and provision the instrument is read in its ordinary sense, but the custom or usages of a particular trade may add an incident to the contract. This is in accordance with English

(1) 16 East. 51.

(2) 8 C.B. (N.S.) 397.

1892
JULY 15.
——
ORIGINAL CIVIL.
——
17 B. 129 = Chitty's S. C. C. R. 320.

law. The rule and the reason for it are laid down and explained with great lucidity by Parker, B., in delivering the judgment of the Exchequer Chamber in *Hutton* v. *Warren* (1). "It has been long settled," (said His Lordship), "that in commercial transactions extrinsic evidence of custom and usage is admissible to annex incidents to written contracts in matters with respect to which they are silent. The same rule has been applied to contracts in other transactions of life in which known usages have been established and prevailed: and this has been done upon the principle of presumption that in such transactions the parties did not mean to express in **[144]** writing the whole of the contract by which they intended to be bound, but to contract with reference to those known usages." This evidence is only receivable when the incident which it is sought to import into the contract is consistent with the terms of the written instrument. If inconsistent, the evidence is not receivable, and the inconsistency may be evinced (*a*) by the express terms of the written instrument, or (*b*) by implication therefrom (see per Blackburn, J., in *Myers* v. *Sarl*(2)). These latter rules the Evidence Act adopts in enacting in proviso (5) that the annexing of such incident shall not be repugnant to, or inconsistent with, the express terms of the contract. In the case before us, to prove a usage that under a contract, which expressly provides that there shall be a shipment in a particular month, delivery to an inland carrier will satisfy the contract, is to prove a usage which does not add an incident to the contract in respect of which the contract is silent, but one which goes to establish that the performance in a different manner from that stipulated for is a performance of it. This is in contradiction to the express terms of the written instrument. The evidence of such a usage is, therefore, not admissible under proviso (5) of s. 92.

Is the evidence, then, admissible under s. 98, which enact that evidence may be given to show the meaning of * * * words used in a peculiar sense? Mercantile usage is in such a case "the mercantile dictionary in which you are to find the mercantile meaning of the words which are used." Per Lord Cairns, L. C., in *Bowes* v. *Shand* (3). In such a case the evidence cannot properly be said to vary the contract; it only explains the meaning in which the mercantile terms in it are used. The difficulty here is that this is not what the case states as the result of the evidence. The custom set up is that the date of the carrier's weight note must be regarded as the date of shipment. It is not alleged that the word "shipment," which is the quivalent of "putting on board a ship" (see *Bowes* v. *Shand*, *supra*), has acquired in the Bombay piece-goods trade a technical meaning, or that it is used in a peculiar sense. What is alleged is that a delivery to **[145]** an inland carrier is treated, in the case of contracts made with members of the "Native Piece-goods Association" (of which the defendant is one), as equivalent to a performance of a contract 'to ship.' It is not alleged that the words "to ship" have acquired the technical or peculiar meaning of putting in a railway truck. I am not prepared to say that the expressions "to ship" and "shipment" may not acquire a meaning in a particular trade different from their plain ordinary and accepted meaning, and that evidence of such meaning may not be given under s. 98 of the Evidence Act, but I think that the evidence given in this case (being of the nature that it is) is not admissible for that purpose.

The third question does not arise.

---

(1) 1 M. & W. 474. (2) 3 E. & E. 306 (320). (3) 2 App. Ca. 468.

I agree as to the fourth question; the answer must be in the negative. The contract provides for the arbitrators, in case of difference, appointing an umpire. It is not a compliance with such a provision for the arbitrators to refer the matter to the Chamber of Commerce, and for the latter body to select a gentleman to deal with the dispute. The case of *Re Hopper* (1) has no application to the facts before us. There the arbitrators appointed an umpire. It was sought to treat that appointment as bad, on the ground that the arbitrators had decided by lot which of the two persons selected for appointment by the arbitrators respectively should be appointed. The Court ruled that, under the circumstances the appointment of the umpire was unimpeachable. Here the arbitrators made no appointment at all. They referred the whole matter to the Chamber of Commerce. That body are said to have dealt with it in the usual way. That is not the contract. What the parties contracted for, was that the arbitrators should appoint an umpire. It is unnecessary, in this view, for me to express an opinion as to the right of the defendant to withdraw from the arbitration, or whether in fact he did so. I wish for myself to say that I do not agree that it is law in India that one of the parties to a written reference can recede from it without cause before award made. The case of *Pestonjee* v. *Manokjee* (2) is an authority to the **[146]** contrary. *Koegler* v. *The Coringa Oil Co.* (3) has no bearing upon the question. There one of the parties did not, in fact, appoint an arbitrator at all.

Attorneys for the plaintiffs :—Messrs. *R. S. Brown & Co.*
Attorneys for the defendant :—Messrs. *Balkrishna and Perozeshaw.*

---

17 B. 146.

PARSI MATRIMONIAL COURT.

Before Mr. Justice Jardine.

HIRABAI (*Plaintiff*) *v.* DHUNJIBHOY BOMANJI (*Defendant*).*
[29th July, 1892.]

Husband and wife—Parsi Matrimonial Court—Act XV of 1865—*Suit by wife for judicial separation--Alimony--Alimony after decree dismissing wife's suit and pending appeal —Alimony pending petition for review of judgment—Practice in allotment of alimony.*

A wife sued her husband for judicial separation in the Parsi Matrimonial Court. Alimony was granted to be by an order dated 11th July 1891, which directed the defendant to pay alimony to her from the 15th April 1891, "until the final decree herein be passed." On the 18th July 1891 the suit was dismissed, and after that date the defendant ceased to pay alimony. The plaintiff obtained a rule for review of judgment, which was discharged on the 27th January 1892, and on the 18th March 1892, she filed an appeal against the decree dismissing the suit and against the order refusing a review. She now applied for an order directing the defendant to pay her all the arrears of alimony "*pendente lite*" from the date of filing the suit or so much as had not been paid, and that he should pay her further alimony until the final disposal of the appeal.

Held—

(1) Dismissing the application, that the words "final decree herein" contained in the order of the 11th July 1891, by which alimony was granted, meant the decree in the suit and not in the appeal.

(2) That the Parsi Matrimonial Court constituted under Act XV of 1865 had no power to award alimony "*pendente lite*" after decree and pending appeal.

---

* Suit No. 4 of 1891.

(1) L.R. 2 Q. B. 367. (2) 12 M. I. A. 112. (3) 1 C. 42.

1892

JULY 29.

PARSI MATRIMONIAL COURT.

(3) An unsuccessful wife is not entitled to claim alimony after final decree and pending appeal, nor for the period during which she is seeking review of judgment.

Quære—whether the Court where a petition for review is pending before it, has a discretion to allow or continue alimony "*pendente lite*."

[147] The words, "during the suit," in s. 33 of Act XV of 1865 include the period up to the making of a final or absolute decree.

Ellis v. *Ellis* (1) and *Dunn* v. *Dunn* (2) should guide the practice of the Parsi Matrimonial Court in allotment of alimony for the time following a decree *nisi*.

17 B. 146.

APPLICATION by a plaintiff, after dismissal of suit and pending appeal, for an order directing alimony to be paid from date of dismissal of suit until final disposal of appeal.

This was a suit, filed on the 24th March, 1891, by a wife against her husband for judicial separation. On the 11th May, 1891, she applied for alimony, which was granted by an order made on the 11th July, 1891. This order directed "that the defendant, Dhunjibhoy Bomanji, do pay to the plaintiff, Hirabai, as and by way of alimony *pendente lite*, the sum of Rs. 120 per mensem from the 13th April, 1891, until the final decree herein be passed."

On the 18th July, 1891, the suit was dismissed; after that date the defendant ceased to pay the plaintiff the alimony allowed by the above order.

The plaintiff obtained a rule *nisi* for review of judgment, which was discharged on the 27th January, 1892, and the review was refused.

On the 18th March, 1892, the plaintiff appealed against the decree dismissing the suit and the order refusing a review.

On the 28th June, 1892, the plaintiff presented a petition praying for an order directing the defendant to pay to her all the arrears of alimony *pendente lite* from the date of the filing of this suit, or so much thereof as had not been already paid, and that he should be directed to pay to her the sum already fixed as alimony *pendente lite*, being Rs. 120 per mensem, till the final disposal of the petitioner's appeal.

The matter now came on for argument.

Jardine (with *J. D. Nimuchwallo*), for defendant showed cause.—No alimony can now be granted. The suit was dismissed and is over. Section 36 of Act IV of 1869 gives alimony only "pending the suit." The word 'suit' there does not include appeal. A husband cannot be required to enable **[148]** his wife to obtain the judgment of a second Court. Further, this Court cannot deal with the question. If the application can be made at all it should be made to the Court of appeal. The appeal is against the decree and the order refusing a review, but no appeal lies against such an order. As to the merits, the review was refused because the Court was of opinion that on the allegations the plaintiff had no case. This application is made at a very late period. The petition was dismissed so long ago as the 18th July 1891; so there can be no pressing necessity—Macrae on Divorce, p. 3; *Wells* v. *Wells*(3).

E. D. Reporter, for plaintiff in support of the rule.—The order for alimony until final decree must include the decree in appeal. As to the English practice, *Lovedon* v. *Lovedon* (4); *Jones* v. *Jones* (5); *Nicholson* v. *Nicholson* (6), in which case the words "*Pendente lite*" are defined as

(1) 8 P.D. 188.
(2) 13 P.D. 91.
(3) 3 S. & T. 542=33 L.J. (P.M.) 151.
(4) 1 Phil. 208.
(5) 41 L. J. (P. & M.) 53.
(6) 3 S & T. 214.

meaning while the rights of the parties are in contest; *Wilson* v. *Wilson*(1); Browne on Divorce, (5th Ed.) pp. 273, 379. 380. *Jones* v. *Jones* (2) decides that alimony continues unless the subsequent proceedings are vexatious and frivolous. The appeal in the case has been admitted by the Court, so it cannot be regarded as frivolous. As to delay, the records of the Court will show that the plaintiff has not been guilty of any delay.

JUDGMENT.

JARDINE, J.—The plaintiff sued for a judicial separation in this Court, and on the 18th July 1891, her suit was dismissed by Mr. Justice Birdwood. The suit was filed on the 24th March. On the 11th May she applied for alimony, and got an order from the Judge on the 11th July, directing the payment of alimony *pendente lite* "until the final decree herein be passed." On the 9th September the plaintiff applied for a review of judgment, and on the 27th January 1892, the learned Judge, after a rule *nisi* and a hearing, refused to review, and ordered the plaintiff to pay the costs. The plaintiff appealed against the dismissal of the suit and the refusal to review; and her appeal was admitted **[149]** to the file of the High Court on the 18th March, 1892, and now awaits hearing and decision. It is admitted that the defendant has paid the alimony up to the date of dismissal of the suit.

On the 28th June last, the plaintiff made application to this Court to direct the defendant to pay her all the arrears of alimony, and to pay her at the same rate as alimony *pendentelite* till the final disposal of the appeal. Mr. Jardine, for the defendant, contends that the appeal is vexatious and frivolous, and that the plaintiff is guilty of laches and delay, and that the Court ought, therefore, if it has any power to order payment of alimony after the dismissal of the suit, to refuse to do so in its discretion. He also argues that this Court has no jurisdiction, and that the application ought to have been made to the High Court, which is seized of the appeal. Mr. Reporter, for the plaintiff, urges that the form of the Judge's order shows that he meant the alimony to continue till the Court of appeal had determined the case.

In my opinion, the words "final decree herein" mean the decree in the suit and not in the appeal. In Rule 190 of the English Rules (quoted in Browne on Divorce, 5th Ed., p. 234) the words "final decree" are used in this sense, and the expression sometimes means the absolute decree as compared with the decree *nisi*, as in Cotton L. J.'s judgment in *Ellis* v. *Ellis* (3). In s. 44 of Act XV of 1865 a final decree is contrasted with an *interim* order.

It has been conceded in argument that the Court of appeal has power to direct payment of alimony pending the appeal. As authorities on the practice in England and the right of the wife as a general rule, to alimony pending the appeal, Mr. Reporter cites *Lovedon* v. *Lovedon* (4) in the Court of Arches and *Jones* v. *Jones* (2), where it was affirmed by the Full Court. But no precedent in this Court, nor authority in any of the reports or text books, has been cited to show that the alimony pending the appeal may be awarded by the Court whose decision has been appealed against.

[150] Another contention for the plaintiff is that s. 33 of Act XV of 1865 should be interpreted as if the word "suit" included appeal in regard to the provision of alimony *pendente lite*, where divorce or judicial

(1) 3 Hagg. 329.
(2) L. R. 2 P. & D. 333=41 L.J. (P. & M.) 53.
(3) 8 P. D. 188.
(4) 1 Phil. 208.

1892
JULY 29.

PARSI MATRIMONIAL COURT.

17 B. 146.

separation is sought. It is urged that after an appeal is admitted, this Court and the High Court have co-ordinate powers to award alimony. I do not think this is the necessary or reasonable meaning. In no section of this Act does the word "suit" or "sue" necessarily take the meaning which includes appeal: such a meaning would conflict with ss. 15 and 16 about jurisdiction and s. 44 about the custody of children. It may be supposed that, if the Legislature had meant to empower this Court to award alimony after appeal made, it would have used as plain language as in s. 36 of the Indian Divorce Act IV of 1869.

Section 33 of Act XV of 1865 empowers this Court to order the husband to pay alimony "during the suit." It is the practice here to pass a decree *nisi* in the first instance upon a sentence of divorce. Since the Court was erected, there had been six sentences of nullity before I passed such a sentence in *S.* v. *B.*(1). In four of these cases the Court proceeded by decree *nisi*, possibly influenced by an amending Act of Parliament, which so far assimilates the English procedure in nullity to that in divorce: I followed these precedents in *S.* v. *B.*(1). I am informed by the Clerk of the Court that there has been only one successful suit for judicial separation (No. 3 of 1870): there the first decree made was a decree *nisi* to be made absolute after three months.

As, in the present case, I have had to consider the practice, I may now state my view that the words "during the suit" may be taken to include the period up to the making of a final or absolute decree. This view will make our practice conform to that of England. In *Hulse* v. *Tavernor* (2), the Judge Ordinary says: "The two decrees are the beginning and ending of the same Act, the one inchoate, and the other perfecting, or complete; a space of time being interposed to admit of enquiry." The same view was taken in *Norman* v. *Villars* (3). The matter [151] settled by two decisions in the Court of appeal. In *Ellis* v. *Ellis* (4), a decree *nisi* had been obtained by a wife, and was not appealed against. It was held, overruling *Latham* v. *Latham* (5), that the Judge Ordinary has power to order alimony *pendente lite* notwithstanding a decree *nisi* has been made for dissolution of marriage. The reason given is as follows:—"Until the final decree the Court can make no permanent provision for the wife; therefore, it seems reasonable that it should have power to make some temporary provision." The case of *Ellis* v. *Ellis* has been distinguished from cases where the guilt of the wife has been established. In *Dunn* v. *Dunn* (6), Cotton, L. J., says: "*Ellis* v. *Ellis* was an entirely different case. The wife there took the proceeding against her husband, and she had in no way forfeited her rights against him. The case was one where it would be proper ultimately to grant permanent alimony, and we thought it reasonable that in the meantime she should have intermediate alimony."

The Indian Divorce Act IV of 1869, s. 36, in cases where a decree *nisi* has been pronounced, leaves less discretion to the Judge than the law of England. It provides no rule in cases of judicial separation; but as to suits for dissolution or nullity, it says that the alimony pending the suit shall continue until the decree is made absolute or confirmed. Mr. Macrae, at p. 111 of his edition of that Act, considers that the Indian rule is based on *Wells* v. *Wells* (7), but the judgment in *Dunn* v. *Dunn* shows that

(1) 16 B. 639. (2) L. R. 2 P. & D. 261. (3) 2 Ex. D. 359.
(4) 8 P. D. 189. (5) 2 Swab. & Trist. 299. (6) 13 P. D. 93.
(7) 3 Swab & Trist. 542.

1892
JULY 29.

PARSI MATRIMONIAL COURT.

17 B. 146.

Wells v. *Wells* did not lay down a binding rule about the period between decree *nisi* and decree absolute. Cotton, L.J., says :—

"In *Wells* v. *Wells* there was no motion for a new trial ; in the present case the motion for a new trial has been refused. We do not find on enquiry that *Wells* v. *Wells* has been treated in the Divorce Court as establishing such a general rule as is contended for—that, although the wife has been found guilty, the alimony must go on till the case is finally disposed of. Until adultery has been proved against the wife, she is entitled to **[152]** support, and the Court gives her alimony *pendente lite*. But, when her adultery has been proved, though she is still a wife, she has lost that right. Ought not the alimony then to stop at the verdict ? * * The reasonable rule then appears to be that on the jury finding the wife guilty of adultery, her right to alimony ceases, subject to this—that if the Judge thinks it reasonable so to do, he can continue it. Thus, for instance, he may think it not improbable that the wife will obtain a new trial, and succeed ultimately in establishing her innocence ; in such a case he might well think it reasonable that the alimony should be continued. To hold that alimony continues as a matter of right, till an application for a new trial is disposed of, would encourage frivolous applications for new trials."

Tindley and Bowen, L. J. J., concurred, and the former remarks : "It seems anomalous that the right should continue when a jury has found her guilty. If the vedict is against her, the *onus* must lie upon her to show that the alimony ought to be continued. The Judge ought to have power to give it to her, but I think it would be wrong to hold that, without further order, it continues after an adverse verdict." I may here state, that as s. 33 of the Act I have to administer (Act XV of 1865) does not limit the Judge's discretion as s. 36 of the Indian Divorce Act does, I am of opinion that *Ellis* v. *Ellis* and *Dunn* v. *Dunn* should guide the practice in allotment of alimony for the time following a decree *nisi*.

It follows logically from the fact that an unsuccessful wife is not as a right entitled to claim alimony up to decree absolute, that she is not entitled to claim it after final decree—I mean pending appeal—nor for the period in which she is seeking review of judgment. *Wells* v. *Wells*, on which Mr. Jardine relies, is authority in England for holding that when the lower Court has declared its final judgment on the case it has no power to allot alimony *pendente lite*. What is said there about the divorce of a wife may well apply to her suit for judicial separation. "Where the cause is tried before the Court itself, that final conclusion will have been reached when the Court declares its judgment on the facts, for in this Court such judgment is **[153]** final. And if an appeal carries the case forward, it also carries it into another Court competent to allot alimony, if it pleases." The discretion to allot can be better exercised by the Court where the appeal is pending than by the original Court. As Lord Penzance says in *Jones* v. *Jones*, in the report in 41 L. J. Prob. 53 : "If there was fair ground for an appeal, it would be reasonable that alimony should be paid, but if a wife in all cases were entitled to alimony during the appeal, great evil might result. A wife found guilty of adultery might appeal for the sole purpose of getting alimony." Now it is obvious that the Judge of the Court appealed from cannot properly exercise the judicial discretion indicated in this remark. I am of opinion that I have no power to allot alimony *pendente lite* after this Court has passed final judgment on the case.

1892
JULY 29.

PARSI MATRIMONIAL COURT.

17 B. 146.

It is, however, argued that the time taken up in the review proceedings ought to be excepted from this ruling, on the analogy of *Nicholson* v. *Nicholson* (1), where on granting a new trial the Judge Ordinary said that the alimony *pendente lite* remained in force. Now, as pointed out in Macrae, p. 167, there is some resemblance between the reasons for, and procedure in new trial and review. I am not prepared to say that this Court, while a petition for review is still pending before it, may not have a discretion to allot or continue alimony *pendente lite*. I can well imagine cases to which the reasoning in *Dunn* v. *Dunn* may justly apply, where the Judge thinks that the wife may be ultimately successful. But no motion for continuing the alimony was made to Mr. Justice Birdwood: the present claim is made after that learned Judge had finally refused the review with costs, and after he had ceased to be Judge of this Court. The reasoning in *Wells* v. *Wells* clearly shows that I should refrain from interference, especially as the wife has appealed against the order refusing to review. There the Judge Ordinary laid down that "such alimony can only be allowed, if paid or enforced, while the question of a new trial is still open." The judgment of this Court being final, so far as this Court is concerned, I refuse alimony for the period of the review proceedings.

[154] To grant it on an application made so late, the husband having no notice of it before, and, therefore, no special reason for getting the review matter determined speedily, would encourage frivolous endeavours to spin out litigation at the husband's expense. Alimony is given *pendente lite* for the husband's protection, to prevent the wife using the husband's credit, but the course taken since the dismissal of the suit has left him without this protection. The basis of the wife's application is that she is without means. I ask, as in *Noblett* v. *Noblett* (2), if the plaintiff was in such a state, why did she not apply earlier?" See, too, *Twisleton* v. *Twisleton* (3). I must refuse to allot alimony during the review proceedings on the ground of delay. I now dismiss the application with costs.

---

17 B. 154 = Chitty's S.C.C.R. 345.

ORIGINAL CIVIL.

Before Mr. Justice Bayley (Acting Chief Justice), and Mr. Justice Farran.

FRAMJI MANEKJI PUNJAJI AND ANOTHER (*Plaintiffs*) *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL (*Defendant*).*

[2nd September, 1892.]

Abkari (Bombay) Act V of 1878, *s.* 55—*Construction*—"*Or*" *read* "*nor*"—*Order of confiscation.*

Section 55 of the Bombay Abkari Act V of 1878 provides that "no order of confiscation shall be made until the expiration of one month from the date of seizing the things intended to be confiscated, or without hearing any person who claims a right thereto, and the evidence, if any, which he produces in support of his claim." Certain casks of vinegar belonging to the plaintiffs were seized by the Collector of Bombay on the 5th November 1891, and an order of confiscation was made on the 17th November 1891. The order was made after hearing the plaintiffs.

---

* Small Cause Court Suit No. 5724 of 1892.

(1) 3 Swab. & Trist 214.
(2) L.R. 1 P. & D. 651.
(3) L.R. 2 P. & D. 339.

1892
SEP. 2.

ORIGINAL CIVIL.

17 B. 154 = Chitty's S. C. C. R. 345.

Held, that under the provisions of the Abkari Act, s. 55, the Collector could not make a valid order of confiscation before the expiration of one month from the date of seizure.

REFERENCE from the Bombay Court of Small Causes, under s. 69 of the Presidency Small Cause Courts Act (XV of 1882).

[155] The Judge stated the case as follows :—

1. In this case the plaintiffs, who carry on business in Bombay in Indian condiments, sought to recover from the defendant the sum of Rs. 560, being the value of 25 casks of toddy vinegar, the property of the plaintiffs, imported from Goa on the 7th of February, 1891. The plaintiffs allege in their statement of claim that the said casks of vinegar were wrongfully and without any justifiable cause detained by the Collector of Customs at Bombay on their landing on the said 7th February, and then illegally and without proper cause seized by the Collector on the 5th November, 1891, and illegally and unjustifiably confiscated on the 17th November, 1891.

2. A copy of the summons and a copy of the plaintiffs' bill of particulars are hereto annexed.

3. The defence to the action was justification under the Bombay Abkari Act V of 1878. Sections 7, 9, 37, 54, 55 and 67 (1) were particularly relied on in support of this plea.

[156] 4. The seizure and confiscation of the goods on the dates alleged in the particulars of demand were not denied.

---

(1) The following are the sections of Act V (Bombay) of 1878 referred to :—

Punishment of subordinate officers for misconduct.

Section 7.—Subject to such orders as aforesaid, the Commissioners may at any time after inquiry recorded in writing, fine, dismiss, suspend or reduce any subordinate officer appointed or any officer on whom any additional powers or duties have been conferred or imposed by them under the provisions of the last preceding section, for any breach of departmental rules or discipline, or for carelessness, unfitness, neglect of duty or other misconduct.

Import of liquor or intoxicating drug.

Section 9.—No liquor or intoxicating drug shall be imported by land or by sea into any part of the Presidency of Bombay unless—

(*a*) it is liable to the payment of duty under the Indian Tariff Act, 1875, or any other law for the time being in force relating to the duties of customs on goods imported into British India and the duty prescribed by such law has been paid thereon ; or

(*b*) such import is permitted under the power next hereinafter conferred.

Subject to the orders of Government, the Collector may from time to time :

(*c*) permit the import of liquor, or intoxicating drug, or of any kind of liquor or intoxicating drugs other than liquor or intoxicating drugs liable to the payment of duty under such law as aforesaid, on payment of duty, if any, to which the same is liable under this Act and on such other terms as he thinks fit, and

(*d*) cancel such permission.

Power to seize liquor, &c., in open places, and to detain, search and arrest.

[156] Section 37.—Any Commissioner, or Collector or other Abkari Officer duly empowered in this behalf, may

(*a*) seize in any open place, or in transit, any liquor or intoxicating drug or any other thing which he has reason to believe to be liable to confiscation under this or any other law for the time being in force relating to Abkari revenue ;

(*b*) detain and search any person whom he has reason to believe to be guilty of any offence against this or any other such law, and if such person has any such liquor, drug, or other things in his possession, arrest him.

What things liable to confiscation.

Section 54.—All liquor or intoxicating drugs, imported, exported, transported, removed, manufactured, sold or had in possession in contravention of this Act, or of any rules or order made under this Act, or of any license, permit or pass obtained under the Act, and

1892
SEP. 2.
ORIGINAL CIVIL.
17 B. 154 = Chitty's S. C. C. R. 345.

[Clauses 5 to 9 of the case stated are not material for the purposes of this report, and are, therefore, omitted.]

[157] The order of confiscation was made after hearing the plaintiffs.

10. The points for determination were:—

(1) Whether this vinegar was liquor within the purview of the Bombay Abkari Act V of 1878?

(2) If so, whether it is liable to the payment of duty under the Indian Tariff Act XVI of 1875, or any other law for the time being in force relating to Custom duties on goods imported into British India?

(3) Whether the seizure was properly made on 5th November, 1891?

All toddy drawn from any tree in contravention of this Act, or of any such rule, order, license, permit, or pass as aforesaid; and

All liquor, if any, and all intoxicating drugs, if any, lawfully imported, exported, transported, removed, manufactured, sold or had in possession, and all toddy, if any, lawfully drawn, along with, or in addition to, any liquor or intoxicating drugs, imported, exported, transported, removed, manufactured, sold or had in possession, or along with, or in addition to, any toddy drawn as aforesaid, and

All stills, utensils, implements or apparatus whatsoever for the manufacture of liquor, or of any intoxicating drug, used, kept, or had in possession in contravention of this Act, or of any rule or order made under this Act, or of any license obtained under this Act, and

All materials collected or had in possession for the purpose of unlawfully manfacturing liquor or any intoxicating drug, and

The vessels, packages, and coverings in which any liquor, intoxicating drug, still, utensil, implement, apparatus, or material aforesaid, is found, and the other contents, if any, of the vessel or package in which the same is found, and the animals, carts, vessels, or other conveyances used in carrying the same

Shall be liable to confiscation.

Order of confiscation by whom to be made.

Section 55.—All confiscations under this Act shall be adjusted by the Collector:

Provided that no order of confiscation shall be made until the expiration of one month from the date of seizing the things intended to be confiscated, or without hearing any person who claims a right thereto, and the evidence, if any, which he produces in support of his claim.

Redemption may be allowed.

[157] Whenever confiscation is ordered under this Act, the owner of the thing ordered to be confiscated may, at the discretion of the Collector, be given an option of redeeming it on payment of such fine as the Collector thinks fit.

Bar of action.

Section 67.—No action shall lie against Government, or against any Abkari Officer for damages in any Civil Court for any act *bona fide* done or ordered to be done by them in pursuance of this Act, or of any law at the time in force relating to Abkari revenue.

And all prosecutions of any Abkari Officer, and all actions which may be lawfully brought against Government or against any Abkari Officer, in respect of anything done, or alleged to have been done, in pursuance of this Act, shall be instituted within four months from the date of the act complained of, and not afterwards.

And any such action shall be dismissed

(*a*) If the plaintiff does not prove that, previously to bringing such action, he has presented all such appeals allowed by this Act, or by any other law for the time being in force, as within the aforesaid period of four months it was possible to present; or,

(*b*) In the case of an action for damages, if tender of sufficient amends shall have been made before the action was brought, or if, after the institution of the action, a sufficient sum of money is paid into Court with costs, by or on behalf of the defendant: or,

Provided that nothing in this section shall be deemed to affect the powers or jurisdiction of Her Majesty's High Court of Judicature or of the Court of Small Causes at Bombay.

1892
SEP. 2.

ORIGINAL CIVIL.

17 B. 154 = Chitty's S. C. C. R. 345.

(4) Whether the order of confiscation of 17th November, 1891, fulfils the requirements of s. 55, and whether it is valid even though made before the expiration of a month from the date of seizure, but after hearing the plaintiffs and receiving such proofs as they wished to adduce?

[158] (5) If such order was invalid, what damages, if any, were the plaintiffs entitled to under the circumstances of the case?

11. As to s. 67, I was of opinion that the acts complained of were not within its protection. Moreover, the Collector could not be said to have acted *bona fide*, in the legal sense of the term.

12. In the view I took of the 55th section it became unnecessary to decide the first, second and third questions.

13. It runs thus:—"All confiscations under this Act shall be made by the Collector; provided that no order of adjudication shall be made by the Collector until the expiration of one month from the date of seizing the things intended to be confiscated, or without hearing any person who claims a right thereto, and the evidence, if any, which he produces in support of his claim." This is a highly penal proceeding, and, to put it very mildly, it makes one of the parties a judge in his own cause. It ought to receive a strict interpretation. It first provides that all confiscations shall be made by the Collector. Then follows a provision which is expressed in negative terms, and is, therefore, imperative. It says no such order shall be made until the expiration of a month. This is the first limitation to the exercise of the Collector's powers. It peremptorily forbids him to pass the order in any event, until the lapse of a month. If he makes one within the prescribed period, it is wholly void and inoperative, and is a mere nullity. The proviso then goes on to impose another condition, and the restriction to the exercise of his power in respect of a wholly different matter, *viz.*, he is not to make the order without hearing the claimant or objector. It has been maintained for the defence that the proviso authorized the Collector to adjudge confiscation upon the happening of one of the two contingencies either after a month or after hearing the claimants. If this argument be sound, the Collector would not be bound to grant a hearing. He may positively refuse to hear, wait for a month, and then confiscate the goods. If the two clauses are to be read in the alternative, that would be the necessary consequence. He has the option of doing one of two matters, and he does one, no matter why, in preference to the other. This construction **[159]** would be revolting to the legal mind. Mr. Little felt the force of the objection, and sought to destroy it by suggesting a trans-position of the two clauses, which he thought would make the "hearing" compulsory. In the first place, such a trans-position is inadmissible in a fiscal statute, but, secondly, it does not really help to solve the difficulty: "Provided that no order of adjudication shall be made without hearing any person who claims a right to the things seized, or until the expiration of a month after seizure." This leaves the Collector's option untouched. He may still elect to postpone taking action for a month instead of hearing the party grieved. If the clause relating to "hearing" acquires an obligatory force by reason of its holding the first place in the sentence, why should not the clause applicable to the month make it equally incumbent on the Collector to stay his hand until the expiration of a month? It already stands first.

14. The construction placed by the Court upon the section and its proviso receives strong support from the following considerations. It avoids the consequence of a precipitate decision by leaving the Collector freedom

1892
SEP. 2.
ORIGINAL CIVIL.
17 B. 154 = Chitty's S. C. C. R. 345.

for a whole month to alter his mind, or modify his views. At the same time the party feeling himself aggrieved has a whole month within which to produce his evidence. The draftsman was no pedant. Having enjoined a prohibition as to time he did not pause to consider whether the use of the conjunction "nor" instead of "or" in the sentence would not better satisfy all grammatical proprieties. For these reasons the Court disallowed the plea of justification.

15. The remaining question relates to the amount of damages. For this purpose the whole circumstances of the case must be looked to from 7th February. There were repeated demands. The plaintiffs were deprived of the possession and use of their goods. The Collector persistently, and in spite of plaintiffs' remonstrances, refused to deliver up the goods. The detention, after the Collector had opportunities of satisfying himself as to the quality of the goods for the purposes aforesaid, was unauthorized. I, therefore, awarded the value of the goods before they got deteriorated in the manner and owing to the causes stated in this reference.

[160] There was a decree in plaintiffs' favour for Rs. 307 and costs contingent upon the opinion of the High Court.

16. At the close of the case I was required by Mr. Little to state a case for the opinion of the High Court, which I have now the honour to solicit upon the questions—

(1) Whether under the provisions of s. 55 of the Bombay Abkari Act of 1878 the Collector can make a valid order of confiscation before the expiration of one month from the date of seizing the things intended to be confiscated, but after hearing the person who claims a right to them?

(2) Whether the plaintiffs were entitled to the damages awarded in the face of their admission that the goods were valueless at the time of seizure and confiscation in November?

Anderson, for the plaintiffs:—As to the construction of s. 55 he contended that "or" should be read "nor."

Lang (Acting Advocate-General), for the defendant.

The following authorities were referred to:—Maxwell on Statutes, p. 284: *Metropolitan Board of Works* v. *Steed* (1).

OPINION.

BAYLEY, C. J. (Acting).—In this case I am of opinion that the learned Small Cause Court Judge's view of the proper construction to be given to s. 55 of Act V of 1878 is correct. The provisions of this Act, it is to be remarked, are intended to be in protection of the subject. It is also to be borne in mind that they are of a highly penal nature. The Court, therefore, will be very averse to anything like a strained construction of this section, if that construction is one which tends to cut down the protection intended to be given to the public.

Now this section runs thus:—

"All confiscation under this Act shall be adjudged by the Collector, provided that no order of confiscation shall be made until the expiration of one month from the date of seizing the things intended to be confiscated, or without hearing any person who claims a right thereto, and the evidence, if any, which he produces in support of his claim.

[161] Whenever confiscation is ordered under this Act, the owner of the thing ordered to be confiscated may, at the discretion of the Collector,

(1) 8 Q.B.D. 445.

be given an option of redeeming it on payment of such fine as the Collector thinks fit."

To my mind that language is sufficiently plain and intelligible. It may be that it would be more strictly grammatical to have used 'nor' instead of 'or' in this sentence. But the meaning of the section, I think, is clear; it is that both these conditions must be fulfilled before an order of confiscation can be made. And that this was the deliberate intention of the Legislature I can very well believe. A month does not seem too long a period to provide before such a serious step as an order of confiscation is allowed to be taken. It is highly desirable that such an order as that should not be made in a hurry.

The construction contended for by the Advocate-General is, I think, a very laboured construction entailing a distant straining of the language of the section; which, as I have already said, seems to be plain and intelligible enough as it stands. Why should the Court so strain the language of the section? I think no reason, certainly no sufficient reason has been shown as to taking that course, if we are at liberty to take it.

On these grounds I think the answer to the first question, referred to us by the learned Fourth Judge of the Small Cause Court, should be in the negative.

FARRAN, J.— I am quite of the same opinion. Now the first provision of this s. 55 is this:—

"No order of confiscation shall be made until the expiration of one month from the date of seizing the things intended to be confiscated* * * *"

That is in the broadest and the most imperative terms. It is a provision dealing with the condition of time. The second provision, *viz.*, "or without hearing any person who claims a right thereto, &c.," has nothing to do with the question of time. In such a section as this—a section dealing with the conditions to be observed before making the order of confiscation—one would expect both these matters to be provided for: both a provision as to the time **[162]** that must be allowed to elapse before such an order is made and also a provision as to the claimant's right to be heard. Presumably, therefore, the second provision is an addition to, and not in substitution for, the first provision. Is there anything in the language used which overrides this presumption? On the contrary, it is only by reading this section, as perhaps a purist might read it, that room is left for any other construction. Using language as it is commonly used, the word 'or' in a sentence constructed as this is, would as often be used as the word 'nor,' to which here, I think, it is clearly equivalent. The illustration put during the argument gives an example of such a case. One may say to a child "you are not to leave the house for an hour, or without your great coat." Can there be a shadow of doubt as to what is there meant? This property of the word 'or' in a sentence thus formed seems to be a peculiarity of the language, as is well shown by Grove, J., in *The Metropolitan Board of Works* v. *Steed* (1). In a sentence beginning with a negative, as this does, 'or' is understood as repeating or carrying on that negative, *i.e.*, as equivalent to 'nor.'

Certainly, had the intention of the Legislature been otherwise, you would have expected to have found the plain and imperative provision

(1) 8 Q.B.D. 445 (447).

1892
SEP. 2.
—
ORIGINAL CIVIL.
—

that "no order should be made within one month" cut down or qualified by words equally plain and unmistakeable, and that we should not have been left to extract that intention by such a laboured and difficult process of argument as with the words as they now stand is required.

---

17 B. 154 = Chitty's S. C. C. R. 345.

17 B. 162.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Birdwood.

GAUSKHA (*Original Plaintiff*), *Appellant v.* ABDUL ROPKHA AND ANOTHER (*Original Defendants*), *Respondents.** [4th February, 1892.]

Decree against a sirdar—*Political Agent's Court—Death of the* sirdar—*Application for execution against the heirs—Change of status—Jurisdiction—Civil Court—Section* 649, *para.* 2, *of the Civil Procedure Code* (*Act XIV of* 1882).

A *sirdar* against whom a decree was passed in the Court of the Political Agent having died, the decree-holder applied for execution against his heirs. The [163] Political Agent rejected the application, holding that he had no jurisdiction over the heirs who were not *sirdars*. The decree-holder then applied for execution to the Court of the First Class Subordinate Judge of Dharwar, who would have had jurisdiction to try the suit if the deceased defendant had not been a *sirdar*, but that Court also rejected the application on the ground that s. 649, para. 2 of the Civil Procedure Code (Act XIV of 1882) applies in cases where the territorial jurisdiction of the Court is changed, and not where the status of the parties is changed, and that the decree-holder should obtain a declaration that the decree was binding against the heirs, who were not *sirdars*.

Held, reversing the order, that the terms of the section are general, and draw no distinction as to the nature of the cause which puts an end to the jurisdiction.

THIS was an appeal from the decision of Rao Bahadur Kasinath Balkrishna Marathe, First Class Subordinate Judge of Dharwar.

A decree was passed in the Court of the Political Agent at Kolhapur against one Abdul Rophkha, a *sirdar* and *jaghirdar* of Bad in the Dharwar District. After the passing of the decree, Abdul Rophkha died, and the applicant Gauskha, *jaghirdar* of Bad, presented an application for execution of the decree against Hasan and Mahamadkha, sons and heirs of the judgment-debtor, Abdul Rophkha. The Political Agent rejected the application on the ground that he had no jurisdiction over the sons who were not *sirdars*. The applicant, thereupon, applied to the Court of the First Class Subordinate Judge of Dharwar, who declined to pass an order for execution, being of opinion that s. 649, para 2, of the Civil Procedure Code (Act XIV of 1882) "does not give jurisdiction in cases wherein there is a change of status of the parties to the decree. The said section has full scope in cases where the territorial jurisdiction of Court is changed, and not in cases where the status of the parties is changed. I am inclined to think that the plaintiff must obtain a declaration that his decree against the father, who was a *sirdar*, is binding on the heirs, although they are not *sirdars*." The Subordinate Judge accordingly rejected the application.

The applicant appealed to the High Court.

Shamrav Vithal, for the appellant.

Mahadeo Waman Bhat, for the respondents.

---

* Appeal No. 111 of 1891.

1892
FEB. 4.
APPELLATE CIVIL.
17 B. 162.

JUDGMENT.

SARGENT, C.J.—The Subordinate Judge considers that s. 649, para. 2, of the Civil Procedure Code Act (XIV of 1882) does not [164] apply to this case, because the jurisdiction of the Political Agent to execute the decree has ceased by reason of the change of status of the heirs, but the terms of the section are general, and draw no distinction as to the nature of the cause which puts an end to the jurisdiction. We may remark that this section has already been held applicable in *Vishnu* v. *Krishnarao* (1) to a case of this nature. As it is admitted by the pleader for the respondents that the First Class Subordinate Judge of Dharwar would have had jurisdiction to try the suit had the deceased defendant not been a *sirdar*, we must reverse the order and send the case back for the Ccurt below to dispose of the application for execution. Costs to abide the result.

Order reversed and case sent back.

---

17 B. 164.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Birdwood.

KRISHNARAV TRIMBAK HASABNIS (*Original Plaintiff*), *Appellant v.* SHANKARRAAV VINAYAK HASABNIS AND ANOTHER (*Original Defendants*), *Respondents.** [10th February, 1892.]

Hindu law—Adoption—Adoption by a mother who has succeeded as heir to her son after the death of his widow.

An adoption to herself and her deceased husband by a mother who has succeeded as heir to her son after his death and that of his widow is invalid according to Hindu law.

[**N.F.**, 24 Ind. Cas. 999 = 27 M.L.J. 306 = 16 M.L.T. 413 ; **Appr.**, 26 B. 526 (528, 531, 532); (**F.B.**) ; **R.** 17 B. 551 (554 & 556) (**F.B.**) ; 20 B. 250 (259); 22 B 416 (418, 419, 420) ; 23 B. 327, (330, 331, 334); 25 B. 306 (311) ; 33 C. 1306 = 4 C.L.J. 357 = 11 C.W.N. 12 (18) ; **D.**, 19 B 331 (336).]

THIS was an appeal from the decision of Khan Bahadur L. G. Fernandez, First Class Subordinate Judge of Poona.

One Trimbak died, leaving a widow, Gangabai, and son, Sadashiv, surviving him. Sadashiv afterwards died childless, leaving a widow, Anpurnabai, who also died. Upon her death her mother-in-law, Gangabai, succeeded as Sadashiv's heir. On the 2nd October 1885, she adopted the plaintiff Krishnarav to herself and her deceased husband Trimbak. Krishnarav now sued as such adopted son to recover certain property.

[165] The Court of first instance rejected his claim, holding that his adoption by Gangabai after Anpurnabai's death was invalid.

The plaintiff appealed.

Jardine (with *Mahadeo Chimnaji Apte*), for the appellant :—

The plaintiff's adoption is valid. Gangabai adopted him after her son, Sadashiv, and his widow were both dead. She had succeeded as heir to her son Sadashiv. The adoption, therefore, was in derogation only of her own estate, and not that of any other person. The ruling in *Thayam-*

---

* Appeal No. 15 of 1890.

(1) 11 B. 153.

1892
FEB. 10.
APPELLATE CIVIL.
17 B. 164.

mal v. *Venkatarama* (1) relied on by the lower Court is not applicable here. In that case the widow of the son was living at the time of the adoption, and consequently the adoption had the effect of divesting her of her estate. For this reason, the adoption in that case was held to be invalid. The case of *Raja Vellanki Venkata* v. *Venkata Rama* (2) is nearer to the present case. Being a Madras case, the permission of the *sapindas* was there necessary. On this side of India neither the authority of the husband nor the permission of the *sapindas* is necessary for an adoption.

When an estate once becomes vested in any one it cannot be divested by a subsequent adoption made by another person, but a mother can divest herself of her estate by adopting a son. The case of *Keshav Ramkrishna* v. *Govind Ganesh* (3) is not applicable, because in that case there were adoptions made both by mother-in-law and daughter-in-law, and the adoption made by the daughter-in-law was held to be valid. There is no difference in the mother's right to adopt, whether she succeeds as heir directly to her son, or whether she succeeds to him after the death of his widow.

Latham (Advocate General with *Ganesh Ramchandra Kirloskar*), for the respondents.—There are two questions involved in the present case: (1) whether Gangabai had power to adopt, and (2) assuming she had, can the adoption have the effect of divesting the estate. We contend that, in the present case, Gangabai's power to adopt had become extinguished. There is a difference between **[166]** a mother adopting after her son's death and adopting after the death of that son's widow—Mayne's Hindu Law, s. 104 (4th Ed.). The Privy Council has ruled that when an estate returns to a widow after devolution to her grandsons and other descendants, the widow's power to adopt is gone. The power to adopt having become extinct, the adoption becomes invalid. *Raja Vellanki Venkata* v. *Venkata Rama* (2) is not applicable, because in that case the son had died unmarried, and therefore, the adoption by the mother was held good. We rely upon the following rulings:—*Bhoobun Moyee Debia* v. *Ram Kishore* (4); *Pudma Coomari* v. *The Court of Wards* (5); *Thayammal* v. *Venkatarama* (1); *Tarachurn Chatterji* v. *Suresh Chunder Mookerji* (6); *Chandra* v. *Gojarabai* (7); West and Buhler, (3rd Ed.), pp. 982, 983, 985.

Mahadeo Chimnaji Apte, in reply.—The decisions in *Pudma Coomari* v. *The Court of Wards* (5) and *Bhoobun Moyee Debia* v. *Ram Kishore* (4) do not lay down that an adoption by a mother, as in the present case, is invalid for all purposes. What they lay down is that those adoptions were invalid with respect to the particular points involved in them. An adoption may be invalid for the purpose of succession, yet it may be good for, spiritual purposes—*Kalova* v. *Padapa*(8). The devolution of the estate on the daughter-in-law does not extinguish the power of the mother-in-law to adopt. The devolution of the estate on the daughter-in-law only suspends the power of the mother-in-law to make an adoption. If the daughter-in-law had made an adoption, there would have been no necessity for the mother-in-law to adopt, because, in that case, the daughter-in-law's son would have effectually provided for the spiritual benefit of the three immediate predecessors. Gangabai having succeeded as heir to her son, she was entitled to adopt—*Bykant Monee Roy* v. *Kisto Soonderee*

(1) 14 I. A. 67. (2) 4 I. A. 1. (3) 9 B. 94. (4) 10 M. I.A.279.
(5) 8. I. A. 229. (6) 16 I.A. 166. (7) 14 B. 463. (8) 1 B. 248.

Roy (1). In the original Hindu texts there is nothing to show that the power of a Hindu widow to adopt is restricted.

JUDGMENT.

[167] SARGENT, C. J.—The plaintiff, Krishnarav Trimbak, claims his share in the properties mentioned in the plaint as the adopted son of one Trimbak, who died, leaving a widow Gangabai and a son Sadashiv, who subsequently died, leaving a widow Anpurnabai. Anpurnabai died childless, and her mother-in-law, Gangabai, who succeeded as Sadashiv's heir, adopted the plaintiff for herself and her husband on the 2nd October, 1885.

The Subordinate Judge, proceeding on the assumption that Trimbak was separated from his brother, which was not disputed before us, held that the adoption was invalid, on the authority of the Privy Council decision in *Thayammal* v. *Venkatarama* (2). Their Lordships in that case held that an adoption with the permission of *sapindas* by a Hindu widow, after the husband's estate had vested in his son's widow, is invalid. This conclusion was arrived at by the Privy Council as a necessary consequence of the decision in *Pudma Coomari's* case (3), where it was decided by their Lordships, as the result of the decision in *Bhoobun Moyee Debia* v. *Ram Kishore* (4), that "by the vesting of the estate in the widow of the son the power of adoption (given by the deceased to his widow) was at an end and incapable of execution." Here, the son's widow was dead when the adoption by Gangabai took place, and such adoption would only divest Gangabai's own estate, a distinction which was made the ground of the decision in *Bykant Monee Roy* v. *Kisto Soonderee Roy* (1) in favour of the mother's adoption. But we do not think it is warranted by the language of the Privy Council in *Bhoobun Moyee Debia* v. *Ram Kishore*, as explained by the Privy Council in *Pudma Coomari's* case (3). They say: "The substitution of a new heir for the widow was, no doubt, the question to be decided, and such substitution might have been disallowed, the adoption being valid for all other purposes, which is the view that the lower Courts have taken of the judgment, but their Lordships do not think that this was intended. They consider the decision to be that upon the vesting of the estate in the widow Bhowani, the power of adoption was "at an end" and **[168]** incapable of execution." Again, in *Thayammal* v. *Venkatarama* (2), their Lordships say they "entirely concur in that view, and they are of opinion that the adoption, with the permission of *sapindas* in the present case, could have no greater effect as regards the right to property, than the adoption under the deed of permission in the cases to which reference has been made." This language appears to us to be altogether inconsistent with any idea of the right to adopt being merely suspended during the widow's life. It is also to be remarked that the reasoning of the Court in *Bhoobun Moyee Debia* v. *Ram Kishore* (4) seems to allow of no such distinction being made. Their Lordships say: "The rule of the Hindu law is that in the case of inheritance the person to succeed must be the heir of the last full owner. In this case Bhowani Kishore was the last full owner, and his wife succeeds as his heir to a widow's estate. On her death the person to succeed will again be the heir at that time of Bhowani Kishore"—meaning, as we apprehend, that the son adopted by the mother

(1) 7 W. R. 392. (2) 14 I. A. 67. (3) 8 I. A. 229 (245).
(4) 10 M. I. A. 279 (311).

1892
FEB. 10.

APPELLATE CIVIL.

17 B. 164.

could not succeed, as he would, as such, be primarily the heir of her husband and not of her son.

The subject of the adoption by a mother higher in the line than the son is discussed in West and Buhler, (3rd Ed. p. 984), from the ceremonial point of view, and such adoption is held invalid on the ground that the son would be placed in a worse position as regards the due performance of his *sraddhas* than if there had been no adoption—and they conclude by laying down, as a consequence of that view, that" a mother succeeding to her son after the son's investiture is not the more capable of adopting a son to him, because she divests no estate but her own." In this Presidency. doubtless, the permission of *sapindas* is not required, but that circumstance cannot affect the application of the above rule, as explained and applied in *Thayammal* v. *Venkatarama* (1).

We have been referred to a decision of the Calcutta High Court—*Manik Chand Golecha* v. *Jagat Settani*(2)—where the **[169]** circumstances of the case were the same as here. Mitter and Beverley, JJ., there say: "It is true that in their later judgment the Privy Council decided that upon the vesting of the estate in the widow of Bhowani the power of adoption was " at an end " and incapable of execution, but the power in that case was a power given by the husband, and the decision referred to lays down the limit of the time within which such a power should be exercised." It is plain from this that the attention of the Court had not been directed to the decision in *Thayammal* v. *Venkatarama* (1), that the ruling in *Bhoobun Moyee Debia* v. *Ram Kishore* was equally applicable where the adoption was made with consent of *sapindas*.

From the above Privy Council decisions, taken together, we think that the question under consideration is concluded by authority, and that the adoption by Gangabai after Anpurnabai's death was invalid; and that the decree must, therefore, be confirmed with costs.

Decree confirmed.

---

17 B. 169.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Birdwood.

JIJAJI PRATAPJI RAJE AND OTHERS (*Original Plaintiffs*), *Appellants* v. BALKRISHNA MAHADEO AND OTHERS (*Original Defendants*), *Respondents.** [18th February, 1892.]

Pensions Act (XXIII of 1871), ss. 4 and 6—Collector's certificate—Certificate not obtained when suit filed—Certificate not produced at hearing—Adjournment asked for and refused—Certificate accepted in appeal and placed on record—Procedure—Practice.

A suit under the Pensions Act XXIII of 1871 is not bad *ab initio* by reason of its being filed without a Collector's certificate.

Where at the hearing of such a suit the necessary certificate was not produced. *Held*, that the Judge ought to have granted the plaintiffs' application for an adjournment, in order that the certificate might be obtained and produced.

[F., 25 A. 73 (75); 12 Bom.L.R. 801=7 Ind. Cas. 986 (989); 12 Bom.L.R. 803 (809); **R.**, 17 C.L.J. 239=17 C.W.N. 408=17 Ind. Cas. 490.**]**

THIS was a second appeal from the decision of H. J. Parsons, District Judge of Thana.

---

* Second Appeal, No. 673 of 1885.

(1) 14 I.A. 67.

(2) 17 C. 518, (537).

1892
FEB. 18.
APPELLATE CIVIL.
17 B. 169.

[170] Suit to recover revenues of a village granted in *inam* to the plaintiffs by the defendants, who were the *khots* of the village.

This action was originally instituted by plaintiffs Nos. 1 and 2 (Jijaji Pratapji Raje and Narayan Manaji Raje) in their own names. Plaintiffs Nos. 3 and 4 were subsequently joined on their own application.

The plaintiffs sought to recover one-half of the revenues of the village of Kandali, granted to them *inam*, from the *khots* of the village, defendants Nos. 1 and 2.

Defendant No. 3 was joined afterwards, as claiming the right to the revenues himself as *inamdar*.

Defendants Nos. 1 and 2 disputed (*inter alia*) the right of the plaintiffs as *inamdars*, and set up the plea of limitation.

Defendant No. 3, Kanoji Ramaji Raji, pleaded that the suit was barred by the Statute of Limitation, and also by the Pensions Act (XXIII of 1871).

The Subordinate Judge (Rao Saheb Sakharam M. Chitale) held that the claim would lie, although the plaintiffs had not obtained a certificate under the Pensions Act (XXIII of 1871), s. 6, but rejected it on the ground that it was barred by limitation.

The plaintiffs appealed to the District Court on the point of limitation, and defendant No. 3 on the point relating to the certificate under the Pensions Act.

In appeal, the only issue raised was "will this suit lie without a certificate from the Collector, having regard to the provisions of the Pensions Act of 1871," and the finding thereon was in the negative.

The District Judge in his judgment remarked :—

"I am asked to adjourn the case to allow of the plaintiffs procuring a certificate, and a case in the Printed Judgments, 1888, p. 52, is cited. There I notice that there was a certificate though not a very clearly worded one. Printed Judgments, 1877, pp. 228, 314 and Printed Judgments 1880, p. 56, cited on the other side. I think that the suit being filed, without a certificate, is bad *ab initio*, and must be dismissed. Were I disposed to grant time, it would be uselesss, because as the suit could only be said to have been properly brought at the time when **[171]** the certificate is produced, the claim would now be time-barred. The plaintiffs' remedy, however, was not by a suit at all, but by application to the revenue authorities. The decree of the Court dismissing the suit is, therefore, confirmed on the finding of the only point that I have raised."

The plaintiffs appealed to the High Court.

Mahadeo Chimnaji Apte, for the appellants (plaintiffs) :—Our suit was dismissed by the lower Court, because the Collector's certificate under the Pensions Act was not produced, the property in dispute being *saranjam*. The Court gave no opportunity to produce the certificate, being of opinion that the suit must be held to be brought on the day the certificate is produced, and that it would then be time-barred. The lower Court is wrong, and it ought to have given us an opportunity to produce the certificate. The suit is not instituted on the day the certificate is brought—*Nawab Mahammad Azmat Ali Khan* v. *Mussumat Lalli Begum* (1). We have got the necessary certificate, and we tender it.

Branson (with *Mahadeo Bhaskar Chavbal*), for respondents Nos. 2 and 3, and *Daji Abaji Khare*, for respondent No. 1.—Under the provisions of the Pensions Act, the Court can only take cognizance of a suit when

(1) 9 I.A. 8.

1892
FEB. 18.
APPELLATE CIVIL.
17 B. 169.

the certificate is produced, and not before. A suit launched without a Collector's certificate cannot be recognized as a suit. The suit when it was brought was not properly constituted—*Kalidas Kevaldas* v. *Nathu Bhagvan* (1).

Mahadeo Chimnaji Apte, in reply.—The suit was instituted when it was originally filed, and it is not barred. A suit cannot be barred except under the provisions of the Limitation Act (XV of 1877), s. 4. But the explanation of that section says that a suit is instituted when the plaint is presented to a proper officer. The point is, therefore, whether the plaint was presented to a proper officer, and not whether it was accompanied by a certificate. There are special provisions in the Limitation Act under which suits are barred, &c. But there is no section with respect to the provisions of the Pensions [172] Act, nor is it laid down that a plaint must comply with the provisions of a particular enactment. In order to satisfy the requirements of the Limitation Act, a plaint is to be presented to a proper officer within a prescribed period, and nothing more. An analogous case is where a minor brings a suit, and a guardian *ad litem* is appointed afterwards. In that case the suit is held to be instituted on the day the plaint was presented, and not when the guardian *ad litem* was appointed. Similarly, when a suit is filed on an insufficient Court fee, it is held to be filed on the day the plaint was presented, and not on the day on which the deficiency in the Court fee is made up. We now produce the Collector's certificate, and ask to have it put on in the record.

The certificate was put on the record.

JUDGMENT.

SARGENT, C. J.—We agree with the District Judge that the suit is one which falls within the Pensions Act as relating to a grant of land-revenue, and that, too, although the Government is not a party to the suit—*Balaji* v. *Rajaram* (2). But the District Judge is wrong in treating the suit as bad *ab initio* by reason of its having been filed without a certificate. The remarks of the Privy Council in *Nawab Mahammad Azmat Ali Khan* v. *Mussumat Lalli Begum* (3) show that this is not so, and that the Court is only precluded from taking cognizance of it until the certificate is produced. The District Judge should, therefore, on being asked to do so, have adjourned the case for the production of a certificate.

The certificate is now produced; and we must, therefore, reverse both the decrees of the Courts below and remand the case for a fresh trial, as all that has hitherto been done by the Subordinate Judge, without the certificate, was done without jurisdiction.

As regards the question of the Statute of Limitations, we are of opinion that the suit must be treated as having been instituted by plaintiff No. 1. Costs to follow the result.

Decree reversed and case remanded.

(1) 7 B. 217.
(2) 1 B. 75 (79).
(3) 9 I. A. 20.

17 B. 173.

1892
MARCH 30.

APPELLATE CIVIL.

17 B. 173.

[173] APPELLATE CIVIL.

Before Mr. Justice Jardine and Mr. Justice Telang.

BHOGILAL *(Original Plaintiff)*, *Appellant v.* AMRITLAL *(Original Defendant)*, *Respondent.** [30th March, 1892.]

Limitation Act (IX of 1871), art. 148—Acknowledgment—Acknowledgment by one of several mortgagees as agent for the others—Acknowledgment by one of several heirs of the mortgagee—Not sufficient—Mortgage—Redemption.

Under art. 148 of the Limitation Act (IX of 1871), an acknowledgment of the mortgagor's title by one of several mortgagees as agent for the others is wholly ineffectual, and does not bind the rest. So, too, is an acknowledgment by one of several heirs of the original mortgagee without effect. The expression "some person claiming under him" in art. 148 of the Act means some person claiming under him the *entirety* of the mortgagee's rights.

The property in dispute was mortgaged by Hari Bhagti to the firm of Kasandas Bechardas in 1816. In 1830 Jagjivandas, one of the sons and heirs of Kasandas, who was then manager of the firm on behalf of the whole family, sub-mortgaged the property in dispute to a third party, under a bond which recited the original mortgage by Hari Bhagti to Kasandas. In 1885 the defendant, who was a descendant of Kasandas, redeemed the sub-mortgage effected by Jagjivandas. In 1887 the plaintiff, having purchased the equity of redemption from Hari Bhagti's descendants, filed the present suit for redemption of the mortgage of 1816. The plaintiff relied on the acknowledgment made by Jagjivandas in 1830 as giving a fresh starting point to limitation.

Held, that the suit was barred by limitation. The acknowledgment by Jagjivandas, whether as manager of the firm or as one of the heirs of the original mortgagee, was not sufficient under art. 148 of the Limitation Act (IX of 1871).

[Diss., 15 C.L.J. 251=16 C.W.N. 493 (494)=13 Ind.Cas. 702 (703); **Appl.**, 1 Ind.Cas. 204=5 M.L T. 261; **Appr.**, 18 A. 458 (461); **R.**, 1 Ind. Cas. 203=19 M. L J. 288 (289)=5 M.L.T. 208; **D.**, 11 Bom.L.R. 318 (324, 329)=2 Ind. Cas. 469.**]**

SECOND appeal from the decision of Venkatrao R. Inamdar, Acting Joint Judge of Ahmedabad, confirming the decision of Rao Bahadur Chunilal Maneklal, First Class Subordinate Judge, in suit No. 1124 of 1887.

This was a suit for the redemption of certain property which was mortgaged in 1816 A. D. by the firm of Hari Bhagti to the firm of Kasandas Bechardas.

Kasandas Bechardas had three sons—Gangadas, Jagjivandas and Raghunath. On Kasandas's death Jagjivandas became the manager of the firm and also manager of the family estate. And in 1830 he sub-mortgaged the property in dispute to Narbheram **[174]** Sukhmal by a mortgage-bond, which recited the fact of the mortgage by Hari Bhagti to Kasandas Bechardas.

In 1885 A.D the defendant, who was a grandson of Raghunath, the third son of Kasandas, redeemed the sub-mortgage effected by Jagjivandas in 1830.

In 1887 the plaintiff, having purchased the equity of redemption from Hari Bhagti's descendants, filed the present suit to redeem the mortgage of 1816.

The plaintiff contended that the acknowledgment of the original mortgagor's title made by Jagjivandas in the mortgage-deed of 1830 gave a fresh starting point to limitation, and that the suit was, therefore, within time.

---

* Second Appeal No. 192 of 1891.

1892
MARCH 30.
APPELLATE CIVIL.
17 B. 173.

The defendant pleaded (*inter alia*) that the suit was barred by limitation, and that the acknowledgment in question was not binding on him, or sufficient to save the bar of limitation.

Both the lower Courts rejected the plaintiff's claim as barred under the Limitation Acts XIV of 1859 and Act IX of 1871.

Against this decision the plaintiff preferred a second appeal to the High Court.

Gokuldas Kahandas Parekh, for appellant.—The acknowledgment by Jagjivandas of the original mortgagee's title operates under art. 148 of Act IX of 1871 to give a fresh starting point for limitation. At the date of the acknowledgment Jagjivandas was a managing partner in the firm to which the property in suit was mortgaged. And as a partner in a going concern Jagjivandas must be presumed to have an implied authority to make the acknowledgment on behalf of the whole firm. The acknowledgment, therefore, binds the firm—*Premji Ludha* v. *Dossa Doongersey* (1). Jagjivandas was, moreover, a manager of the family, and in this character also he had authority to make the acknowledgment in question so as to bind his co-sharers—*Chinnaya* v. *Gurunatham* (2).

[TELANG, J., referred to *Richardson* v. *Younge* (3) as showing that, in the case of a mortgage to two persons jointly, there must be a joint acknowledgment.]

[175] Under art. 148 of the Limitation Act IX of 1871 the acknowledgment need not be by all the heirs of a mortgagee. It is sufficient if it is made by "*some* person claiming through the mortgagee." Jagjivandas was admittedly one of the heirs of the original mortgagee. His acknowledgment was, therefore, sufficient.

Ganpat Sadashiv Rao, for the respondent.—This suit is governed by Act IX of 1871. The case of *Premji Ludha* v. *Dossa Doongersey* (1) does not apply, as it was decided under the present Act XV of 1877, which has made a material alteration in the law as to acknowledgment. Under the former Act IX of 1871 an acknowledgment by an agent of the mortgagor's title was absolutely ineffectual to give a fresh starting point—*Rahmani Bibi* v. *Hulasa Kuar* (4). As a managing partner in the firm, Jagjivandas' acknowledgment cannot be put on a higher footing than that of an agent. It is, therefore, ineffectual. As a manager of the family, his acknowledgment is equally invalid—*Naranji* v. *Bhagvandas*(5). The case of *Richardson* v. *Younge* is in point. It clearly lays down that one of several mortgagees has no authority to bind the others by his sole acknowledgment, and that is also the principle adopted in s. 21 of Act XV of 1877. Refers to *Mussummat Mah Bibi* v. *Motan Mal* (6). As laid down in this case, the expression "some person claiming under the mortgagor" in art. 148 of Act IX of 1871 means some person claiming the *entire* interest of the mortgagee. Jagjivandas, being one out of three heirs of the original mortgagee, could not be said to be a person claiming the entire interest of the mortgagee. This acknowledgment is, therefore, ineffectual.

JUDGMENT.

JARDINE, J.—It is admitted that the mortgage to Kasandas took place in A. D. 1816: and that the present suit for redemption would be barred by the expiry in 1876 of the sixty years' period of limitation

(1) 10 B. 358. (2) 5 M. 169. (3) L. R. 6 Ch. A. 478.
(4) 1 A. 642. (5) P. J. for 1881, p. 238.
(6) 12 P.R. 162 (61 P.R. 1877).

prescribed by Act IX of 1871, art. 148, unless the acknowledgment made in 1830 by Jagjivan gives a new starting point. The Court below has found on the facts that Jagjivan was the son of Kasandas, who admittedly had [176] other heirs, and that Jagjivan was then manager of the mortgagee firm for and on behalf of the Hindu family to which the firm belonged, and was not sole owner thereof, but like the present defendant only one of several co-parceners—a co-parcener in his own right.

Under Act XIV of 1859, s. 1, cl. 15, there was a fresh starting point "if in the meantime an acknowledgment of the title of the depositor, pawner or mortgagor, or of his right of redemption, shall have been given in writing signed by the depository, pawnee or mortgagee or some person claiming under him." Under Act IX of 1871, art. 148, also the date of the acknowledgment is the starting point "where an acknowledgment of the title of the mortgagor or of his right of redemption has, before the expiration of the prescribed period, been made in writing, signed by the mortgagee or some person claiming under him.

The only question argued is whether the written acknowledgment signed in 1830 by Jagjivan is sufficient. Th contention of the plaintiff is two-fold: first, that as Jagjivan was manager of a firm, a going concern, his acknowledgment was binding on the defendant, and for this *Premji Ludha* v. *Dossa Doongersey* (1) was cited. This case, I may remark, construes the provisions of the Limitation Act XV of 1877, and so do *Ravji* v. *Narayandas* (2) and *Gadu Bibi* v. *Parsotam* (3), which follow the Bombay case. The Courts below have noticed that s. 19 of the present Act has changed the law so as to include an acknowledgment signed by the agent of a mortgagee, whereas the similar provisions about agents in s. 20 of the law of 1871 extended only to debts and legacies. In *Rahmani Bibi* v. *Hulasa Kuar* (4) it was held that under Act IX of 1871 the signature of an agent was not sufficient. This decision is based on that of the Privy Council in *Luchmee Buksh Roy* v. *Runjeet Roy Panday* (5), which interpreted the similar words of Act XIV of 1859. See also *Naranji* v. *Bhagvandas* (6) which cites [177] *Kumarsami Nadan* v. *Pala Nagappa* (7) as to a manager's powers in a Hindu family and the discussion in West and Buhler, 612, 613. I think the authorities are against the first contention. Secondly, it was contended that the defendant is now the sole owner of the mortgagee's rights, and that as he becomes such by succession to the estate of Jagjivan and others, who were co-parceners in 1830, he is "a person claiming under" the mortgagee, and being, as to part of the mortgagee's rights the successor of Jagjivan, he is estopped from denying that Jagjivan's acknowledgment binds him.

The present case is one of first impression, and in the absence of Indian decisions on the words of art. 148 of the Act of 1871 about the acknowledgment by the mortgagee, or some person claiming under him, I may refer to the case of *Richardson* v. *Younge* (8). Vice-Chancellor Malins affirmed—at p. 278—interpreting the Statute of Limitation 3 and 4, Will IV, c. 27, s. 28, which is the authority given in Coote on Mortgage for the proposition that "where there is a mortgage to two jointly, there must be a joint acknowledgment." The case differs from the present, in that the two joint mortgagees were trustees, and the decision is confined by Lord Justice James to the case of mortgagees who are trustees: and also

(1) 10 B. 358. (2) P.J. 1888, 147. (3) 10 A. 418.
(4) 1 A. 642. (5) 13 B.L.R. 177. (6) P.J. 1881, p. 238.
(7) 1 M. 385. (8) L.R. 10 Eq. 275.

1892

MARCH 30.

APPELLATE CIVIL.

17 B. 173.

that there were two joint trustees as defendants before the Court, while here the whole right of the mortgagees is now vested in one defendant, so that there is not apparently the same difficulty in taking a complete account. The reasoning applied seems to me, in spite of these differences, applicable to the construction of the Act of 1871. It is as follows:—see 6 Ch Ap. at p. 480. The provision as to acknowledgment, which only refers to an acknowledgment by the mortgagee, would, if it stood alone, require an acknowledgment by all the mortgagees where there are more than one, it being provided by the General Clauses Act, I of 1868, that words in the singular shall include the plural. The distinction drawn between party and agent about debts and legacies in s. 20 shows that the question of agency was before the mind of the Legislature, but there is no provision in art. 148 or elsewhere as to signature by an agent for a mortgagee. A signature, therefore, **[178]** by one of several mortgagees *as agent* for the others would be ineffectual, and it appears unsafe to hold that the acknowledgment of one binds all the others. The conclusion that the Legislature in 1871 omitted to provide for signature by a mortgagee's agent seems affirmed by the fact that this was done in 1877 by the general provision of s. 19 of the Act of that year. The above reasoning leads to the same result as the Privy Council decision in *Luchmee Buksh Roy* v. *Runjeet Roy Panday* (1), where their Lordships follow Tyndal, C. J., in *Hyde* v. *Johnson* (2), and interpret the Act of 1871 "according to its plain words" and exclude the signature of a mortgagee's agent.

The above conclusion is not, however, sufficient for the determination of the present case. It is contended that Jagjivan's interest as a coparcener in 1830 brings him within the words "some person claiming under him," *i.e.*, under his father Kasandas the mortgagee, and that the acknowledgment signed by Jagjivan is, therefore, sufficient under the Act of 1871. It being found, as a fact, that Jagjivan was only one of several heirs, and not sole owner of the mortgagee's rights, the argument requires that the words be read as meaning "some one or more of the persons claiming under him," or "any one or more of the persons claiming under the mortgagee the whole or any part of the rights conferred on him by the mortgage." We have then to determine whether these paraphrases embody the true construction, or whether the phrase means "some person or persons claiming under him the entirety of the mortgagee's rights." After considering the arguments I come to the opinion that the last is the real meaning. I leave out of consideration the case of joint tenants, of whom it is said in *Richardson* v. *Younge* at p. 481 of the Report—"if a joint tenant dies, there is no transmission of interest, and no person claims anything under him." If as settled by that case where there is a mortgage to two jointly there must be a joint acknowledgment, I think it would be anomalous, in the absence of precise words, if an acknowledgment signed by one of many holding collectively the mortgagee's rights were sufficient. I lay more stress on this view, because the doctrine **[179]** that one mortgagee can be treated as agent for the others in the matter of acknowledgment has, as determined by the authorities cited above, no place in the Acts of 1859 and 1871. In construing a statute we must not look to cases of very rare and singular occurrence, but to those of every day experience—*Hyde* v. *Johnson* (2), and remember that Statutes of Limitation are in their nature strict and inflexible enactments, intended to quiet long possession and to extinguish stale demands—

(1) 13 B. L. R. 177.

(2) 2 Bing. N. C. 776 (780).

Luchmee Buksh Roy v. *Runjeet Roy Panday* (1). These principles would, I think, be imperilled if any owner of a mere fraction of the mortgagee's rights could by means of an acknowledgment exceed the powers of a joint mortgagee or an agent in regard to giving the mortgagor a new starting point for his claim.

No English case has been cited, nor any decision of an Indian High Court found, on the present question. Possibly it might have been, but in fact it was not raised in *Daia Chand* v. *Sarfraz* (2). The facts are not clear, and it is to be noted that it is said (at p. 123) that the actual parties, the defendants-appellants, had signed the acknowledgments, and it cannot be gathered that there were any other owners of the mortgagee's right. The question was, however, determined by the Chief Court of the Punjab in *Mussummat Mah Bibi* v. *Motan Mal* (3). The views stated by Fitzpatrick, J. (Boulnois, J., concurring) are clearly, and I think correctly, expressed. He says :

"The question is one of considerable difficulty, and I give my opinion on it with considerable diffidence ; but on the best consideration I have been able to bestow on it, I come to the conclusion that the suit is altogether barred. The 148th article of the Indian Limitation Act, 1871, is not new. It is copied, with some alterations which are immaterial for the purposes of the present question, from the 15th clause of the 1st section of the former law, Act XIV of 1859, and that, again, is taken with certain alterations and omissions, one at least of which seems to me important for the purposes of the present question, from the 28th section of the 3rd and 4th Wm. IV, c. 27.

[180] "The 28th section of the 3rd and 4th Wm. IV, c. 27, provides that the mortgagor's suit to redeem shall be barred within a certain period reckoned from the date on which the mortgagee obtained possession, "unless in the meantime an acknowledgment of the title of the mortgagor or of his right of redemption shall have been given * * * in writing *signed by the mortgagee or person claiming through him*," in which case the period shall be reckoned from the date of such acknowledgment.

"Up to this point, our Acts have followed the English Act, but here comes the important difference. The English Act goes on to provide for the case of an acknowledgment by one of a number of mortgagees or persons claiming under a mortgagee enacting that such acknowledgment shall be binding only as against the person making it and providing for the apportionment for the mortgage-debt between him and the others, but no similar provision is to be found in our Acts. It is hardly conceivable that the Indian Legislature, having copied the English Act so far as they did, would not, if they intended that an acknowledgment by one of several mortgagees should have so peculiar an effect as that of breaking up the mortgage into portions ; I say it is hardly conceivable that they would not have followed the English Act here, too, and enacted something more or less similar to its provisions on this point. I have no doubt that the omission to do so was deliberate, and I can well understand that it may have been thought as well to avoid the difficulties and complications, which there is reason to apprehend would, in many cases, arise from allowing to an acknowledgment by one of several mortgagees the effect in question. However this may be, it seems to me impossible, by any effort of construction, to get from the Indian Acts, as they stand,

(1) 13 B.L. R. 177.
(2) 1 A. 117.
(3) 12 P. R. 162 (61 P. R. 1877).

1892

MARCH 30.

APPELLATE CIVIL.

17 B. 173.

anything similar in effect to the provisions of the English law on this point. There may be a transaction (and such transactions are not uncommon in this country), which, though spoken of as a single mortgage, is really a number of mortgages of different properties to different persons executed in the same sheet of paper. Such a transaction would, I presume, for the purposes of the 148th article of the Limitation Act, as I believe it usually is for all [181] other purposes, be treated on its proper footing, *viz.*, as a number of different mortgages, and if one of the mortgagees had given an acknowledgment in respect of the property mortgaged to him, the mortgagor might take advantage of that acknowledgment to redeem that property from him, the mortgage of it being really separable from or rather separate from that of the other properties.

"But where there is but one single mortgage to a number of persons, an acknowledgment by one of those persons cannot, under the 148th article, give a new period of limitation in respect to a portion or a share of the property mortgaged. It must either be absolutely without effect, or give a new period of limitation in respect of the whole property.

"I have, as I have already said, come to the conclusion that it is absolutely without effect. In *Richardson* v. *Younge* (1) a case in which some of the difficulties of the English law were brought out, Lord Justice Mellish in commenting upon that Act (at p. 489) makes an observation to the effect that, if it had stopped short at the point down to which, as I have shown, our Acts have followed it, it could not have been contended that the acknowledgment of one of several mortgagees would bind the others.

"Of that, I think there can be little doubt. But there is a slight difference in the wording of the Indian Acts to which I have not before adverted, and, which it may be contended, would afford ground for a distinction.

"The acknowledgment which the English Act requires is 'an acknowledgment in writing signed by the mortgagee or *the* person claiming through him;' while what the Indian Act requires is an acknowledgment 'in writing signed by the mortgagee or *some* person claiming under him.'

"It would hardly be disputed that, as observed by Mellish, L. J., in the case I have just referred to, 'the mortgagee' in the English Act means 'the mortgagee *or* mortgagees,' and similarly that 'the person claiming through him' in that Act [182] means 'the person *or persons* for the time being claiming through him.'

"In like manner, it would hardly be disputed that 'the mortgagee' in the Indian Act means 'the mortgagee *or mortgagees*,' but it may possibly be suggested that the Indian Legislature, in using the words *some* person claiming under 'him,' may have intended to include an acknowledgment like that in the present case given by one of several heirs or purchasers to whom different shares of the mortgagee's interest in the property or the mortgagee's interest in the different portions of the property may have passed.

"But, in the first place, it is not likely that a change in this direction would have been made by the Indian Legislature, for the recognition of such acknowledgments would infallibly lead to collusion (such as is alleged to have occurred in the present case) between the mortgagor and one of the heirs or purchasers; and again it is hardly conceivable that one of several mortgagees who had together entered into the mortgage transaction

(1) L. R. 6 Ch. Ap. 478.

should be unable to bind one another, and that one of several purchasers from a mortgagee should be given power to bind the others who might be perfect strangers to him. If a result of this sort was intended, we may be sure very clear words would have been used.

"It is accordingly natural to look out for some other construction of the words used, and I do not think there is any difficulty in finding a very reasonable one. I think 'some person claiming under the mortgagee' means some one of the persons or aggregates of persons who, from time to time, by purchase, inheritance or otherwise, may have been in a position to claim under, *i.e.*, to represent the mortgagee.

"This, I think, though as I have already said with some diffidence, is the proper construction of the Act; and I accordingly hold that an acknowledgment (such as that in the present case) by one of several heirs of the mortgagee is altogether without effect."

I think that if the Indian Legislature in 1871 or 1859 had intended to give effect to acknowledgments by persons claiming [183] only a fraction of the mortgagee's rights it would, to avoid the disquieting of titles and the revival of stale demands, as well as to secure its other object, have used plain words, as in s. 28 of 3 and 4 Wm. IV, c. 27.

For these reasons, I am of opinion that the decree under appeal should be confirmed with costs.

TELANG, J.—I cannot say that I am entirely satisfied with the reasoning contained in the judgment of Fitzpatrick, J., concurred in by Boulnois, J., in the case of *Mussummat Mah Bibi* v. *Motan Mal* (1), which was cited to us by Mr. Ganpatrao. Nor do I think that the case of *Richardson* v. *Younge* (2), to which I referred during the argument, has, except only to a certain extent, any very close application here, having regard to the actual language of the Act we have to construe. But as that language has, in fact, been construed by two learned Judges in one way, and as Mr. Justice Jardine is satisfied with that construction, I think it would be right for me to follow it—especially in the case of an Act which is not any longer in force. And I do so the more readily, because I cannot say that I have myself formed any strong or clear opinion in favour of any other construction. According to the construction, then, which has been placed on Act IX of 1871, the claim of the plaintiff in this case was barred while that Act was in force, and the Act of 1877 could not, therefore, revive it. The Courts below were consequently right in deciding against the plaintiff, and the decree must be confirmed with costs.

Decree confirmed.

(1) 12 P. R. 162 (61 P.R. 1877).

(2) L. R. 6 Ch. Ap. 478.

1892
SEP. 20.

CRIMINAL REFERENCE.

17 B. 184.

17 B. 184.

[184] CRIMINAL REFERENCE.

Before Mr. Justice Parsons and Mr. Justice Telang.

QUEEN-EMPRESS *v.* KANJI BHIMJI.* [20th September, 1892.]

Bombay Gambling Acts (IV of 1887 *and I of* 1890), *s.* 3—"*Common gaming house*"—"*Instrument of gaming*"—"*Used*"—*Meaning of these words in s.* 3 *of the Act.*

The accused rented a place near a public road at Bombay at Rs. 250 a month. There they erected a shed containing eleven *pedhis* or stalls. In the centre of the shed they put up, in a prominent position, a clock for keeping accurate time. The stalls were let out to certain persons, each at the rate of Rs. 100 a month.

The roofs of several adjoining houses surrounded this place From one of these roofs rain fell into the place.

Numbers of people resorted to this place for the purpose of rain-betting.

The rain-botters staked certain sums of money on the chance whether the rain would fall or would not fall within a certain time. After making the bets, the parties betting would go to one of the stall-keepers, and get him to register the particulars of the bet in a book kept for the purpose, and each deposited with the stall-keeper the amount staked.

The bets as to rain falling were determined by persons at the place seeing the rain falling in a stream from such of the roofs of the adjoining houses as had been chosen by the betters on making the bets, and seeing also the time by the clock, if there was any doubt as to the time.

After the bet was determined, the winner received from the stall-keeper the amount of the stake.

Under these circumstances, the accused were charged before the Chief Presidency Magistrate with committing the offence of keeping a "common gaming house" under s. 4, cls. (*a*), (*b*) and (*c*), of the Bombay Gambling Act IV of 1887 as amended by Act I of 1890;

On a reference by the Magistrate under s. 432 of the Code of Criminal Procedure (Act X of 1882);

Held that to bring the place in question within the definition of a "common gaming house" in s. 3 of the Bombay Gambling Act (IV of 1887) as amended by Bombay Act I of 1890, the instrument of gaming or wagering must be in the place itself, either kept there, or brought there and used there, for profit and gain. It is not sufficient that wagers are made in the place upon or by means of some article or other which is outside the place. The roofs of the houses surrounding the place in question could not, therefore, be regarded "as instruments of gaming either kept or used therein" within the meaning of s. 3 of the Act.

Held, also, that the word "used" in s. 3 of the Act, as amended by Act I of 1890, must be taken in its ordinary sense, as meaning *actually* used. Any article which is *in fact* used as a means of wagering comes within the definition of "an instrument of gaming," even though it may not have been specially devised or intended for that purpose.

[185] *Held*, per Telang, J., that neither the stalls, nor the books in which the bets were registered, nor the money staked and deposited with the stall-keeper, were instruments of gaming or wagering.

[R., 26 B. 533 (535) ; 28 B. 129 (145).]

THIS was a reference, under s. 432 of the Code of Criminal Procedure (Act X of 1892), by C. P. Cooper, Chief Presidency Magistrate.

The reference was in the following terms :—

"2. The accused were charged before me on the 3rd of August, 1892, with committing an offence on and prior to the 13th day of July, 1892, at Bombay under paragraphs *a*, *b* and *c* of s. 4 of Bombay Act IV of 1887 and Bombay Act I of 1890.

"3. They denied having committed the offence.

---

* Criminal Reference, No. 80 of 1892.

1892
SEP. 20.
CRIMINAL REFERENCE.
17 B. 184.

"4. The facts proved are that the accused, who are the nominees of certain persons, in the month of June last rented a place at the Cathedral Road, Bhuleshwar, from one Purshotamdas Hurkissondas for two months at Rs. 250 a month, and the next two months they should continue to occupy at Rs. 400 a month.

"5. The accused took possession of the place, and afterwards caused to be erected on part of it a shed in which were eleven '*pedhis*' or stalls, and also placed in a prominent position in about the centre of the shed an ordinary American clock which kept accurate time. The clock was kept in charge of *ramushis* appointed by the accused to prevent persons tampering with it.

"6. The stalls were let out to certain persons by the accused, at the rent of Rs. 100 each stall per month. The accused had the care and the management of the place, which was used by numbers of persons for the purpose of rain-betting, the place being kept open for any one who liked to go there.

"7. Surrounding the place are several roofs of adjoining houses, the rain from one of which fell into the place.

"8. That persons making bets on the rainfall ventured certain sums of money against each other upon the chance whether rain would fall, or would not fall, within a certain time. The time was not for a less period than three hours, and might be for a longer period during the time from 6 A. M. to 6 P. M. of each day.

[186] "9. After the bets were made the parties betting would go to one of the stall-keepers, and get him to register the particulars of the bet in a book kept and used by him for that purpose alone, and in most cases each of the parties would deposit with the stall-holder the money ventured (the stakes).

"10. The bets were determined as to rain falling by persons at the place seeing the rain falling in a stream from such of the roofs of the surrounding houses as had been chosen by the individual betters on making the bets, and the time by the clock if it was necessary, but in case of no doubt without reference to the clock.

"11. After the bet was determined, the winner received from the stall-keeper, whether the loser was present and consented or not, the amounts staked, less two pice a rupee deducted by the stall-keeper as his commission from the amount won.

"12. No business, except rain-betting, was carried on in the shed.

"13. The clock in the shed could be looked at and used by the persons frequenting the place for other purposes besides those of determining the time in respect of the betting, and the evidence proved it was so used.

"14. A plan of the premises and the clock is forwarded herewith.

"15. Mr. Little on behalf of the prosecution contended that the place was used for the purpose of a common gaming house within the meaning of s. 3 of the Act, and the clock, the roofs of the adjoining houses, the stakes or deposits of money, and the books are each of them an article used in the place as a subject or means of gaming, including wagering; and referred to the case of *Queen-Empress* v. *Govind* (1), and particularly to the judgment of the Honourable Justices Birdwood and Parsons.

---

(1) 16 B. 283.

1892
SEP. 20.
CRIMINAL REFERENCE.
17 B. 184.

"16. Mr. Inverarity on behalf of the accused contended it was necessary, before convicting under s. 4, to prove that the place was used as a common gaming house under s. 3; that all instruments or articles used for gaming or wagering [187] kept or used for the profit or gain of persons using or keeping the place must be those specially devised or intended for that purpose; that under the Act the Court had the power to order the destruction of instruments of gaming; that the point really for decision is referred to by the Honourable Mr. Justice Jardine in the case of *Queeen-Empress* v. *Govind*, what are 'instruments of gaming,' then to consider if any of these articles, which are kept or used on the premises, come under the definition, and what is really meant by 'means of wagering.' He contended that the roofs were not instruments of gaming; that it was clear these roofs are only the ordinary roofs of surrounding buildings, though the roof of the adjoining chawl, which belongs to other persons, projects a few inches over the place.

"17. He maintained it could not be contended that these roofs are used in the place, and that in any event they are not instruments of gaming or wagering.

"18. As to the stakes, that is covered by the decision in *Queen-Empress* v. *Govind*.

"19. The books of account are covered by the case of *Tollett* v. *Thompson* (1).

"20. As to the clock, there was no attempt to make out there was anything peculiar about it, that it was used only in connection with the betting on certain occasions, and at other times by the persons frequenting the place for other purposes.

"21. There was no evidence to show that any one is bound by the entries made in the books, and he contended that in any event none of these things are instruments of wagering within the Act.

"22. As to the word 'used' it does not mean actual usage therefrom. Under the section it is meant to be understood that anything that assists in the smallest degree in making or ending a bet is an instrument of gaming; but instruments that are actually used for wagering, which is something actually made for that purpose, or something devised for it.

[188] "23. In England, they have a special legislation for betting houses, which we have not here, and he referred to the English Acts relating to betting houses.

"24. The questions for the opinion of the High Court are—

"(1) Whether the accused, who had the care and management of the place, kept or used the same for the purpose of a common gaming house within the meaning of s. 3 of Bombay Act IV of 1887 as amended; and

"(2) Whether any of the articles, *viz.*, the clock, the money staked, the '*pedhis*' or stalls, the books or the roof of the adjoining houses, were instruments used as subjects or means of gaming, including wagering, within the meaning of s. 3 of the said Act."

Lang, (Acting Advocate-General), for the Crown:—The accused have rented the place simply for the purpose of carrying on rain-betting. They have put up a clock there, not with the object of seeing the time of the day, but of deciding the bets by it. Bets are laid and deposited with the stakeholder. There are books kept in which the bets are registered. I contend

(1) L. R. 6 Q. B. 514.

that the clock is used as a means of gaming. So, too, the roofs of adjoining houses were used as means of gaming.

[PARSONS, J.—Then you might as well contend that the rain was used in the building]

So I do. The rain from one of the adjoining roofs fell into the place. The word "used" in s. 3 of Bombay Act IV of 1887 means actually used, and it must be given full effect to. No inference can be drawn from s. 8 of the Act, which empowers a Magistrate to destroy the articles used as instruments of gaming after a conviction. The section is permissive. The ruling in *Queen-Empress* v. *Govind* (1) does not conflict with this view.

Inverarity, for the accused:—If the Legislature had intended to stop betting, it would have passed an Act for that purpose. Statute 16 and 17 Vict., c. 119, expressly brings a betting house within the statutory definition of a gaming house. See also 36 and 37 Vic., c. 38. Refers to Encyclopædia Britannica, **[189]** title "Game." The mere keeping of a common betting house is not criminal in India as it is in England. There is nothing illegal in persons meeting together in a particular place for rain-betting. The expression "instrument of gaming" no doubt includes means of gaming. The two words are convertible terms, as shown in Webster's Dictionary. But that definition does not apply to the clock used in the present case. The bets are not made with reference to the clock; they are made with reference to the time. They are not determined by the clock. The clock is, therefore, not an instrument or a means of wagering. The wager is independent of the clock. An instrument of gaming is an instrument specially devised for the purpose of gaming—*Imperatrix* v. *Vithal* (2); *Queen-Empress* v. *Narotumdas* (3); *Queen-Empress* v. *Govind* (1); *Reg.* v. *Rama* (4); *Imperatrix* v. *Mahomed* (5).

These cases show that an instrument of gaming is an instrument specially devised or intended for the purpose of gaming. The words "other instrument of gaming" in s. 3 of Bombay Act IV of 1887 mean other instrument *ejusdem generis*. The clock is not, therefore, an instrument of wagering. The wager is independent of the clock. It is a convenient thing in a place of public resort. As to the roof of the adjoining house, the definition of the word "*instrument*" in the Act shows that it is some tangible, moveable article; it does not include immoveable property. The roof is not a tangible moveable article, and, therefore, is not an instrument of wagering. The word "used" in the definition of *instruments of gaming* as given in Bombay Act I of 1890 is not a word of wide import. It means not actually used, but ordinarily used. The stakes or coins are not instruments of gaming.

Lang, in reply:—The cases cited were decided before the amending Act I of 1890 was passed. The definition of "instruments of gaming" given in this Act is very wide, and includes any and every article which is used as a means of gaming.

[PARSONS, J.—What do you mean by "used"?]

[190] I mean actually used as an instrument or means of gaming. The clock is used for the purpose of wagering. The bets were to be decided by the clock in case of doubt. The object of putting up the clock on the premises was for the purpose of deciding the bets. It is immaterial if the clock is used by people for other purposes. As to stakes, it is idle to say

---

(1) 16 B. 283. (2) 6 B. 19. (3) 13 B. 681.
(4) B. H. C. Cr. Rul. dated 19th June, 1873. (5) B.H.C. Cr. Rul. No. 72 of 1886.

1892
SEP. 20.
CRIMINAL REFERENCE.
17 B. 184.

that stakes are not the subject of wager. The roof is also used for purposes of gaming,

[TELANG, J.:—Is the roof an "article"?]

Lang:—The word "article" means "thing." The roof is used for the purpose of deciding bets. People stand on the premises and make use of the adjoining roof for determining the bets. If a house be kept for betting on a subject however distant, it falls within the definition of a common gaming house.

Cur. adv. vult.

JUDGMENT.

PARSONS, J.—Since the hearing of the arguments in this case my learned colleague and myself have consulted together and have arrived at a unanimous conclusion on the points of law involved and upon the terms of the order to be passed on the reference. We have decided to deliver separate judgments, considering the importance of the subject and for its better elucidation.

The Chief Presidency Magistrate has referred to this Court the following questions:—Firstly, whether the accused, who had the care and management of the place, kept or used the same for the purpose of a common gaming house within the meaning of s. 3 of Bombay Act IV of 1887, as amended; and secondly whether any of the articles, *viz.*, the clock, the money staked, the *peāhis* or stalls, the books, or the roofs of the adjoining houses were instruments used as subjects and means of gaming, including wagering, within the meaning of s. 3 of the said Act. His reference shows that the place in question is used as a common betting house for the profit of the occupant. Since gaming, by the provisions of Bombay Act I of 1890, includes wagering, the place will be a common gaming house if cards, dice, tables, or other instruments of gaming or wagering are kept or used therein (see s. 3 of the Bombay Prevention of Gambling Act IV of 1887).

[191] The expression instruments of gaming or wagering is by Bombay Act I of 1890 made to include any article used as a subject or means of gaming or wagering. The point, therefore, narrows itself to this "—Is any article used as a subject or means of wagering kept or used in the place in question"? The Advocate-General on behalf of the Crown contended that the word "used" where it first occurs in the above sentence, which is taken from the definition given in Bombay Act I of 1890, means actually used. Mr. Inverarity for the accused argued that the word must be confined to things that are specially devised and intended to be used for the purpose of wagering, and he cited cases and the opinion of Jardine, J., in *Queen-Empress* v. *Govind* (1), in support of his contention. After a full consideration of his argument, and of the authorities he cited, I can come to no other conclusion than that the word "used" must be understood in its ordinary meaning, and that it refers to an actual user; in other words, I am of opinion that any article that is made use of as a subject or means of wagering, no matter of what nature that article may be, comes within the definition of instruments of gaming or wagering. I see nothing in s. 8 that is opposed to this view, for the power to order the destruction of articles found in a common gaming house is permissive only, and a Magistrate would only order the destruction of what properly ought to be and could be destroyed. There is no indication in the Act of 1890

(1) 16 B. 283.

of any intention to restrict the meaning of the word "used," and it is almost impossible, considering the decisions, to suppose that the Legislature, had it intended the articles to be limited, would not have plainly so provided when it passed the Act. Whether or not an article is used as a subject or means of gaming or wagering, is a question of fact which has to be determined upon the evidence in each case. It is not a point that I would be willing to consider in a reference of this kind, since in case of a conviction there would be an appeal open to the accused in which the propriety of the finding could be called in question.

The above would, I consider, have been a sufficient reply to the reference were it not for the mention of the roofs of the adjoining **[192]** houses in it and for the arguments of the Advocate-General thereon. This requires us to determine the legal meaning of the words "kept or used in the place in question" which occur at the end of the point before raised, and which are taken from s. 3 of the principal Act. The roofs of the adjoining houses clearly are not kept in the place in question. But the Advocate-General contends that they are used therein, since they are made use of for the purpose of wagering therein. If this argument is sound, then it would have been far simpler to have proceeded against the accused for the use of the rain itself, since that admittedly was used as the subject of wagering within the place. The whole of the bets were laid on or against the fall of the rain. I am unable, however, in any way to accept the argument. I think that, to bring the place within the section, the instrument of wagering must be in the place itself, either kept there or brought there, and used there for profit or gain, and that it is not sufficient that wagers are made in the place upon, or by means of, some article or other which is outside the place. To hold otherwise would be, I think, to do violence to the language of the section, while it would be inconsistent with the provisions of ss. 5 to 8. The roofs of the adjoining houses must, therefore, be excluded from the list of articles that are in law capable of being used in this place as a subject or means of wagering.

The only other article that is relied on in argument as coming within the definition is the clock. That under the Act would be an instrument of wagering if it was used as a subject or means of wagering; if, for instance, wagers were made depending upon, or to be decided by, the time kept by it, it would, I think, be used as a means of wagering. This, however, as I have before said, is a question of fact upon which I am unwilling even to express an opinion, as the point may come before us in another form. Even if I were willing, I could not do so in the present reference, since we have not got the evidence, and the Magistrate has not himself found upon the point. All he says is that the clock kept accurate time and was watched by *ramushis*, and that bets were decided by persons seeing the time by the clock if, necessary, but in cases of no doubt without reference to the clock. I cannot infer from **[193]** this that bets were made and decided by the time kept by this clock, which is apparently what would have to be proved in order to make it an instrument of wagering.

The order of the Court is that the reference be returned to the Chief Presidency Magistrate with the following answers, *viz.*, (1) In the affirmative only if any article is kept or used in the place as a subject or means of wagering. (2) With the exception of the roofs of the adjoining houses, which are not within the place, any one of the articles mentioned might be an instrument of wagering if it is within the place and actually

1892

SEP. 20.

CRIMINAL REFERENCE.

17 B. 184.

kept or made use of in the place as a subject or means of wagering, but not otherwise.

The Magistrate should complete the trial of the case in accordance with the above answers. The costs of this reference are to be paid by the accused if they are ultimately convicted, but by the Crown if the result of the prosecution is an acquittal.

TELANG, J.—This case comes before the Court on a reference made by the Chief Presidency Magistrate under s. 432 of the Code of Criminal Procedure. The questions referred are as follows :—

(1) Whether the accused, who had the care and management of the place, kept or used the same for the purpose of a common gaming house within the meaning of s. 3 of Bombay Act IV of 1887 as amended? and

(2) whether any of the articles, *viz.*, the clock, the money staked, the "*pedhis*" or stalls, the books or the roofs of the adjoining houses, were instruments used as subjects and means of gaming, including wagering, within the meaning of s. 3 of the said Act?

The answer to the second of these questions decides the answer to be given to the first, and the argument before us has been consequently directed to the elucidation of the point, whether any of the specific articles mentioned in the second question, and chiefly the clock, the money staked, and the roofs, are or are not instruments or subjects or means of wagering within the meaning of s. 3 of Bombay Act IV of 1887, interpreted by the light of Bombay Act I of 1890. I will first deal with the "articles" **[194]** which did not form the subject of argument, *viz.*, the "*pedhis*" or stalls, and the books. I am of opinion that, having regard to the statements in the case referred, neither of them can be held to fall within the purview of the Gambling Acts. The stall is the seat or office, so to say, of the man who keeps a register of the bets made, and the books are those in which the bets are registered. In my opinion, they are both too remotely connected with the wagering to be accurately described as either instruments or means or subjects of wagering. They appear to me, according to the statements in the case, to be merely helps to the preservation of evidence relating to the completed wagering transaction. As regards the money staked, I think it would be a straining of language to describe that as falling within the words instrument, or means, or even subject of the wager. It is rather the fruit or result of the wager, and falls outside the scope of the section. This view may be supported to some extent by the language of ss. 5, 6 and 8 and is in accordance with the opinion expressed by Jardine, J. in *Imperatrix* v. *Govind* (1).

The roofs of the neighbouring houses must next be considered. I do not think it to be necessary on the present occasion to decide whether, looking at the manner in which they are utilized for the purposes of these wagers as stated in the case, they are instruments or means or subjects of the wagers; or, again, whether they can be properly included under the term "articles" used in Bombay Act I of 1890. It seems to me enough to say that they are not "kept or used *in*" the place in question. They plainly are not kept there. And, having regard to the provisions of such sections as 6, 7 and 8, I am, to some extent, confirmed in the view I expressed during the argument, that the Legislature cannot have intended that tangible things should be treated as used in a place where they are not physically.

(1) 16 B. 283.

1892
SEP. 20.
——
CRIMINAL REFERENCE.
——
17 B. 184.

Lastly comes the clock. And, as regards the clock, I confess I have felt considerable doubt. The doubt is, partly at least, due to the circumstance that the facts stated in the case do not furnish sufficiently full and precise information. Thus it is not quite clear from the case whether, in point of fact, the clock has **[195]** ever been consulted at any stage of any of the wagering transactions entered into on the premises in question. All that the Magistrate states is that "the bets were determined as to rain falling by persons at the place seeing the rain falling in a stream from such of the roofs of the surrounding houses as had been chosen by the individual betters on making the bets, and the time by the clock if it was necessary, but, in cases of no doubt, without reference to the clock." This is not quite precise. Again, this statement does not make it clear whether the "determination" as to the time was made by the parties to the bet referring to the clock or by "the persons at the place" doing so, or whether it was the stakeholder, who, in order to deal with the alleged winner's application for the stakes, satisfied himself by such a reference. It may be, I say no more at present, that different results may follow in the different cases.

It is true that, if Mr. Inverarity's argument is corret to its full extent, these points will be all immaterial. He contends that the interpretation of the phrase "instruments of gaming" in *Watson* v. *Martin* (1) and other authorities adopted by this Court in more than one ruling is still good in spite of Bombay Act I of 1890. This certainly appears to have been the opinion of Jardine, J. But, I own, I find it difficult to concur in that opinion. *Prima facie*, I should say that the very fact that the Legislature, having all these authorities before it, lays down a fresh interpretation of the phrase "instruments of gaming" affords by itself an indication that some enlargement of the scope of the words was intended. And, secondly, I think that the word "means" is a word with a wider signification than was given to the word "instrument" by the judicial decisions which have been alluded to. Taking the phrase "means of wagering" in its ordinary idiomatic sense, I should say that it might fairly be regarded as somewhat wider than the phrase "instruments of wagering." And when the former phrase is added by express separate legislation to the definition of the latter, it seems to me difficult to avoid the inference that some widening of the scope of the old law must have been intended. The considerations **[196]** which would be applicable in interpreting a statute, in which both the words "instrument" and "means" occurred together, would not necessarily apply where "instruments" being the sole word used in the first statute an amending statute was subsequently passed to add the word "means." It seems to me, therefore, that we cannot now hold ourselves bound by the older authorities referred to in the case of *Queen-Empress* v. *Govind* (2). And, looking at the question apart from those authorities, I think we must come to the conclusion that a thing may be an "instrument or means" of gaming or wagering, although not "devised or intended for that purpose," or "primarily used for that purpose," or "destined for that purpose," or "proved to have no other use," in the sense in which these various phrases have been employed in the authorities touching this point. It seems to me that, looking, as we are bound to do, at the course of legislation on this subject, we ought to hold that any article which is in fact used as a means of wagering must be held to be within the definition, even though it may also serve some other purpose or purposes. This construction, it

(1) 34 L.J.M.C. 50.

(2) 16 B. 283.

1892

SEP. 20.

CRIMINAL REFERENCE.

17 B. 184.

will be noticed, is not open to the observations made by Mellor, J. in *Tollet* v. *Thomas* (1), that if half-pence are instruments of gaming, then we all carry these dangerous instruments. All do not use half-pence, in fact, as means of gaming or wagering, and in so far as they do, I do not know why under our Acts they should not be held to carry dangerous instruments. Nor do I think that s. 8 is in any way opposed to that view. I doubt whether, according to the decision in *Julius* v. *Bishop of Oxford* (2), the section ought to be construed as obligatory, as argued by Mr. Inverarity. But, even if it were so construed, I am not at all sure that the inconvenient and alarming consequences indicated by Mr. Inverarity would necessarily and unavoidably follow.

I ought, perhaps, to notice one other point. Mr. Inverarity cited Webster's Dictionary to show that the words "instrument" and "means" are convertible terms. Conceding that, I venture to think that the conclusion above expressed is nevertheless not vitiated, because I think it clearly fallacious to argue that as [197] means is convertible with instrument, and instrument is by judicial decision interpreted in a limited sense in certain Acts, therefore means also must necessarily bear the same limited construction in other Acts, even although these other Acts are *in pari materia*. I have already shown grounds for adopting a different mode of interpretation. And here I will only add, that it appears to me that instrument and means are convertible and co-extensive, according to Webster, only when the sense of the two words is taken generally, and not limited, as it is in *Watson* v. *Martin* (3) and other cases of that class.

The result is that, in my opinion, the clock here in question, although, of course, it may be, and, as stated in the case, is utilized, as it certainly is capable of being utilized, for other purposes, may nevertheless, in point of law, be also used as an instrument or means of wagering, within the meaning of the Prevention of Gambling Acts. Whether it is in point of fact so used, is a matter on which we cannot properly give an opinion under s. 432 of the Criminal Procedure Code.

I, therefore, agree with Mr. Justice Parsons in thinking that the Chief Presidency Magistrate must be left to come to his own finding, on the evidence before him, as to the questions of fact, and then decide whether the conditions laid down in s. 3 of the Act are satisfied, having regard to the interpretation of the conditions which we have now stated.

(1) L. R. 6 Q. B. 514. (2) 5 Ap. Ca. 214. (3) 34 L. J. M. C. 50.

17 B. 197.

ORIGINAL CIVIL.

1892
SEP. 30.
ORIGINAL CIVIL.
17 B. 197.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Bayley.

THE BOMBAY BURMAH TRADING CORPORATION, LIMITED, *(Original Defendants), Appellants v.* F. YORKE SMITH, *(Original Plaintiff), Respondent.** [30th September, 1892.]

Company—Shareholder—Executor, or administrator of a shareholder, rights of—"Holding a share," meaning of—Agreement—Construction—Declaratory decree—Specific Relief Act (I of 1877), s. 42—Objection taken for first time in appeal—Practice—Procedure.

Prior to the year 1863 W. Wallace carried on an extensive timber trade in Burmah. In that year the defendant company was formed for the purpose of **[198]** taking over the business from him together with the capital and assets engaged therein. The nominal capital of the company was Rs. 25,00,000 divided into one thousand shares of Rs. 2,500 each. On the 22nd July, 1864, an agreement carrying out the above object was executed between W. Wallace and the defendant company. This agreement set forth the assets and property to be transferred, and classified them as (*a*) "fixed assets," which consisted of immoveable property, buildings, &c., valued at Rs. 2,76,000, or thereabouts; and (*b*) assets other than fixed assets, which consisted of what were called "forest operations," and of valuable contracts, rights and concessions from the King of Burmah, &c. The agreement further specified the consideration to be paid to W. Wallace for each of these classes of assets. For the "fixed assets" he was (under the 12th clause of the agreement) to receive one hundred fully paid up shares of the company. That clause contained certain provisions as to the payment of the ordinary dividend upon those shares, and concluded with a provision that the directors of the company should not be bound to consent to or to recognize as valid any assignment made by W. Wallace, his executors or administrators of the shares, or any of them, within five years from the date of the registration of the company.

For the remaining assets it was provided by the 13th clause of the agreement that W. Wallace, his executors, or administrators, should be entitled, *so long as he or they should hold the hundred shares, to an extra or preferential dividend* payable out of such surplus net profits as might remain in any year after paying a dividend of twelve per cent, on all the shares of the company including the said hundred shares and after setting apart an amount (left to the discretion of the directors) for the reserve fund. The said extra or preferential dividend was to be one-third of such surplus net profits. The said 13th clause also provided that if W. Wallace died within the above stated period of five years, his executors or administrators should not be entitled to the said extra or preferential dividend after the expiration of the said period, notwithstanding that they might continue to hold the said shares.

Subsequently to the execution of this agreement the business and assets were transferred to the company by W. Wallace, and one hundred fully paid up shares were duly allotted to him under cl. 12, and his name was entered on the register of shareholders. In 1888, W. Wallace, then domiciled in England, died. By his will he appointed his three brothers—R. Wallace, L.A. Wallace, and A. F. Wallace—his executors, and he directed that his executors should hold the said shares and all his interest therein and attached to the holding thereof upon trust for such of his said brothers as might survive him, if more than one, as joint tenants. R. Wallace died in the testator's lifetime, and only A.F. Wallace proved the will. On the 27th September, 1888, letters of administration with the will annexed were granted by the High Court of Bombay to the plaintiff in this suit (F. Yorke Smith) as attorney for the said executor A.F. Wallace. On the 29th September, 1889, the said letters of administration were produced to and registered with the defendant company. The hundred shares continued to stand in the testator's name in the register of shareholders. In a parallel column in the register, under the heading "Remarks" the following entry was made:—"Administration in India to the estate of W. Wallace has been granted to **[199]** Mr. Frederick Yorke Smith as attorney for W. A. F. Wallace." Save for this entry the register remained unaltered after the testator's death.

* Suit No. 249 of 1890.

1892
SEP. 30.

ORIGINAL CIVIL.

17 B. 197.

The plaintiff now sued to have it declared that cl. 13 of the agreement was still in operation, and that as such administrator as aforesaid he was entitled to the extra or preferential dividend payable on the said hundred shares if and when there should be sufficient net profits to allow payments thereof under the said clause. The company disputed the plaintiff's claim. They contended that A. F. Wallace, the proving executor of the testator's will, had ceased to hold the shares as executor, and was holding them as trustee under the specific bequest in the will, and that he was only entitled to the preferential dividends, if at the time when such dividends were declared he was holding the shares in the capacity of executor and as an undistributed part of the testator's estate. They insisted that the plaintiff should prove that he so held the shares before he could be entitled to the declaration sought for. The executor was examined in England on commission. He deposed that the estate had been got in, and the debts paid; that the estate had not been divided, because it would not be in accordance with the private wishes of the testator, which they (*i e.*, he and his brother L.A. Wallace) were aware of; that, apart from these private wishes, there was no reason why the estate should not be divided between his brother and himself.

Held, by Farran, J., and by the Court of appeal, that the plaintiff was entitled to the declaration sought for. The executor or his attorney (the plaintiff) was still the registered holder of the shares, and under cl. 13 of the agreement it was intended that W. Wallace, his executors or administrators should be entitled to the extra dividend so long as he or they should be the registered holder or holders of the shares, without reference to the beneficial interest therein. There was nothing to be found in the agreement, express or implied, showing the intention of the parties to regard anything but the legal holding, and to go beyond that holding would virtually be to add a new term to the agreement.

In appeal, the defendants contended that the Court would not make a declaratory decree with regard to a right which (as in the present case) was future and contingent, there being no fund actually in existence when the suit was brought, from which a preferential dividend could be claimed, and no certainty that there ever would be such a fund.

Held, by the Court of appeal, that the present case was one in which in the interests of both parties the Court, in the exercise of a sound discretion, should make a declaration as to the right in question. The right was existent, and although the exercise of it was undoubtedly contingent on there being a balance of profits as contemplated by cl. 13 of the agreement, the very nature of the agreement assumed that there might and probably would be such a balance, and a large sum had been already applied towards the dividend in question. Further, it was intended that the directors should exercise their discretion as to the amount to be carried to the reserve fund upon which the balance of profit available for the preferential dividend depended. It was, therefore, from the very nature of the case, important that the directors should know for certain whether the right to a preferential dividend was still in existence as contended by the plaintiff, [200] or had come to an end. The circumstance, moreover, that the objection had been taken for the first time on appeal would by itself be fatal to it.

[Affirmed., 19 B. 1 (**P.C.**)=21 I.A. 139=6 Sar. P.C.J. 498.**]**

THE plaintiff (respondent) was the administrator with copy of the will annexed, in India, of the estate of one William Wallace, who died on 28th January 1888.

For some years previous to the year 1863 the said William Wallace had carried on an extensive timber trade, in its various branches, at Rangoon and other places in Burmah: the firm of Wallace and Co. of Bombay, acting as his agents in Bombay in that business.

In the year 1863 the defendant company was formed and registered under Act XIX of 1857 for the purpose of taking over the said trade and business and the capital and assets of the said William Wallace engaged therein.

By the clauses and articles of association of the company, Wallace and Co. of Bombay, were to be the secretaries and treasurers. The nominal capital of the company was Rs. 25,00,000, divided into one thousand shares of Rs. 2,500 each.

On the 22nd July 1864, an agreement carrying out the above object was executed between the defendant company and the said William Wallace. The agreement stated the formation of the company and its objects, and set forth the various property and assets of which the said William Wallace was possessed, or to which he was entitled in connection with his trade in Burmah. Part of the assets were referred to in the agreement as "fixed assests," and consisted of immoveable property, buildings, &c., which were valued at Rs. 2,76,000, or thereabouts. The remainder consisted of what were termed "forest operations" in Burmah and of certain valuable contracts and certain valuable rights or permits from the Government of India and from the King of Burmah, &c.

The agreement specified the consideration to be paid to W. Wallace for both the above classes of assets which were to be taken over from him by the company. For the "fixed assets" he was to receive (as provided by the 12th clause of the agreement) **[201]** one hundred fully paid up shares in the company. The said clause contained certain provisions with respect to the *ordinary* dividend to which he was to be entitled in respect of these shares, and concluded with a provision that the directors of the company should not be bound to consent to or to recognize as valid, any assignment made by William Wallace, his executors or administrators of the shares, or any of them, within five years from the date of the registration of the company. The said twelfth clause was as follows :—

"12. In consideration of the transfer, by the said William Wallace to the company, of the said *fixed assets*, the said William Wallace, his executors or administrators shall be entitled to have allotted to him or them one hundred shares in the said company, of rupees two thousand and five hundred each, the whole amount of which shall be deemed to have been paid up; but the said William Wallace, his executors, administrators or assigns shall not be entitled, in respect of such one hundred shares or any of them, to participation of any dividend which may be declared in respect of profits up to the thirty-first day of May one thousand eight hundred and sixty-four, nor shall he or they at any time be entitled to any dividend in respect of the same one hundred shares respectively, save in respect of so much of them respectively as in respect of any other one hundred shares of the same amount in the said company respectively shall for the time being have been actually called up and become due to the said company respectively, but from and after the thirty-first day of May, 1864, the company shall pay to the said William Wallace, his executors, administrators or assigns interest at the rate of seven and a half per cent. per annum on the difference for the time being between the amount of the one hundred shares so allotted and the amount actually for the time being called up and become due in respect of any other one hundred shares of like amount in the said company, provided that, in the event of the said company increasing their capital before calling up the full amount of the original shares, then and in such case the interest to be paid to the said William Wallace on the uncalled amount of such shares shall, if the rate of dividend paid in any year on any class of shares shall exceed seven and a half per cent., be equal to the rate of such dividend in addition to the said one hundred shares so to be allotted to the said William Wallace, the said company shall be liable to pay to him, his executors or administrators the amount of the sums expended by him or on his account since the beginning of the month

1892
SEP. 30.
ORIGINAL CIVIL.
17 B. 197.

of February, 1864, in, upon the erection of Engineers' and other dwelling-houses and offices or otherwise in or upon the improvement of the said fixed assets or any part thereof, and the amount so become payable as last aforesaid shall be deemed to have accrued due on the thirty-first day of May, 1864, provided always that the said company or directors shall not be bound to give their consent to, or in any way to recognize as valid any assignment which the said William Wallace, his executors or administrators may have made or purported to make of the said one hundred shares, or any of them, during a period of five years from the date of registration of the company."

[202] The thirteenth clause of the agreement stated the consideration payable in respect of the assets other than the "fixed assets," and certain specified timber and live-stock. For these assets it provided that William Wallace, his executors or administrators, should be entitled, as long as he or they should hold the hundred shares, to an extra or preferential dividend payable out of such surplus net profits as might remain in any year after paying a dividend of twelve per cent. on all shares of the company including the said hundred shares and after setting apart an amount (which was left to the discretion of the directors) for the reserve fund. (The said extra or preferential dividend was to be one-third of such surplus net profits, and, in addition, William Wallace, his executors, administrators and assigns were to share *pari passu* with the other share-holders in the remaining two-thirds of such surplus net profits, &c. The clause concluded by providing that, if William Wallace died within the above stated period of five years, his executors or administrators should not be entitled to the said extra or preferential dividend after the expiration of the said period, notwithstanding they might continue to hold the said shares. The said thirteenth clause was as follows:—

"13. In consideration of the transfer by the said William Wallace to the company of the premises hereby agreed to be transferred (other than the said fixed assets and other than the premises mentioned in the clauses six, seven, and nine), the said William Wallace, *his executors or administrators shall be entitled, so long as he or they shall hold the said one hundred shares, to an extra or preferential dividend* equal to one-third of such surplus net profits of the company as may remain in any year after paying a dividend at the rate of twelve per cent. per annum on the paid up amount of all shares in the company (including the said one hundred shares) and after setting apart from time to time out of such surplus profits as a reserve fund or to the credit of any reserve fund already created such sum as the directors of the company for the time being may in their discretion think fit, provided always that nothing herein contained shall operate to take away the right of the said William Wallace, his executors, administrators and assigns to share *pari passu* with other share-holders of the company in the remaining two-thirds of the said surplus net profits, and provided also that nothing herein contained shall operate to prevent the directors for the time being of the company from exercising any such discretion as but for these presents they might have exercised in respect of setting apart profits as a reserve fund, or in respect of applying any reserve fund or any part of any reserve fund or any part of any reserve fund formed in any preceding year or years to the payment of any dividend or dividends for any succeeding year or years, but nevertheless any sum taken from the reserve fund for dividend shall be deemed to be [203] and form part of the income or profits of the company for all years in which it is taken, provided further and it is hereby agreed between the

said parties that, in the event of death of the said William Wallace before the expiration of the said period of five years, his executors or administrators, notwithstanding they may continue to hold the said one hundred shares, shall not be entitled to the said extra or preferential dividend thereon after the expiration of the said period of five years."

In due course, after the execution of the said agreement, William Wallace transferred to the company the said "fixed assets" and other properties and rights agreed by him to be so transferred, and he performed all that was required to be done by him under the agreement, and one hundred fully paid up shares in the company, of Rs. 2,500 each, were allotted to him pursuant to cl. 12 above set fourth, and his name was duly entered in the register of shareholders of the corporation as the owner thereof.

Subsequently, *viz.*, in May, 1866. the company, by a special resolution, adopted as one of the articles of association a clause whereby the various arrangements and agreements contained in the above agreement were approved and sanctioned by the company, and it was provided that the directors should at all times have full power to do all such acts and things and to enter into such engagements on the part of the company as might be necessary for the better and more effectually carrying out of the said arrangements and agreements.

On the 28th January, 1888, William Wallace, then domiciled in England, died, having made his will, dated 25th May, 1880. By this will he appointed his three brothers—Richard Wallace, Lewis A. Wallace and Alexander F. Wallace—his executors, and directed that his executors or administrators should hold the shares and all his interest therein and attached to the holding thereof in trust for such of themselves as should survive him, if more than one, as joint tenants.

The following was his will :—

"Whereas I am entitled to one hundred fully paid up shares in the Bombay Burma Trading Corporation, Limited, which shares are standing in my name and so long as I or my executors or administrators shall hold the said shares, we are entitled to an extra or preferential dividend equal to one-third of the surplus net profits of the company as in the articles of association of the company and in the agreement therein referred to is more fully set forth. Now I hereby direct **[204]** that my executors or administrators shall hold those shares and all my interest therein and attached to the holding thereof upon trust for and so that the same shall be at the absolute disposal of such of my brothers Lewis Alexander Wallace, Richard Wallace, and Alexander Falconer Wallace as shall survive me, if more than one, as joint tenants, and as to all the residue of my real and personal estate whatever and wheresoever to which I or any person or persons in trust for me may be entitled at the time of my decease I do hereby give devise, and bequeath the same unto such one or more of my brothers Richard Wallace, Lewis Alexander Wallace, and Alexander Falconer Wallace as shall be living at the time of my decease, and if more than one in equal shares as tenants in common and not as joint tenants for his and their own absolute use and benefit, and as to all estates, if any, vested in me upon trust or by way of mortgage I give the same to the said Lewis Alexander Wallace, Richard Wallace and Alexander Falconer Wallace, executors of this my will, and I revoke all former or other testamentary writings by me at any time made."

1892
SEP. 30.
ORIGINAL CIVIL.
17 B. 197.

One of the brothers (Richard) died in the lifetime of the testator, and only one (*viz.*, Alexander F. Wallace) of the two surviving brothers proved the will. He proved the will in England on the 5th June 1888.

Letters of administration with the will annexed were granted by the High Court of Bombay to the plaintiff F. Yorke Smith, as attorney of the said Alexander F. Wallace, the executor, on the 27th September 1888.

The letters of administration were on the 29th September 1888 produced to and registered with the company, and the hundred shares in the company which had been originally allotted, as above mentioned, to William Wallace, continued to stand in his name in the register of shareholders. In a parallel column in the register, under the heading "Remarks," the following entry was made :—"Administration in India to the estate of William Wallace has been granted to Mr. Frederick Yorke Smith as attorney for Mr. A. F. Wallace." Save for this entry the register remained unaltered after Mr. Wallace's death.

The following clauses in the articles of association of the defendant company provided for the devolution of shares on the death of a shareholder:—

"XXIX.—The executors or administrators of a deceased shareholder shall be the only persons recognized by the company as having any title to his share. But no person shall be recognized as executor, administrator, or representative **[205]** of a deceased shareholder, but upon production of probate or letters of administration granted to such executor, administrator or representative by the High Court of Judicature at Bombay.

"XXX.—Any person becoming entitled to a share in consequence of the death, bankruptcy, or insolvency of any shareholder, or in consequence of the marriage of any female shareholder, may be registered as a shareholder upon such evidence being produced as may from time to time be required by the directors.

"XXXI.—Any person who has become entitled to a share in consequence of the death, bankruptcy, or insolvency of any shareholder may, with the consent of the directors, instead of being registered himself, elect to have some person to be named by him and approved by the directors registered as a transferee of such share."

The plaint in this suit was filed on the 26th April, 1890. The plaintiff claimed to be entitled, as administrator of William Wallace, to the extra or preferential dividend in respect of the hundred shares provided by cl. 13 of the agreement.

The plaint, after stating the facts above set forth, continued :—

"17. The plaintiff submits that under the circumstances hereinbefore appearing he is as such administrator aforesaid entitled to the extra or preferential dividend payable in respect of the said hundred shares under cl. 13 of the said agreement if and when there shall be sufficient net profits to allow the payment thereof under that clause. The company, however, does not admit that he is so entitled, and suggests that that clause has now ceased to have any operation."

The prayer of the plaint was—

"that it may be declared that the said cl. 13 is still in operation, and that the extra or preferential dividend payable on the said 100 shares provided for by cl. 13 is still payable and is payable to the plaintiff as such administrator as aforesaid, if and when there shall be sufficient net profits to allow the payment thereof under that clause."

The defendant company disputed the claim of the plaintiff. They filed a written statement as follows :—

"The defendants believe that, in the events which have happened, Alexander Falconer Wallace in the plaint named as proving executor of the will of William Wallace, deceased, now holds the shares in the plaint referred to in the character of trustee of the same as specifically bequeathed by the said will, and not in the character of executor.

[206] "2. The defendants submit that the plaintiff is entitled to the preferential dividends in the plaint referred to, upon the assumption only that the said shares shall, when such dividends may be declared, be held by the executor of the said testator in the capacity of executor and as an undistributed part of the testator's estate, and not otherwise.

"3. The defendants claim that the plaintiff must prove that the said shares are so held as in the last paragraph stated before he can be entitled to the declaration sought in this suit."

The executor (A. F. Wallace) was examined on commission in London as a witness for the defendants on the 23rd November 1891. He deposed (*inter alia*) as follows :—

"All the estate in England of the testator has been got in for some time and is now represented by money lodged with my firm as bankers. All the debts of the estate were paid as they came in ; the only outstanding one that I am aware of is that for legal expenses connected with the present proceedings. I personally and my brother Lewis Alexander are, under the terms of the will, absolutely entitled, but we are in possession of private instructions or rather private knowledge as to the wishes of the testator. The estate has not been divided, because it would not be according to the private wishes of the testator which we are aware of, and which concern the interest of minors. These private wishes had nothing to do with the dividends on the 100 shares, or with the right to those dividends. Apart from these private wishes there is no reason why the estate should not be divided between myself and my brother. I cannot name a time at present at which the account will be closed, and the estate distributed, in accordance with the testator's wishes. By virtue of these wishes I and my brother consider ourselves trustees for certain persons, with discretion as to the selection of the objection. These persons are now in existence. We have not exercised our discretion in any binding way among them."

At the hearing, counsel for the defendants raised the following issues :—

1. Whether Alexander F. Wallace now holds the shares referred to as trustee for the specific legatee or as executor of the testator ?
2. Whether cl. 13 of the agreement referred to in the pleadings is still in operation ?
3. What is the proper construction of the said clause ?
4. Whether the plaintiff is entitled to the relief claimed, or to any and what part thereof ?

Counsel for the plaintiff raised—

5. Whether the defendants are entitled to raise the question raised in the first issue ?

[207] *Kirkpatrick* (*Scott* with him), for plaintiff.—The administration is still open, and the executor is entitled to the extra dividend payable under cl. 13 of the agreement. So long as there is an executor, and until the shares are actually transferred, the executor, as representing the estate, can take the dividend. There is no limit of time as to the obligations imposed on the executor by the agreement (see cls. 4 and 10

1892
SEP. 30.
——
ORIGINAL
CIVIL.
——
17 B. 197.

of the agreement (1) and see also art. 145 of the Articles of Association (2)), and, if the executor is still liable to the burdens, he is still entitled to the benefit. The concluding words of cl. 13 set forth the only case in which the executor is not to get the dividend. The benefit of the agreement was clearly not limited to the life of Wallace, for it was to go to his executors. The holder meant in the agreement is not necessarily a beneficial holder, for under it executors may hold, and executors do not hold beneficially.

The estate is the real holder of the shares through its representative the executor. See Buckley on Companies, (6th Ed.), notes **[208]** to s. 76, p. 204, and notes to art. 12, Table A, p. 461. Once a holder of shares is duly registered he continues to be the holder until he executes a transfer of the shares. No transfer of these shares has been executed, and the register is unaltered. As to the position of executors, see *Buchan's case* (3). The defendants contend that under the agreement the executor must hold as executor, but that here he now holds as trustee. But the register does not and cannot show that he holds as trustee (ss. 53 and 126 of the Indian Companies Act, VI of 1882), and it is from the register alone that the holder is ascertained. The company cannot raise any question as to the capacity in which the person on the register holds. They cannot call on the executor to show that he is not a trustee. He may be a trustee, but that does not concern the company. It is bound by its register—Buckley on Companies (6th Ed.), p. 88 ; *Pulbrook* v. *Richmond Consolidated Mining Co.* (4) ; *Ex Parte Bugg* (5) ; *In re Perkins* (6) ; *Turquand* v. *Kirby* (7) ; *Pender* v. *Lushington* (8). The company could still regard the estate as holder of the shares, and enforce claims against it. If so, the estate has a right to the dividend—*Keene's Executors' case* (9) ; *Ex parte Bulmer* (10) ; *Ex parte Gouthwaite* (11). An executor may be also a trustee—Williams on Executors (8th Ed.), p. 1804. As to the assent of executor, see Indian Succession Act (X of 1865), ss. 293, 295 ; Williams on Executors (8th Ed), pp. 1386—1388.

---

(1) (Clause 4).—Provided always that the said William Wallace, his heirs, executors and administrators shall and will at all times at the expense of the said company execute, do and take or cause to be executed, done and taken all such conveyances, assignments, acts and proceedings as may be in his or their power, in order that the rights of him the said William Wallace under the said permits and grants and under the said contracts may be secured to and exercised and enjoyed by the said company, their successors and assigns.

(Clause 10).....the said William Wallace, his executors and administrators will do all things in his or their power to induce such persons to remain in the service of the said company and others to secure to the company and their successors the advantages and benefits of such good will.

(2) Article 145 of the Articles of Association.—The Directors shall have power, if they shall see fit so to do, to enter into any new agreement or agreements with or to be binding upon any assignee or assignees, transferee or transferees, of the said one hundred shares of the said William Wallace, or any of them, which may be assigned or transferred by the said Willam Wallace, before or after the expiration of the said five years with the consent of the Directors such as shall impose upon such assignee or assignees, transferee or transferees, the same liabilities and obligations towards the said Company as were undertaken by the said William Wallace, by said Indenture of the 22nd day of July, 1864, in all that relates to the said shares, and every such agreement as last aforesaid shall be binding on the parties, any clause or regulation herein contained to the contrary notwithstanding, as if the provisions thereof were by these regulations specially excepted or affirmed and approved.

(3) 4 Ap. Ca. 595 (596). (4) 9 Ch. D. 610. (5) 2 Dr. and Sm. 452.
(6) 24 Q. B. D. 613. (7) L. R. 4 Eq. 123. (8) 6 Ch. D. 70.
(9) 3 D. M. and G. 272. (10) 33 L.J. (Ch.) 609. (11) 3 Mac. and G. 187.

Latham, Advocate-General (*Jardine* with him), for defendants.—It is clear that the estate has been administered, and the duty of the executor is ended. He has ceased to hold as executor, and now holds as trustee and acts as such—Lewin on Trusts (9th Ed.), p. 204; Williams on Executors (8th Ed.), p. 1380. The shares ought to be transferred to those who are entitled to them under the will. Not to do so, but to allow the register to remain as it is for the purpose of claiming the dividend as executor, is really a fraud on cl. 13 of the agreement. It could not have been intended that the extra dividend should be payable for ever to Wallace's estate. The agreement evidently intended that five **[209]** years' enjoyment of the extra dividend should satisfy Wallace's claim. For five years it secured that his interest and service should be given on behalf of the company. In cl. 13 the word "hold," in the sentence "so long as they should hold the hundred shares," means holding as executors, not as trustees. The executor has clearly assented to the legacy of these shares, and it is no longer held as part of the general estate. *Ex parte Bulmer* has been relied on, but the authority of that case is now shaken See *Bainbridge* v. *Smith* (1). A company may be affected by a trust. It cannot disregard equitable titles: see Buckley on Companies, (6th Ed.), p. 86 *et seq.*; *Binney* v. *Ince Hall Coal Co.* (2).

11*th March*, 1892. FARRAN, J.—The plaint in this suit prays that it may be declared that cl. 13 of a certain agreement of 22nd July, 1864, made between William Wallace of the one part and A. F. Wallace and four other directors of the defendants' corporation on its behalf of the other part, is still in operation; and that the preferential dividends on the 100 shares referred to in the clause is still payable; and that it is payable to the plaintiff as administrator with the will annexed of the said William Wallace, now deceased.

The plaint does not ask for consequential relief. No objection has been taken by the defendants on that ground under s. 42 of the Specific Relief Act, and as no fiscal regulation is contravened by the omission, I see no reason why the Court should raise the objection of its own motion.

From the recitals in the agreement, it appears that the defendants' corporation, originally called the Burmah Trading Company, Limited, was established in 1863 with the object of carrying on trade, and especially the timber trade, with Burmah and its neighbouring States, and, for that purpose, of acquiring and working forests in Burmah. Its secretaries, treasurers and managers were to be the firm of Messrs. Wallace and Co., of Bombay. That firm were the agents of William Wallace of Burmah. William Wallace, before the formation of the company, had been, and was at the date of the agreement, carrying on the **[210]** timber trade in Burmah; and the object of the agreement was that the company should take over the business and assets of William Wallace in Burmah as a going concern on terms equitable towards both parties.

The property of William Wallace in Burmah consisted partly of immoveable property, buildings, mills, works and machinery easily capable of valuation, which in the agreement were termed "fixed assets," and partly of assets upon which it was difficult to place a money valuation, such as concessions and expected concessions from the King of Burmah and the Government of India, running contracts with natives of Burmah for cutting timber, the possession of a trained and organised staff, and generally the good-will of a very peculiar business depending

(1) 41 Ch. D. 462.

(2) 35 L. J. (Ch.) 363.

1892
SEP. 30.
ORIGINAL CIVIL.
17 B. 197.

largely for its successful working on the loyal co-operation of William Wallace with those who carried it on.

The earlier clauses of the agreement provide for William Wallace making over both classes of property to the company. Clauses 12 and 13 contain the consideration which Mr. Wallace was to receive from the company. Clause 12 provides that, in consideration of the transfer by William Wallace of his "fixed assets," he, his executors, and administrators shall be entitled to have allotted to him or them 100 shares of the company, of Rs. 2,500 each, the whole amount of which shall be deemed to have been paid up. Then follow certain provisions regulating the payment of the ordinary dividend on the 100 shares, and the clause concludes as follows:—"Provided always that the company shall not be bound to give their consent to or in any way recognize as valid any assignment which the said William Wallace, his executors, or administrators may have made or purported to make of the said 100 shares or any of them during a period of five years from the date of the registration of the company." That proviso seems to me to be of importance when considering the interpretation to be put on the succeeding clause. It shows that for some reason the parties to the agreement considered it to be of importance to the company that not only William Wallace in his lifetime, but that his executors or administrators after his death, should not assign his shares; but **[211]** that his executors or administrators should hold his shares for some time. This must have been irrespective of the beneficial disposition which William Wallace should make of his shares. Then comes cl. 13 —"In consideration of the transfer by the said William Wallace to the company of the premises hereby agreed to be transferred" (other than the said fixed assets and other than the premises mentioned in cls. 6, 7, and 9, *viz.*, certain timber and stores in hand) the said William Wallace, his executors or administrators shall be entitled, so long as he or they shall hold the said 100 shares, to an extra or preferential dividend, equal to one third of such surplus net profits of the company as may remain in any year after paying a dividend at the rate of 12 per cent. per annum of the paid-up amount of all shares in the company (including the said 100 shares) and after setting apart from time to time, out of such surplus profits, as a reserve fund, or to the credit of any reserve fund already created, such as the directors of the company for the time being may in their discretion think fit. Provided always that nothing herein contained shall operate to take away the right of the said William Wallace, his executors, administrators and assigns to share *pari passu* with other shareholders of the company in the remaining two-thirds of the remaining surplus assets." Then follows another explanatory proviso, and the clause concludes:—"Provided, further, and it is hereby agreed between the said parties, that, in the event of the death of the said William Wallace before the expiration of the said period of five years, his executors or administrators, notwithstanding that they may continue to hold the said 100 shares, shall not be entitled to the said extra or preferential dividend than after the expiration of the said period of five years." Pausing here for a moment, I may remark that the holding of the shares by the executors or administrators of William Wallace after his death is put practically on the same footing whether he dies within the five years' period or beyond it. In the former case, they are forbidden to assign the 100 shares until the five years' period expires, and they receive the preferential dividend. In the latter case, the right of the executors or

1892
SEP. 30.
ORIGINAL
CIVIL.
17 B. 197.

administrators to receive the preferential dividend is limited only by their [212] ceasing to hold the 100 shares. They are allowed to assign after the five years' period expires; but, if they did so, they were to lose their right to the preferential dividend.

William Wallace died on the 8th January 1888, and consequently after the period of five years limited by the agreement had expired. He left his will, dated the 25th May 1880, unrevoked, and thereby appointed R. Wallace, L. A. Wallace, and A. F. Wallace his executors. Of these R. Wallace predeceased the testator. A. F. Wallace alone proved the will in England. The plaintiff, F. Yorke Smith, as his attorney, has taken out letters of administration to the estate of William Wallace here, with copy of the will annexed.

The testator, William Wallace, by his will, after referring to the conditions under which the 100 shares in the defendants' corporation were held, and to the preferential dividend attaching thereto, directed his executors or administrators to hold the same, and all his interest therein, upon trust, so that the same should be at the absolute disposal of such of his brothers as should survive him. The residue of the testator's property under the terms of the will is given also to the same beneficiaries. Acting under instructions from the plaintiff as representing the estate in India, the defendants' corporation has left the 100 shares upon the register in the name of William Wallace, appending a note thereto, that administration in India to the estate of William Wallace has been granted to the plaintiff as attorney for Mr. A. F. Wallace.

Whether this be the correct mode of keeping the register or not, I think that, for the purposes of this case, it must be deemed that the executor of William Wallace is now the registered holder of the 100 shares. The parties to the agreement contemplate that there could be a holding of shares by an executor. Clause 12 of the agreement, as well as cl. 13, refers to such a holding and the agreement recites one of the articles of Association of the company, which provided that no shareholder should hold more than 25 shares at one time on his own account, nor should any shareholder hold more than that number at any one time in any one representative capacity—a proviso which, [213] however, was not to apply to William Wallace if he became a shareholder. The general estate of William Wallace has all been got in, and is now represented by a sum of money standing to the credit of his executors in England in the books of Wallace Brothers in London as bankers of the executor. There are no assets of William Wallace in India, except the 100 shares in question, with the preferential dividend (if any) payable in respect of them, and as to these shares the plaintiff says that L. A. Wallace and A. F. Wallace are entitled to call upon the administrator of the estate to transfer the same to them. In this sense, he says that the beneficial interest in the 100 shares is vested in them. The estate, therefore, of William Wallace is ready to be handed over to the beneficiaries under this will. This has not been done, because the testator entertained wishes, known to his executor, as to its ultimate disposition, which cannot at present be carried into effect. It is not clear, from the evidence of the executor, Mr. A. F. Wallace, whether those wishes extended to the 100 shares or not. I rather think that Mr. A. F. Wallace intended to draw no distinction between the 100 shares and the rest of the estate.

The estate is all, however, still held by the executor, including the 100 shares. So far as the 100 shares are concerned, the estate has not

1892
SEP. 30.
ORIGINAL CIVIL.
17 B. 197.

been got in. If the defendants' corporation refused to deal with the shares according to the wishes of those entitled to them, the attorney for the executor, the administrator in India, would have to sue in respect of them, and conversely, if the defendants' corporation wished to obtain an order from the Court in respect of the shares, they would have to take proceedings against the attorney of the executor. The executor or his attorney is, in fact, still the registered holder of the shares. This is, in my opinion, what is meant by the executor "*holding*" the shares in cl. 13 of the agreement. Holding a share is the equivalent of being a shareholder and shareholder throughout the agreement, and the memorandum and articles of association of the company which must be read with, and in explanation of the agreement, has a fixed and definite meaning, *viz.*, that of registered holder. For example cl. 4 of the articles of association provides that "every person whose name shall be entered in the **[214]** register of shareholders as the owner of any share shall as regards the company be deemed to be the owner of such share." Again, cl. 7 states: "Every shareholder shall on payment * * * be entitled to a certificate under seal of the company specifying the share or shares held by him and the amount paid up thereon." I therefore read cl. 13 as if the words "shall be the registered holder or holders of" were substituted for their equivalent "shall hold." The clauses will then read: "In consideration of the transfer by the said William Wallace to the company * * * the said William Wallace, his executors, or administrators shall be entitled, so long as he or they shall be the registered holder or holders of the said 100 shares, to an extra or preferential dividend thereon." That appears to me to be the plain grammatical meaning of the sentence, and that is what we must first look to in construing an agreement. In attaching this meaning to the words, there is nothing, I think, repugnant to the rest of the agreement. I have already pointed out that, in the case of the five years' period coming into operation, it is contemplated that the executors shall hold the shares for the portion of that time unexpired at the death of the testator, without reference to the beneficial ownership of the shares.

If I am correct in so reading the clause, the fact that the registered holder of the shares is a trustee for some other person does not affect the company—*In re Perkins* (1). There is no qualification to the words "shall hold the shares" such as "in his or their own right." The question as to the meaning of this qualification, which was discussed in *Pulbrook* v. *Richmond Consolidated Mining Co.* (2) and in *Brainbridge* v. *Smith* (3), does not therefore arise. The absence, however, of words of qualification shows that the intention of the parties to the agreement was to disregard everything but the registered holding.

It is contended by the Advocate-General that under the circumstances which I have detailed, the executor of William Wallace must be taken to have assented to the specific bequest of the 100 shares, and he now holds them, not as executor, but as a **[215]** trustee for the beneficiaries. That may possibly be so as between the executor and the specific legatees. I express no opinion upon the point. It is not so, I think, as between the executor and the defendants' corporation. The latter have still the right to treat the executor, or the estate he represents, as the holder of the shares. That would be the case if the shares were

(1) 24 Q. B. D. 613. (2) 9. Ch. D. 610. (3) 41 Ch. D. 462.

liable to have calls made upon them—*Keene's Executor's case* (1); *Ex parte Bulmer* (2); *Ex parte Gouthwaite* (3). Here the shares are fully paid up, but the executor is under other obligations to the company, such as those imposed by cls. 4 and 10 of the agreement (4)—theoretical perhaps now, but such as must be taken into account in considering the legal position of the parties. Clause 145 of the articles (4) of the defendants' corporation would seem to indicate that the corporation consider them more than merely theoretical.

The Advocate-General further contends that it is a necessary implication arising from the wording of the agreement, that the preferential dividend was not intended to be perpetual, and, further, that the executor now continuing to hold the shares is a fraud, in its legal sense, upon the agreement. As to the latter point, if the agreement put no limit upon the period for which the executor should hold the shares after the death of William Wallace, I cannot see that he is not entitled to hold them se long as his beneficiaries and the law allow him to do so. To hold that the executor is bound to cease to hold the shares at any particular time, or at any particular stage of his executorship, would be, in effect, to introduce a new term into the agreement, or to construe it according to its supposed, and not according to its expressed, meaning. As to the preferential dividends not being intended to be perpetual, they are, in terms, limited to the period during which William Wallace, his executors, or his administrators, hold the shares. By appointments perpetually of administrators "*de bonis non*" to the estate of William Wallace, representation to him could be kept up theoretically indefinitely. It is not, I think, necessary in the thirteenth clause of the agreement to construe executors or administrators as [216] including administrators "*de bonis non*." In other clauses it may have to be so construed, but in this clause the expression is used to limit the period of the payment of the preferential dividend; and it seems to me that the expressed intention of the parties to the agreement will be carried out if the words are construed in their strict literal meaning. What, however, I decide is, that the preferential dividend is payable so long as the executor of William Wallace is the registered holder of the 100 shares.

I find on the issues—

(1) In so far as the defendants' corporation is concerned, that A. F. Wallace now holds the shares as executor of the testator.

(2) In the affirmative, and for the plaintiff.

(3) That the agreement is to be construed as set out in my written judgment.

(4) In the affirmative, and for the plaintiff.

(5) No finding.

Decree for the plaintiff. Declaration in terms of paragraph (*a*) of the plaint down to the word "aforesaid." Plaintiff to have his costs.

The following was the material portion of the decree:—

This Court doth pass judgment for the plaintiff, and doth declare that cl. 13 of the agreement dated the 22nd day of July 1864, hereinbefore mentioned, is still in operation, and that the extra or preferential dividend payable on the 100 shares provided for by the said cl. 13 is still payable to the plaintiff as administrator of William Wallace as in the plaint mentioned, and this Court doth construe cl. 13 of the said agreement in accordance

(1) 3 D. M. and G. 272.
(2) 33 L.J. (Ch.) 609.
(3) 3 Mac. and G. 187.
(4) See *supra*, 17 B. 207, note.

1892
SEP. 30.
ORIGINAL CIVIL.
17 B. 197.

with the written judgment of this Court, copy of the extract from which judgment, so far as it relates to the construction of the said clause, is hereunto annexed and marked A (1); and on the issue whether the defendants are entitled to raise the questions raised in the following issue, *viz.*, whether Allexander Falconer Wallace now holds the shares referred to, as trustee for the specific legatee, or as executor of the testator, this Court doth record no finding, &c., &c.

[217] The defendants appealed. In their memorandum of appeal they (*inter alia*) raised the point that the suit was not maintainable.

The plaintiff also filed objections to the decree. He objected, 1st, that it was unnecessary to decide whether an administrator *de bonis non* was or was not included in the words "executors or administrators" in the 13th clause of the agreement; 2nd, that, if it was proper to decide that point, the decision should have been that the said words did include an administrator *de bonis non*.

Inverarity (*Jardine* and *Anderson* with him), for the appellants.—This suit is not maintainable. The plaintiff asks merely for a declaration of a right to a dividend which does not at present exist, and which may never exist—Specific Relief Act (I of 1877), s. 42. The Court is asked to express an opinion as to the construction of the agreement in a hypothetical case, for no dividend has been as yet declared, and the directors have a discretion whether to declare one or not. There is no allegation in the plaint that there are or will be profits. The words in the prayer are "if and when"—Daniell's Chancery Practice (6th Ed.), p. 791; *Kevan* v. *Crawford* (2); *Bright* v. *Tyndall* (3); *Strimathoo Moothoo* v. *Dorasinga Tever* (4). We may take the point now though it was not taken in the Court below—*Raja Har Narain Singh* v. *Chaudrain Bhagwant* (5). The Courts are bound to take notice of the provisions of the Act.

Further, the declaration made by the decree is not the one prayed for. The decree assumes there are dividends. The plaint is framed on the assumption that there were none.

As to the construction of cl. 13 of the agreement, we say that as soon as it appears that the executor has ceased to hold as executor, and holds it as trustee, he has ceased to "hold" within the meaning of this clause. The executor could not probably be placed in the register as executor—*Buchan's case* (6). The Judge below regards the executor as the registered holder, **[218]** but he is not. The registered holder is William Wallace. But he is dead, and cannot be the holder—*Bainbridge* v. *Smith* (7). The estate is not the holder, for there is no estate now. It is administered. Wallace's will gives the executors the shares in trust for themselves. As soon as they began to hold "on trust" they ceased to hold as executors. At latest, they do so when all the estate is administered, that is, in this case when all the debts are paid, as there are no legacies. The estate therefore should have been transferred to the *cestuis que trustent*. It is possible to cease to be an executor and to hold as trustee—Lewin on Trusts (9th Ed.), p. 215; *Phillipo* v. *Munnings* (8); *Dix* v. *Burford* (9); *In re Smith* (10); *Northey* v. *Northey* (11)

---

(1) The extract referred to comprises from the words "The Advocate General" on p. 215 to the end of the judgment.

(2) 6 Ch. D. 42. (3) 4 Ch. D. 189. (4) 2 I. A. 169.
(5) 18 I. A. 55. (6) 4 Ap. Ca. 549. (7) 41 Ch. Div. 462.
(8) 2 My. and Cr. 315. (9) 19 Bea. 409. (10) 42 Ch. D. 302.
(11) 2 Atkins, 76.

1892
SEP. 30.
ORIGINAL CIVIL.
17 B. 197.

If, then, as a fact, the executor now holds as a trustee, can he claim to hold as executor within the meaning of cl. 13? He claims to be the registered holder. We contend, first, he is not the registered holder; secondly, we say that "holder" in cl. 13 does not mean registered holder. In the agreement the word has not the same meaning as it has in the Companies Act.

The construction which the plaintiff seeks to give cl. 13 involves this, that if William Wallace died within five years, his executors could only claim the extra dividend up to the expiration of the five years; but if, on the other hand, William Wallace survived the period of five years, and died at a later time, then, although he had received this dividend up to his death (receiving of course the more the longer he lived), yet he was further to be entitled to it in perpetuity. The mere fact of his surviving beyond the period of five years not merely gave to himself during his life a larger consideration for the property which he had transferred, but bound the company to go on paying the consideration for ever to his executors or administrators. It is impossible that the agreement could have intended this.

As to the effect of s. 53 of the Indian Companies Act (VI of 1882). Suppose William Wallace had sold the shares in his lifetime on the terms that his name should remain on the register for [219] the benefit of the vendee. If, as is contended, William Wallace in that case still "held" the shares, the vendee could nevertheless have sued the company, and the company would have to recognize him as *cestui que trust*—*Binney* v. *Ince Hall Coal Co.* (1). If the vendee ordered the company not to pay William Wallace, it could not do so. Under these circumstances could Wallace be said to be the holder of the shares?

Lang, Acting Advocate-General (*Scott* with him), for the respondent:—As to this suit not being maintainable because when filed no dividend had been declared, the appellants have no right to take this objection in appeal. If they had taken it below, the plaint could have been amended, as at the time of hearing a dividend had been declared. They cited *Curtis* v. *Sheffield* (2) and the cases relied on in the Court below.

JUDGMENT.

SARGENT, C. J.—This suit arises out of an agreement entered into by the directors of the Burmah Trading Company with Mr. Wallace for the purchase of the timber business which he had been carrying on in Burmah together with the capital, good-will, and assets appertaining to the same. By the 12th clause of that agreement it was agreed that 100 fully paid up shares in the company should be allotted to Mr. Wallace, in consideration of his transfer of the "fixed assets" of the business, and by the 13th article it was further agreed that, in consideration of the transfer of the other assets, "the said W. Wallace, his executors and administrators should be entitled, so long as he or they shall hold one 100 shares, to an extra or preferential dividend equal to one-third of the surplus net profits of the company as may remain in any year after paying a dividend at the rate of 12 per cent. per annum on the paid-up amount of all shares in the company, including the said 100 shares, and after setting apart from time to time out of such surplus profits, as a reserve fund or to the credit of any reserve fund already created, such sum as the

(1) 35 L.J. (Ch.) 363, (368).

(2) 21 Ch. D. 1.

1892
SEP. 30.
ORIGINAL CIVIL.
17 B. 197.

directors of the company for the time being should in their discretion think fit, &c."

Mr. Wallace died on the 28th January, 1888, having made a will, by which he appointed his three brothers, Messrs. R. Wallace, [220] L. A. Wallace, and A. F. Wallace, his executors, of whom Mr. R. Wallace predeceased the testator, and Mr. A. F. Wallace alone proved the will, which, after referring to the 100 shares and the preferential dividend attaching thereto, directed his executors or administrators to hold the same upon trust so as to be at the absolute disposal of such of his said brothers as should survive him. The plaintiff, as attorney to Mr. A. F. Wallace, has taken out letters of administration to the will in India, and a note that administration has been granted to him has been appended to the register, leaving the 100 shares upon the register still in the name of the testator.

The plaintiff prays "that it may be declared that the said cl. 13 is still in operation, and that the extra or preferential dividend payable on the said 100 shares, provided for by cl. 13, is still payable, and is payable to the plaintiff as such administrator as aforesaid, if and when there shall be sufficient net profits to allow the payment thereof under that clause." The defendants' written statement contends that, "in the events which have happened, A. F. Wallace, as the proving executor of the will of William Wallace, now holds the said shares in the character of a trustee of the same specifically bequeathed by the said will, and not in the character of executor; and that the plaintiff is entitled to the preferential dividends upon the assumption only that the said shares shall, when such dividends may be declared, be held by the executor of the said testator in the capacity of executor, and as an undistributed part of the testator's estate and not otherwise."

A preliminary objection has been taken that the Court will not make a declaratory decree with respect to a right which is future and contingent, as was said to be the case here, there being no fund actually in existence when the suit was brought from which a preferential dividend could be claimed, and no certainty that there ever would be such a fund. It was pointed out that the Court of Chancery in England does not, as a general rule, make a declaration with respect to future or contingent rights. Here, however, the right itself is existent, and although the exercise of it is undoubtedly contingent on there being a balance of profit, [221] as contemplated by cl. 13 of the agreement, the very nature of the agreement assumes that there may and probably will be such balance, and indeed the past history of the company shows that more than four lakhs have already been applied towards the preferential dividend in question. Further, it is plain that it was intended that the directors should exercise their discretion as to the amount to be carried to the reserve fund, upon which the balance of profit available for the preferential dividend depends, with some regard to the fact that it was agreed to be paid as the consideration for the transfer of the assets other than the "fixed assets." It is, therefore, from the very nature of the case important that the directors should know for certain whether the right to a preferential dividend is still in existence, as contended by the plaintiff, or has come to an end. We think, therefore, that it is clearly a case in which, in the interests of both parties, the Court, in the exercise of a sound discretion, should make a declaration as to the right in question. It is also to be remarked that this objection has been taken for the first time on appeal—a circumstance which by itself is, in our opinion, fatal to it.

1892
SEP. 20.
ORIGINAL
CIVIL.
17 B. 197.

The real question between the parties in this case turns upon the meaning to be given to the expression "hold" in the 13th clause of the agreement, which provides for a preferential dividend being paid to Mr. Wallace, his executors and administrators "so long as he or they should hold the 100 shares," which, by the previous clause it had been agreed, should be allotted to him as the consideration for the transfer of the "fixed assets." By holding shares in its ordinary acceptation is meant being a "shareholder," *i.e.*, a person whose name is on the list of shareholders, or at any rate entitled to have his name placed on it, and the language of the latter part of cl. 13 shows that Mr. Wallace's holding was regarded as being in that character without any qualification being annexed to it.

As to what is meant by the executors and administrators of Mr. Wallace "holding" the shares, the agreement must be read in connection with the sections of the articles of association of the defendants' company which relate to the transmission of **[222]** shares. Those sections are ss. 29, 30 and 31, and provide that the executors and administrators of a deceased shareholder shall be the only persons that the company can recognize as having a title to the shares, and that they can be registered as shareholders, or elect to have some person to be named by them registered as a transferee of such shares. These articles show that the executors and administrators, although not entered on the register, are the only persons whose title can be recognized by the company. And as long as that is so between themselves and the company, they would be the "holders" of the shares in their representative character, in the sense that no one else could dispose of them, and there is nothing in this agreement to show that the executor and administrator were required to make themselves personally liable by having their own names placed on the register. The shares were fully paid up, and they would remain, in any case, until transferred by the executors and administrators of Mr. Wallace, subject to a lien in respect of all Mr. Wallace's obligations. By "holding" therefore, in the absence of anything in the agreement to show a contrary intention, must, in our opinion, in the case of the executors and administrators, be understood to be their continuing to be the only persons who could be recognized by the company as having a title to the shares; and the executor, Mr. A. F. Wallace, is still in that position with respect to the shares.

It is, however, objected by the defendants in their written statement that it never could have been intended that the executors and administrators should continue to be entitled to the preferential dividend after the debts on the estate of Mr. Wallace had been paid, as was admitted to be the case here; and that Mr. A. F. Wallace, the executor, who had taken out probate, would, it was contended, be regarded in a Court of Equity as a trustee for the person entitled to the shares under the will, *viz.*, for himself and his brother, Lewis Wallace. Whether Mr. A. F. Wallace would, under the circumstances disclosed by his deposition, be so regarded by a Court of Equity, is not necessary to determine, as we agree with Mr. Justice Farran that there is nothing to be found in the agreement express or implied, which shows an intention of the parties **[223]** to the agreement to regard anything but the legal "holding" under the articles of association by Mr. Wallace, his executors and administrators, and that to go beyond that holding would be virtually to add a new term to the agreement. There are no express words qualifying the "holding," and the language throughout the agreement, especially that of

1892
SEP. 30.
ORIGINAL CIVIL.
17 B. 197.

the proviso at the close of cl. 13, points to Mr. Wallace and his representatives, as the legal holders of the shares, being the only persons in the contemplation of the parties. Lastly, the very form of the consideration provided by cl. 13 for the transfer of the other assets, shows that the object the company had in view was to afford an inducement to Mr. Wallace and his executors to continue on the register as the holders of the shares.

These inferences as to the intention of the parties are entitled to special consideration from the circumstance that the agreement is not an inartificial document such as is often found in transactions of this nature, but a highly artificial instrument—the work obviously of a skilled draftsman We are of opinion, therefore, that Mr. A. F. Wallace, by his attorney, the plaintiff, is still holding the shares within the contemplation of cl. 13 of the agreement, and the plaintiff is, therefore, entitled to a declaration in the terms of the prayer of his plaint. We do not, however, think it advisable for the Court to express an opinion as to the construction of the expression "executor and administrator," a question which may never arise in the future, and is not raised by the pleadings.

We must, therefore, vary the decree by omitting the part of it which follows after the words "is still payable to the plaintiff as administrator of W. Wallace as in the plaint mentioned," but in other respects the decree is confirmed. Respondents to have their costs of this appeal.

Attorneys for the appellant: Messrs. *Craigie, Lynch and Owen.*

Attorneys for the respondent: Messrs. *Little, Smith, Frere and Nicholson.*

---

17 B. 224.

[224] APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Birdwood.

DAJI NILKANTH NAGARKAR AND OTHERS (*Original Plaintiffs*), *Appellants v.* GANPATRAO NILKANTH NAGARKAR (*Original Defendant*), *Respondent.** [30th September, 1891.]

Jurisdiction—Court of Agent for Sirdars in the Deccan—Suit in that Court—Pensions Act (XXIII of 1871), s. 4, applies to such suit—Collector's certificate—Reg. XXIX of 1827, ss. 4 and 6—Ordinary Rules—Reg. II of 1827.

A suit brought against a *sirdar* in the Court of the Agent for Sirdars in the Deccan, of the class specified in s. 4 of the Pensions Act (XXIII of 1871), requires a Collector's certificate, as provided by s. 6 of that Act.

THIS was an appeal from the decision of G. C. Whitworth, Agent for Sirdars in the Deccan at Poona.

Suit for an account and recovery of income.

The plaintiffs alleged that they and the defendant Ganpatrao Nilkanth Nagarkar, deceased (pending appeal to the High Court), who was a third class *sirdar*, were co-sharers in certain *jaghir*, *inam*, *saranjam* and other properties situate in the Ahmednagar District; that partition had taken place between the co-sharers, and that they had been separately receiving the income of their respective shares; that for the sake of convenience the lands had not been actually partitioned, and that the

---

* Appeal No. 123 of 1889.

income thereof had been collected with the assistance of a clerk named Gangadhar Balkrishna Godbole, who was appointed by all the co-sharers; that, latterly, this clerk in collusion with the defendant, who was the senior representative of the family, and under whom the clerk acted, declined to render accounts, &c. The plaintiffs therefore brought this suit for an account, &c. They further stated that the defendant being a third class *sirdar* was amenable to the jurisdiction of the Agent for Sirdars in the Deccan, and that they had therefore filed the suit against him in the Agent's Court and a separate suit against the clerk, Gangadhar Balkrishna, in the Subordinate Judge's Court.

The defendant, Ganpatrao Nilkanth Nagarkar, contended (*inter alia*) that as some of the property in dispute was service *vatan*, **[225]** the suit must fail for want of the Collector's sanction under the Pensions Act (XXIII of 1871).

The Agent for Sirdars held that the suit was barred owing to the plaintiffs' failure to produce the Collector's certificate under s. 4 of the Pensions Act (XXIII of 1871). On the authority of the case of *Babaji Hari* v. *Rajaram Ballal* (1) he dismissed the claim.

The plaintiffs appealed to the High Court.

Ganesh Ramchandra Kirloskar (with *Purushottam Parashuram Khare*), for the appellants:—The Collector's certificate is not required for a suit in the Agent's Court. It is necessary for a suit filed in an ordinary civil Court, but the Court of the Agent for Sirdars is not such a Court. The appointment of the Agent is made under s. 3 of Reg. XXIX of 1827, and ss. 4 and 6 lay down what suits shall be tried by the Agent and not by civil Courts. Under s. 4 of the Pensions Act a civil Court cannot maintain a suit without the Collector's certificate, but the Agent's Court not being a Court contemplated by the Act, a suit filed in his Court cannot fail for want of the certificate, the Agent being invested with a special jurisdiction. The Pensions Act cannot take away a jurisdiction which is specially created under a prior enactment (Reg. XXIX of 1827) for particular purposes. *Khusaldas* v. *Sakharam Ramchandra* (2) shows that the Court of the Agent was not considered to be a Civil Court under s. 284 of the Civil Procedure Code Act VIII of 1859.

In any case, we contend that the Agent was wrong in dismissing our suit wholly, as our claim includes certain other property to which the Pensions Act is not applicable, and the Agent ought at least to have proceeded to determine the suit with respect to that property.

Mahadeo Chimnaji Apte, for the respondent:—The Pensions Act lays down that no Civil Court shall entertain a suit without the Collector's certificate. There is no distinction drawn between the Court of a Subordinate Judge and that of the Agent for **[226]** Sirdars. The provisions of the Pensions Act apply to all Courts of civil jurisdiction, and what is to be determined is whether a particular Court is a Civil Court under Reg. II of 1827; and if so, s. 21 of the Regulation and s. 4 of the Pensions Act apply to suits brought in such a Court.

The plaintiffs brought the present suit to recover damages. The defendant has died, and the cause of action does not survive against his sons; moreover, owing to the defendant's death, the jurisdiction of the Agent ceases, because, though the defendant was a *sirdar*, his sons are not.

(1) 1 B. 75.

(2) 12 B.H.C.R. 212.

1891

SEP. 30.

APPEL-LATE CIVIL.

17 B. 224.

JUDGMENT.

SARGENT, C. J.—Having regard to the general scope and object of Reg. XXIX of 1827, we think that the expression "Ordinary Rules" as used in s. 4 of that enactment means the rules for the time being in force determining the jurisdictions of the Judges referred to in that section (1). We cannot hold that the Agent for Sirdars was intended to exercise jurisdiction only in such cases of a civil nature as the Civil Courts were empowered by Reg. II of 1827 to take cognizance of. The object of the Regulation was clearly to invest the Agent with such jurisdiction as would for the time being, but for the enactment of the Regulation, be vested in the Civil Courts. If, after the passing of the Act, the jurisdiction of the Civil Courts were to become in any way modified, the jurisdiction of the Agent would be similarly modified. Section 4 of Act XXIII of 1871, being now a part of the "Ordinary Rules" determining the jurisdiction of the Civil Courts, is applicable therefore to the Agent's Court, though that Court is not a Civil Court in the ordinary acceptation of the term. As the plaintiff had obtained no certificate from the Collector as regards so much of the claim as is affected by the Act of 1871, the Agent has rightly held that in respect of such claim the suit is barred.

The Agent should, however, have dealt with that part of the claim which is not affected by the Act, and he was wrong, we [227] think, in dismissing the whole of the plaintiffs' claim. We must, therefore, reverse his decree and remand the case for a re-hearing. Costs to abide the result.

At the hearing of the appeal it was objected for the respondent that the defendant being now dead, and the suit being one for damages, does not survive against the son. This is a question that must be dealt with by the Court below when the appeal is reheard.

Decree reversed and case remanded.

---

17 B. 227.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Birdwood.

KADAPPA (*Plaintiff*) *v.* MARTANDA (*Defendant*).*

[11th February, 1892.]

Estoppel—Suit on a document executed by defendant in which he was described as a trader—Plea in suit that he was an agriculturist—Dekkhan Agriculturists' Relief Act (XVII of 1879).

The mere fact that the defendant described himself in the instrument, on which the suit was brought, as a trader, would not of itself estop him from pleading at the trial that he was an agriculturist, and entitled to the protection of the Dekkhan Agriculturists' Relief Act (XVII of 1879). There must be evidence to show that by describing himself as a "trader" he represented himself as a trader, and intended that that representation should be acted on by the plaintiff.

---

* Civil Reference No. 23 of 1891.

(1) Section 4 of Reg. XXIX of 1827 is as follows :—

An agent of Government shall be specially appointed for the purpose of receiving, and trying, and deciding all complaints of a civil nature which would under the ordinary rules be cognizable by either of the Judges of Poona and Ahmednagar against any of the persons contemplated in the preceding section.

1892
FEB. 11.

APPELLATE CIVIL.

17 B. 227.

THIS was a reference made by Rao Saheb R. D. Nagarkar, Subordinate Judge of Islampur in the Satara District, under s. 617 of the Civil Procedure Code (Act XIV of 1882).

The circumstances under which the reference was made were as follows :—

The plaintiff, Kadappa, sued to recover possesssion of a shop and arrears of rent on a rent-note, dated 23rd July, 1889, in which the defendant's occupation was mentioned as "trade." In the plaint, also, his occupation was given as "trade." The defendant, Martand, pleaded that he was an agriculturist, and that, therefore, the suit was not maintainable without the Conciliator's certificate under s. 47 of the Dekkhan Agriculturists' Relief Act (XVII of 1879). He further stated that he was an agriculturist at the time of the execution of the rent-note sued upon, **[228]** and had been so ever since, and he claimed the protection of the Act.

The Subordinate Judge, having regarded to the description of the defendant in the rent-note and his contention with respect to his status, referred the following questions to the High Court :—

"(I) Whether the admission of a non-agriculturist status in the rent-note in question would prevent the defendant from proving the existence of a contrary status on the day of its execution by operating as an estoppel ?

"(II) Whether, in the absence of an allegation of a change of status, he would be at liberty to prove the existence of the status of an agriculturist after the date of its execution ?"

The opinion of the Subordinate Judge on both the points was against the defendant,—that is, on the first in the affirmative, and on the second in the negative.

There was no appearance for the parties.

JUDGMENT.

SARGENT, C.J.—The mere fact that the defendant described himself in the instrument on which the suit was brought as a trader would not of itself estop him from pleading at the trial that he was an agriculturist and entitled to the protection of Act XVII of 1879. There must be evidence to show that by describing himself as a "trader" he represented himself as a trader, and intended that that representation should be acted on by the plaintiff.

Order accordingly.

1892

FEB. 11.

APPELLATE CIVIL.

17 B. 228.

17 B. 228.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Birdwood.

KASHINATH TRIMBAK JOSHI (*Applicant*) *v.* DUMING ZURAN (*Opponent.*)* [11th February, 1892]

Limitation—Civil Procedure Code (Act XIV of 1882), s. 318—Purchaser at Court sale—Certificate of confirmation of sale—Application for possession of purchased property—Date of accrual of right to apply for possession.

The right of a purchaser to apply for possession under s. 318 of the Civil Procedure Code (Act XIV of 1882) accrues to him when the certificate "has been [229] granted,"—that is to say, when it has been issued to him, and the period of limitation for such an application is to be computed from that day.

[**Diss.**, 30 A. 390 (391)=5 A.L.J. 516=28 A.W.N. 162; 15 M.C.C.R. 58 (59); **Appr.**, 32 M. 136=19 M.L.J. 224 (226)=4 M.L.T. 350.]

THIS was a reference made by Rao Saheb Ramchandra V. Patki, Second Class Subordinate Judge of Bassein in the Thana District, under s. 617 of the Civil Procedure Code (Act XIV of 1882).

The applicant, Kashinath Trimbak Joshi, purchased certain immoveable property at a Court sale on the 13th February, 1888, and the sale to him was confirmed on the 18th April, 1888. On the 7th October, 1890, he applied for a certificate under s. 316 of the Civil Procedure Code (Act XIV of 1882), which was granted to him on the 13th February, 1891, and was issued to him on the same day. He subsequently presented an application to obtain possession of the property under s. 318 of the Civil Procedure Code. The Subordinate Judge referred the following question for decision :—

"Should the period of limitation for the application to recover possession be counted from the day on which the certificate was actually issued to the applicant, or should it be counted from the date on which the sale was confirmed ?"

The opinion of the Subordinate Judge was that the period of limitation should be counted from the date of the confirmation of the sale.

There was no appearance for the parties.

OPINION.

SARGENT, C.J.—The right of a purchaser to apply for possession under s. 318 of the Civil Procedure Code accrues to him when the certificate "has been granted,"—that is to say, when it has been issued to him. See *Motichand Tarachand* v. *Naikjibin Gopalji* (1).

Order accordingly.

* Civil Reference No. 22 of 1891.

(1) P. J. 1886, p. 46.

17 B. 230.

1892
FEB. 25.

APPELLATE CIVIL.

17 B. 230.

[230] APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Birdwood.

PITAMBAR MANCHARAM (*Original-Applicant*), *Appellant v.* ISHVAR JADURAM (*Original Opponent*) *Respondent.**

[25th February, 1892.]

Jurisdiction—Heirship—Application for declaration of heirship—Bombay Regulation VIII of 1827, *s.* 2—*Subordinate Judge invested with function of District Court under Act VII of* 1889—*Jurisdiction of such Judge to hear such application.*

A Subordinate Judge who (under s. 26 of Act VII of 1889) has been invested by Government with the functions of a District Court under Act VII of 1889 has jurisdiction to hear and determine an application made under s. 2 of Bombay Regulation VIII of 1827(1).

[F., 18 B. 748 (749) ; 19 B. 399 (400).]

THIS was a reference made by G. McCorkell, District Judge of Ahmedabad, under s. 617 of the Civil Procedure Code.

The appellant, Pitambar Mancharam (original applicant), presented a petition under Bombay Regulation VIII of 1827 in the Court of the Subordinate Judge of Kaira, praying to be declared the heir of one Motiram Ghelabhai, deceased. Under s. 26 of Act VII of 1889 that Court had been invested by Government with the functions of a District Court under Act VII of 1889 (2).

[231] The respondent, Ishvar Jaduram (original opponent), contended (*inter alia*) that the Court of the Subordinate Judge had no jurisdiction to entertain the application under Regulation VIII of 1827, which conferred jurisdiction only upon Zilla Courts.

The Subordinate Judge held that he had no jurisdiction to entertain the application under the regulation, and rejected it.

The applicant appealed to the District Court, and the District Judge being doubtful, referred the following question for the decision of the High Court:—

"Had the Subordinate Judge authority to hear and determine an application made under s. 2 of the Bombay Regulation VIII of 1827?"

There was no appearance for the parties.

---

* Civil Reference No. 2 of 1892.

(1) Clause 2 of s. 2 of Bombay Regulation VIII of 1827 is as follows:—

"If an heir, executor, or administrator is desirous of having his right formally recognised by the Court for the purpose of rendering it more safe for persons in possession of, or indebted to, the estate to acknowledge and deal with him, the Judge, on application, shall issue a proclamation in the form contained in Appendix A, inviting all persons who dispute the right of the applicant to appear in the Court within one month from the date of the proclamation, and enter their objections, and declaring that, if no sufficient objection is offered, the Judge will proceed to receive proof of the right of the applicant, and if satisfied, grant him a certificate of heirship, executorship, or administratorship."

(2) Clauses 1 and 2 of s. 26 of Act VII of 1889 are as follows:—

"(1) The Local Government may, by notification in the official gazette, invest any Court inferior in grade to a District Court with the functions of a District Court under this Act, and may cancel or vary any such notification.

"(2) Any inferior Court so invested shall, within the local limits of its jurisdiction, have concurrent jurisdiction with the District Court in the exercise of all the powers conferred by this Act upon the District Court, and the provisions of this Act relating to the District Court shall apply to such an inferior Court as if it were a District Court."

1892

FEB. 25.

APPELLATE CIVIL.

17 B. 230.

OPINION.

SARGENT, C. J.—We think that s. 28 of Act VII of 1889 (1) distinctly applies the provisions of s. 26 and the other sections set out in s. 28 to certificates granted under Regulation VIII of 1827 and applications for such certificates made after the commencement of the Act.

Order accordingly.

---

17 B. 232.

[232] APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Birdwood.

GITABAI (*Original Defendant*), *Appellant v.* BALAJI KESHAV SHASTRI NAGARKAR (*Original Plaintiff*), *Respondent.**

[2nd March, 1892.]

Specific performance—Agreement to sell—Reversionary interest, sale of—Purchase-money less than market value of reversion—Stat. 31 *Vic.*, c. 4—*Inadequate consideration.*

The rule observed in England until the passing of Stat. 31 Vic., c. 4, that specific performance of an agreement to sell a reversionary interest should not be decreed where the purchase-money was less than the market value of the reversion.

Held, not to be the rule in India.

[1906 P.W.R., p. 104.]

THIS was a first appeal from the decision of Khan Bahadur L. G. Fernandez, First Class Subordinate Judge of Poona.

Suit for specific performance of an agreement to sell a house.

The defendant, Gitabai, was the daughter-in-law and heiress of one Nana, deceased. On 18th December, 1885, Nana had agreed to sell the house in question to the plaintiff for Rs. 2,000, and then received Rs. 25 earnest-money. At the time of the agreement Nana was not entitled to the possession of the house. His adoptive mother, Renukabai, was in possession and management, and under the will of her deceased husband she was entitled to it during his lifetime and after her death it was to go to Nana.

On Renukabai's death the plaintiff, in accordance with the agreement, tendered the rest of the purchase-money to Nana, and asked him to execute a conveyance, but he refused. Nana subsequently died, and the plaintiff now sued the defendant, as his representative, to enforce the agreement of sale.

The defendant pleaded that Nana was of weak mind, and had been induced by the plaintiff's misrepresentation to enter into the agreement; that the agreement was, therefore, invalid, and that the suit was time-barred.

---

* Appeal No. 47 of 1890.

(1) *Section* 28.— Notwithstanding anything in the regulation of the Bombay Code No. VIII of 1827, the provision of s. 3, s. 6, sub-s. (1), cl. *f*, and ss. 8, 9, 10, 11, 12, 14, 16, 18, 19, 25, 26 and 27 of this Act with respect to certificates under this Act and applications therefor, and of s. 98 of the Probate and Administration Act, 1881, with respect to the exhibition of inventories and accounts by executors and administrators, so far as they can be made applicable, apply, respectively, to certificates granted under that regulation, and applications made for certificates thereunder, after the commencement of this Act, and to the exhibition of inventories and accounts by the holders of such certificates so granted.

The Subordinate Judge found that the claim was not barred by limitation, and allowed it, observing: "The plaintiff has, no [233] doubt, secured a good bargain from Nanaji Dinkar without any risk at all to himself * *. I cannot say that he dealt very fairly with Nana, but he is within his legal rights in trying to enforce the agreement, and, as defendant has failed to establish the ground on which the agreement was impeached, the plaintiff is entitled to succeed."

The defendant appealed.

Jardine (*Mahadeo Chimnaji Apte*), for appellant.—Nana had only a reversionary interest in the property. The Court cannot give specific performance of an agreement relating to the sale of such interest. By this agreement Nana sold a house for Rs. 2,000, which, according to the evidence and in the opinion of the lower Court, was worth Rs. 5,000 or Rs. 6,000. The consideration is inadequate. The onus lies on the plaintiff to show it was sufficient: see White and Tudor's Leading Cases, Vol. I, p. 685. Moreover, it is shown that Nana was of weak mind, and undue advantage was taken of him. A Court of Equity will not give effect to such an agreement. Under s. 28 of the Specific Relief Act (I of 1877) the plaintiff is not entitled to relief, because the consideration for the sale is grossly inadequate.

Branson (*D. S. Garud* and *N. V. Gokhale*), for respondent.—A new case is made here on appeal. The appellant's case in the lower Court was that fraud was practised on Nana, but no fraud was proved. The consideration is not inadequate. Some witnesses, no doubt, say that the house is worth Rs. 6,000, but it is very old, and requires extensive repairs. The plaintiff did not induce Nana to make the agreement of sale. On the contrary, it was he who was anxious to sell. Fraud cannot be presumed, and there is no evidence to prove it. The agreement is, therefore, capable of specific performance (s. 22 of Specific Relief Act I of 1877). Nana was not a man of weak intellect. The lower Court has found that he was a man possessed of ordinary capacity. He himself could not have resisted a decree for specific performance, and if so, his heirs cannot.

JUDGMENT.

SARGENT, C. J.—The case was tried below on the statements contained in the written statement that the plaintiff had practised [234] fraud on Nana by representing that Nana's mother had given the house away from Nana to her mother. It was also stated that Nana was a simpleton. Those defences were held by the lower Court not to be supported by the evidence. And no attempt has been made before us to impeach that finding.

Here, however, it has been sought to impeach the sale on the ground that, being a sale of a reversionary interest, the Court would not decree specific performance, as the purchase-money was less than the market value of the reversion. Such, no doubt, was the practice in England until the passing of 31 Vic., c. 4, but it cannot, we think, be held to be the rule in India. No mention of it is to be found in the Specific Relief Act, and if it had been intended to give effect to it, we should have expected to find it in s. 28 of the Act. It is further to be remembered that the Specific Relief Act I of 1877, which was passed after the English Act had been passed, abolishing the rule, was drawn by a jurist who had had long experience of the practice of the Court of Chancery.

1892
MARCH 2.
APPEL-
LATE
CIVIL.
17 B. 232.

The only other question which can be raised on the evidence is, whether the price for which the property was sold was so grossly inadequate as to be evidence of fraud practised on the vendor. We do not think that was the case. The property would not probably have been let for more than Rs. 250 per annum. That rental capitalized at 16 per cent. subject to a deduction of 10 per cent. for repairs would give Rs. 3,400 as the value of the property, and it was sold for Rs. 2,000. The defendant having failed to establish the defence actually set up, and the only grounds on which the case has been argued before us having also failed, we confirm the decree of the Court below with costs.

Decree confirmed.

---

17 B. 235.

[235] APPELLATE CIVIL.

Before Mr. Justice Jardine and Mr. Justice Telang.

JOHARMAL (*Original Plaintiff*), *Appellant v.* TEJRAM JAGRUP (*Original Defendant*), *Respondent.** [7th March, 1892.]

Registration—Partnership—Mortgage of land to a firm—Dissolution of firm—Division of assets among partners—Letters of one partner to another transferring to the latter the share of the former in the assets of the firm, including the mortgages, but not mentioning them—Necessity of registering such letters—Evidence—Registration Act III of 1877, ss. 17 and 49—The words "document" and "instrument" in the Registration Act.

By two mortgage-bonds, dated, respectively, 25th July, 1866, and 19th September, 1870, certain lands were mortgaged to a firm of money-lenders at Khadkala, carrying on business under the style of Gangaram and Mayaram. There were four partners in the firm, *viz.*, Gangaram, Mayaram, Panji and Sadaram. In 1874 Gangaram retired from the firm, and wrote three letters, the effect of which was to transfer his share in the partnership to Panji and Sadaram. In 1878 the shop was closed, and the partners divided the assets of the firm. The two mortgages fell to the share of Sadaram. Subsequently Sadaram died, and the plaintiff, his son, inherited his property and took possession of the mortgaged lands. These lands were afterwards attached in execution of a money decree against one of the mortgagors (defendant No. 1). The plaintiff objected to the attachment, but his objection was disallowed, and the property was sold in execution and purchased by defendants Nos. 2 and 3. The plaintiff then filed this suit to establish his rights under the two mortgage-bonds. The defendants contended that the plaintiff had no interest in the mortgages, and was not entitled to sue. The plaintiff relied (*inter alia*) in support of his title upon the letters (A, B and C), whereby Gangaram had transferred his share in the assets of the firm to his (the plaintiff's) father Sadaram. These letters were objected to as inadmissible in evidence, not having been registered.

Held, that, independently of the letters, there was evidence to show that the plaintiff's father Sadaram was a partner in the firm, and that as such partner the mortgages in question fell to his share at the final division of assets. The position of Sadaram as a partner being once established, his right to the property followed by operation of law, and no other proof of title was required.

Per JARDINE, J.—"To lay down that the three letters in question, which deal generally with the assets moveable and immoveable, without specifying any particular mortgage or other interest in real property, require registration, would, I incline to think, in the present state of the authorities, go too far. It may be argued that such letters are not 'instruments of gift of immoveable property', but rather disposals of a share in a partnership of which the business is money-lending, and the mortgage securities merely incidental thereto."

---

* Second Appeal No. 138 of 1891.

[236] *Per* TELANG, J.—"Although a partner's share does not include any specific part of any specific item of the partnership property, still where the partnership is entitled to immoveable property, such share does include an interest in immoveable property, and therefore every instrument operating to create or transfer a right to such share requires to be registered under our Registration Act (III of 1877). It is true that the authorities referred to apply, in terms, only to immoveable property owned by a partnership. But I am, on the whole, disposed to hold that the principle of those authorities applies to cases where immoveable property is held by a firm not in full proprietorship, but only by right of mortgage. . . . Upon the whole I should, if necessary, have been disposed to hold that the letters in question not being registered were rightly treated by the Court below as being inadmissible in evidence to prove directly a transfer of the share of Gangaram in the partnership of Sadaram.

Per TELANG, J.—A perusal of various sections of the Registration Act seems to show that the Legislature has used the words "document" and "instrument" interchangeably.

SECOND appeal from the decision of W. H. Crowe, District Judge of Poona, in appeal No. 207 of 1889.

A firm of money-lenders carried on business at Khadkala under the style of Gangaram and Mayaram. The partners in the firm were Gangaram, Mayaram, Panji and Sadaram (plaintiff's father).

On the 25th July, 1866, certain land (Survey Nos. 39, 41 and 68) was mortgaged to this firm by Lakshman and Ramji bin Lakshman, and on the 19th September, 1870, certain other land (Survey Nos. 34, 37 and 110) was mortgaged to this firm by Ramji bin Lakshman. The mortgagees mentioned in the deed were the two partners, Gangaram and Mayaram, but they took the mortgages on behalf of the firm.

In 1874 Gangaram retired from the partnership, and went to his native place in Marwar. From there he sent three letters (Exs. A, B and C) by post to Sadaram, his former partner and the father of the plaintiff.

These letters were to the following effect:—

"I intend to become a *Sanyasi*. I have a shop at Khadkala. My share therein is worth Rs. 6,500. You should make a settlement of my debts by paying off my creditors. Remission to the extent of Rs. 3,000 should be given to my debtors. You should get the lands and houses transferred to your name. The property should be divided between you and Panji."

[237] Mayaram subsequently retired also from the firm, and Sadaram and Panji remained the sole surviving partners.

In 1878 the shop was closed. A division was made of the partnership property, and the two mortgages of 1866 and 1870 fell to the share of Sadaram, the plaintiff's father.

On Sadaram's death his son, the plaintiff, inherited his property, and took possession of the mortgaged lands.

Subsequently these lands were attached in execution of a money decree against the mortgagor, Ramji bin Lakshman (defendant No. 1). The plaintiff objected to the attachment, but his objection was disallowed, and the lands were purchased at the Court-sale by defendants Nos. 2 and 3.

The plaintiff then filed this suit for a declaration that the lands were not liable to attachment and sale in execution of the money decree, or that, if they were so liable, the defendants Nos. 2 and 3 (the auction-purchasers), were not entitled to possession without satisfying the plaintiff's mortgage lien under the two mortgage bonds of 1866 and 1870, respectively.

1892
MARCH 7.

APPEL
LATE
CIVIL.

17 B. 235.

The defendants pleaded (*inter alia*) that the plaintiff had no interest in the mortgages in question, and could not, therefore, sue.

The plaintiff relied on the above-mentioned letters (Exs. A, B and C) in support of his title.

The defendants objected to the admissibility of the letters, on the ground that they were neither stamped nor registered.

The Subordinate Judge overruled this objection, admitted the letters in evidence, and passed a decree in plaintiff's favour.

On appeal the District Judge was of opinion that the letters in question were inadmissible for want of stamp and registration, and as they were the only proof of plaintiff's title, he held that the suit must fail. He, therefore, reversed the decree of the Subordinate Judge, and rejected the plaintiff's claim.

Against this decision the plaintiff appealed to the High Court.

M. B. Chaubal, for appellant.—The letters are admissible in evidence. They are not instruments creating any right, or **[238]** interest in immoveable property within the meaning of the Registration Act (III of 1877). They do not come within the definition of instrument: see Wharton's Law Lexicon. Such informal documents do not need registration. There is no provision in the Act making registration of such letters compulsory. Refers to *Waman Ramchandra* v. *Dhondiba* (1); *Oo Noung* v. *Moung Htoon Oo* (2); *Kedar Nath Dutt* v. *Sham Lal Khettry* (3). Even if they required registration to prove the transfer of one partner's share to another, they would be still admissible to show that the plaintiff's father was a partner in this firm. It is found by both the Courts below that the two mortgage bonds under which we held the property in dispute were passed to the firm, and were treated as part of the firm's assets, and that they eventually fell to the share of our father. Upon these facts we are entitled to a decree.

B. N. Bhajekar, for respondent.—The letters are inadmissible for want of registration and stamp. The words "I have given the ownership to you" show that the whole interest of one partner in the partnership property was transferred to another partner. And as part of the partnership property admittedly consisted of these lands mortgaged to the firm, these letters must be held to convey or transfer an interest in immoveable property. They therefore require registration. We do not admit that the mortgage-bonds were passed to the firm. They are passed to the individuals Gangaram and Mayaram personally and not on behalf of the firm.

JUDGMENT.

JARDINE, J.—Mr. Chaubal argued several points on behalf of the appellant-plaintiff. But as no issues were raised below about estoppel and adverse possession, and as the claim was not based on adverse possession, we refrain from dealing with these matters in second appeal.

The plaintiff claims the lands in suit under two mortgage-deeds executed by the owners in 1866 and 1870 respectively. His case was that these mortgages were in favour of a money-lending firm; that several changes of partners occurred, on which occasions these mortgages were treated as partnership property: that **[239]** the plaintiff's father, Sadaram, was admitted as a partner as evidenced by three letters dated 1874, A, B and C; that some time after this, Panji and Sadaram remained the only partners, and that, on a division between them, these two mortgages were

(1) 4 B. 126. (2) 13 C. 322. (3) 11 B.L.R. 405.

assigned to the share of Sadaram, and that by means of partitions after Sadaram's death they became the sole property of the plaintiff, who claims as mortgagee in possession.

The lands were attached by the first defendant in execution of decrees against one of the mortgagors, and the plaintiff did not succeed in raising the attachment.

Among other pleas the defendants in both Courts below averred that the mortgages were not genuine and were not passed for consideration; but these questions were decided against them at the trial and have not been raised here.

The Subordinate Judge was evidently of opinion, as shown by his recital of the evidence of fact, that the rights over the property acquired by the mortgagees were for the purpose of the partnership business. It would appear that upon this part of the judgment an issue was raised in the District Court, whether the plaintiff was entitled to sue alone. The District Judge found this issue in the affirmative. It has been faintly argued in the present appeal that the facts do not show that the mortgages were partnership property. It may be that, if we were at liberty to go into all the facts, the point would require consideration (see Lindley on Partnership, Book III, chap. 4, s. 2, and Cunningham and Shepherd's Indian Contract Act under s. 253), but we do not think this arises in second appeal. It must also be taken as a fact found below that the plaintiff is the only remaining partner.

With reference to the question whether the letters transferring the property required registration, I may here state my opinion that the mortgage transactions about the immoveable property in suit were ancillary to the trade of money-lending—*Steward* v. *Blackeway* (1). The Subordinate Judge held that the letters A, B and C were admissible in evidence, but the District Judge has **[240]** held them inadmissible under the Registration Law, Act VIII of 1871, s. 17. Act XVIII of 1869, sch. I, art. 13, he also observes, required that they should be stamped. But under s. 34 of the present Stamp Law, Act I of 1879, this omission to stamp is immaterial, the documents having been admitted in evidence by the Subordinate Judge—*Garpadapa* v. *Naro* (2); *Punchanund Dass Chowdhry* v. *Taramoni Chowdhrain* (3); *Ramasami* v. *Ramasami* (4).

We have next to consider whether the documents are such as required registration under s. 17 of Act VIII of 1871. It is contended for the respondents that these documents constitute an instrument of gift of immoveable property, as was evidently held by the District Judge. The appellant's pleader refers us to the doubts expressed by Westropp, C. J., in delivering the judgment of the Full Bench in *Waman* v. *Dhondiba* (5) as to the extent of the meaning of the word *instruments* in the section we have to construe. This point had been argued, and the definition of instrument in Wharton's Law Lexicon as a "formal legal writing" quoted; and the judgment notices that no provision appears to have been made for registering a contract lying in letters, similar to the provisions in the Stamp Acts with reference to an agreement lying in letters or those in the Registry Acts of Parliament where the conveyance or security is contained in more writings than one. I concur with my brother Telang, however, in distinguishing the present case on the ground that the letters A, B and

---

(1) L.R. 4 Ch. 603. (2) 13 B. 493. (3) 12 C. 64.
(4) 5 M. 220. (5) 4 B. 126 (139).

1892
MARCH 7.
APPELLATE CIVIL.
17 B. 235.

C are rather repetitions of each other than a series in which each is required to help the others in order to spell out the disposition which the retiring partner meant to make of his immoveable property, being assets of the firm. *Oo Noung* v. *Moung Htoon Oo* (1), which follows *Kedar Nath Dutt* v. *Sham Lall Khettry* (2), was also cited to us. It was contended for the appellant that the three letters were admissible at any rate to show how the mortgagee's rights, being partnership property, came to the appellant's share. I will consider this point later.

[241] The cases cited to us on the question of registration, and mentioned above, do not help much on the construction of s. 17 of the Act; and I have not found any reported Indian case in point. *The Menglas Tea Estate case*(3), where the question was whether the document was a transfer of a lease or a conveyance of a share of a partnership, is really an interpretation of arts. 21 and 60 of the Stamp Act I of 1879, and leaves unnoticed the equitable doctrine discussed in the English cases to which in these judgments we refer, although not one of them has been cited in the arguments. The doctrine is stated in Lindley on Partnership, (5th Ed.), p. 343, in the following terms:—"From the principle that a share of a partner is nothing more than his proportion of the partnership assets after they have been turned into money and applied in liquidation of the partnership debts it necessarily follows that, in equity, a share in a partnership, whether its property consists of land or not, must, as between the real and personal representatives of a deceased partner, be deemed to be personal and not real estate, unless indeed such conversion is inconsistent with the agreement between the parties." At p. 347 the learned author states: "It follows, however, from this doctrine, that probate duty and legacy duty are payable in respect of the share of a deceased partner in partnership real estate: and a partner's share in such estate is clearly within the Charitable Uses Act—9 Geo. II, c. 36."

As to the application of the doctrine to cases on the statutes relating to Probate and Legacy Duties this statement is supported by *Attorney-General* v. *Brunning* (4), *Forbes* v. *Steven* (5), *Attorney-General* v. *Hubbuck* (6). Thus the share in partnership is made liable for probate duty, following the rule laid down in *Darby* v. *Darby* (7) that "if partners purchase land merely for the purpose of their trade, and pay for it out of the partnership property, that transaction makes the property personalty and effects a conversion out and out;" or, as remarked by Bowen, L.J., **[242]** in *Attorney-General* v. *Hubbuck* (6), this doctrine of conversion necessarily affects partnerships: partnership property is that which is held by the partners for the purpose of the partnership, of carrying on the adventure of the partnership; and must be treated in the end as subject to a trust for sale, and therefore it is personal property.

There is another class of cases interpreting the Statute of Mortmain, 9 Geo. II, c. 36. In *Myers* v. *Perigall* (8), share in a joint stock Bank, the assets of which comprised land and mortgages, was held not to be within the Statute: and Lord St. Leonards proposed the following test, which, it is submitted in Clerke and Humphry's Sales of Land, p. 12, seems to be equally applicable to the Statute of Frauds:—"The true way to test it would be to assume that there is real estate of the company

(1) 13 C. 322. (2) 11 B.L.R. 405. (3) 12 C. 383.
(4) 8 H.L. Cases, 243. (5) L. R 10 Eq. 178.
(6) 10 Q.B.D 488 and in Appeal 13 Q.B.D. 275 (289). (7) 3 Drew. 495.
(8) 2 D.M. & G. 599.

vested in the proper persons under the provisions of the partnership deed. Could any of the partners enter upon the lands, or claim any portion of the real estate for his private purposes? They would have no right to step upon the land: their whole interest in the property of the company is with reference to the shares bought, which represent their proportions of the profits." He goes on to say: "In short, a member has no higher interest in the real estate of the company than that of an ordinary partner seeking his share of the profits out of whatever property those profits might be found to have resulted." This case is followed in *Entwistle* v. *Davis* (1), where Sir W. Page-Wood, V.C., held that shares in land companies were not an interest in land within the Statute 9 Geo. II, c. 36. The Vice-Chancellor said: "Since the decision in *Myers* v. *Perigall*, the test is not whether the holders of the shares can in some sense be said to be interested in land, but whether the share is such a share as, under any ordinary state of circumstances, can result to him in the shape of land. In other words, is the right of a shareholder merely a right to call for his share of the profits, and not for a specific part of the land itself?" In *Attree* v. *Hawe* (2), Hall, V.C., held the debenture stock of a railway company to be within the Statute; but this decision was reversed on appeal, where in [243] the judgment James, L.J., states the policy of the Act and uses the following language as to the decision:—"It has been held that a share or interest in a trading partnership or business, incorporated or unincorporated, is not within the prohibition, although it may have, as indeed almost every business has, some interest in land with which or on which it is carried on, or although it may have among its assets any amount." But then in the year 1880, in *Ashworth* v. *Munn* (3), the same learned Judge qualifies this language as too general; and the latter case interprets *Myers* v. *Perigall* so as to restrict its effect to shares in companies. corporate or unincorporated, which companies have a perpetual or continuing existence, notwithstanding the changes in the persons who constitute the partnership, and which shares can be realized not only by winding up the whole concern, but by selling them in the market. Ordinary partnerships are thus excepted from the rule about charitable gifts laid down in *Myers* v. *Perigall*. In *Ashworth* v. *Munn*, the Lords Justices followed the decision of Lord Chancellor Cairns in *Brook* v. *Badley* (4), a case of 1868, where it was held that a legacy payable out of personalty and of the proceeds of the sale of real estate is an interest in land within the Statute of Mortmain, and cannot, whilst it remains unpaid, be bequeathed by the legatee for charitable purposes. Lord Cairns said: "The case, as I have described it, seems to me to be exactly within the 3rd section of the Mortmain Act (9 Geo. II, c. 36) which enacts that all gifts, grants, conveyances, appointments, assurances, transfers and settlements whatsoever of any lands, tenements or other hereditaments, or of any estate or interest therein, to any charitable use shall be void." I pause here to notice the different language of the clause of the Registration Act we have to interpret—"Instruments of gifts of immoveable property," which are among the documents "required by s. 17 to be registered," and which s. 48 makes inadmissible "as evidence of any transaction affecting such property," "unless it has been registered in accordance with the provisions of this Act" (VIII of 1871). In *Ashworth* v. *Munn* a testator, who was a partner in a mercantile firm, gave the proceeds of the sale of his share of certain real estate which was

(1) L. R. 4 Eq. 272.
(2) 9 Ch. D. 337.
(3) 15 Ch. D. 368.
(4) L. R. 3 Ch. 672.

1892
MARCH 7.
APPEL-
LATE
CIVIL.
17 B. 235.

[244] held as partnership property to charitable uses. Vice-Chancellor Malins held that although the real estate must as between the real and personal representatives be treated as personal property, yet it was quite a different question whether the proceeds could be applied to charitable purposes, and he decided "that any property derived from the sale of freehold estate is within the Statute of Mortmain, and cannot be applied for the benefit of the charities mentioned in the will." The Lords Justices in appeal affirmed the decision. The reasons given require close attention. Lord Justice James says at p. 367 of the Report: "With some fluctuation of opinion during the time of the argument, it appears to me at last that we must arrive at the conclusion that the case is hit by the words of the Statute commonly called the Statute of Mortmain." Then after discussing *Myers* v. *Perigall* he lays stress on the words "any charge or incumbrance." "Those very words are in the Statute, and were put in for the purpose of preventing possible evasions, some instances of which I attempted to give in the judgment in *Attree* v. *Hawe*." Then he supposes a case where the partner has a right in property which "in one sense is pure personalty, because it is personalty as between the real and personal estate, still it is exactly that which comes within the very words of the Statute." Lord Justice Brett could not but marvel at the great length to which the construction of this Mortmain Act has been carried. "It seems to me," he says, "to have been carried much further than the reason of its enactment suggested or authorized; but the construction has been carried to this great length by authorities which are binding upon us and which we have no right to dispute." He felt bound to follow *Brook* v. *Badley*. He held that the exceptional cases on corporations did not apply, and ended as follows on the case before him:—"It comes within the proposition laid down by the cases, that where it may be necessary to deal with the land in order to effectuate the devise in favour of the charity, the gift is void. Therefore it seems to me that the case of an ordinary partnership is not within the exceptional rules, but within the original rules, and therefore this decision is correct." The judgment of Lord Justice Cotton seems to me founded on considerations closer to those which arise on the words we are to **[245]** interpret. The question, he says, is not what the charity can take under this will, but what was the interest of the testator in the property which he attempted to devise to the charity. What the Act points at is the devise of land—that is, it prevents testators giving by their wills that which in them is land, or an interest in land, and what we have to consider really is, whether or no the interest of the testator was land or "any estate or interest in land, or any charge or incumbrance thereon." Then the Lord Justice dealing with the matter first without reference to any of the cases on the point considers whether there was or was not an interest for charge on land. "If a charge, then it was an interest." At p. 374, continuing the argument, he says: "At all events it is the right of the surviving partner, if he desires it, to say there shall be a sale, and, therefore, I say that the testator could not get his interest in this partnership or in this land, except either by special arrangement or by sale. Then when there was a sale, he would have a right to the proceeds of the sale of the land, and to have that paid to him, and until there was a sale he would have a claim against the land; and as against also the other assets of the partnership, whether you call it lien or charge, or anything else, to secure to him what was ultimately coming to him. It is, in my opinion, independently of any decision, an interest in land, and we cannot but say that a gift of his interest in the partnership property, being land, is a gift of an

interest in land within the 3rd section of the Statute of Mortmain." Then he relies on *Brook* v. *Badley* as authority applicable to partnership property as well as to other property.

It appears to me that the decisions on the Statute of Mortmain proceed generally on the words of the Statute and on the mischief at which it strikes: and as the Statute being held to be remedial is liberally and beneficially interpreted so as to suppress the mischief and advance the remedy—*Jeffries* v. *Alexander* (1)—we must be cautious in using these decisions as guides to the construction of a Registration Act which is to be more strictly construed.

There is another class of decisions which are usually cited in dealing with Probate Duty and Mortmain cases, I mean those [246] about equitable freeholds qualifying for the electoral franchise. I pass over *Baxter* v. *Brown* (2), which is discussed in *Watson* v. *Spratley* (3) (a case on the Statute of Frauds) and referred to in *Watson* v. *Black* (4), as a case that has been sometimes doubted and sometimes distinguished. *Watson* v. *Black* follows *Bennett* v. *Blain* (5), which dealt with shares in a corporation. In *Watson* v. *Black* the associated, but in no way incorporated, partners had vested the freeholds in their trustees free from any equitable interest in the individual members in the land itself and these partners had an interest in the profits only. It was therefore held by Coleridge, C. J., and Grove and Cave, JJ., that they had no equitable interest in the freeholds. In the case before us there is no such vesting, and perhaps *Watson* v. *Black* may be used as tending to show that the letters purported to convey an interest in immoveable property.

I have found no case in point decided on the English or Irish Registry Acts, and will now turn to those which interpret the Statute of Frauds, which, as its author Lord Nottingham remarks in *Ash* v. *Abdy* (6), restrains the common law, and ought therefore itself to be restrained by exposition. The words in s. 4 are "any contract or sale of lands, tenements or hereditaments,, or any interest in or concerning them." *Watson* v. *Spratley* (3) is authority that shares in a mine worked on the cost book principle do not constitute an interest in land within the section, in the absence of evidence that the shareholders take a direct interest in the freehold. The partnership was treated as similar to an incorporated Joint Stock Company. See Sugden on Vendors and Purchasers (14th Ed.), 127, commenting on *Boyce* v. *Greene* (7). In *Gray* v. *Smith* (8) the partnership assets included leaseholds. Kekewich, J., held that the agreement for the dissolution of the partnership came within s. 4, on the ground that the party sought to be charged must part with and assign to others an interest in land. He thus distinguished the agreement in [247] question from an agreement to form a partnership which may be by parol—*Forster* v. *Hale* (9); *Dale* v. *Hamilton* (10)—even when the partnership was to deal with land. The Lords Justices upheld the decision. Lord Justice Cotton notes that there was no argument on the point whether the agreement was within s. 4, and says: "As at present advised, I agree with Mr. Justice Kekewich that the agreement is within the 4th section, so that a memorandum in writing is necessary." No reasons for their opinion are given by the Lords Justices.

(1) 8 H. L. C., 628, 646, 656.
(2) 7 M. & G. 198.
(3) 10 Exch 222.
(4) L. R. 16 Q. B. D. 278.
(5) 15 C. B. (N. S.). 518 = 33 L. J. (C. P.) 63.
(6) 3 Swan 664.
(7) Batty's Irish R. 608.
(8) L. R. 43 Ch. D. 208.
(9) 3 Ves. 696=5 Ves. 308.
(10) 5 Hare 369.

1892
MARCH 7.
APPELLATE CIVIL.
17 B. 235.

It may be that the tendency of decisions in England is to bring partnership agreements conveying interests in land among other assets within s. 4 of the Statute of Frauds, as has been done under the Statute of Mortmain. But the authorities do not appear to me sufficiently numerous and clear to make it easy to apply them to the Registration Act of India (III of 1877). The case of *Forster* v. *Hale* (1) decided by Lord Chancellor Rosslyn has not been overruled. There one of four partners in a bank took with three strangers a lease of a colliery as tenants-in-common. The Lord Chancellor said, p. 309: "The question of partnership must be tried as a fact, and as if there was an issue upon it. If by facts and circumstances it is established as a fact that these persons were partners in the colliery in which land was necessary to carry on the trade, the lease goes as an incident. The partnership being established by evidence upon which a partnership may be found, the premises necessary for the purposes of that partnership are by operation of law held for the purposes of that partnership." This was in answer to the objection that a signed writing was required by the Statute of Frauds. Vice-Chancellor Wigram in *Dale* v. *Hamilton* carried the doctrine further, as pointed out in Lindley on Partnership and in Story on Contracts (5th Ed.), s. 83, note, going according to Sir N. Lindley a long way towards repealing the Statute of Frauds.

In determining whether transfers of shares of partnerships, which hold, among other assets, interest in immoveable property, require registration, a Court must be influenced by the policy of [248] the Act as gathered from its language and provisions and those of the earlier legislation. But on this part of the subject there has been no argument, the provision in s. 17, which excepts shares of Joint Stock Companies from cls. 2 and 3, not having even been noticed. To lay down that the three letters in question, which deal generally with the assets, moveable and immoveable, without specifying any particular mortgage or other interest in real property, require registration, would, I incline to think, in the present state of the authorities, go too far. I am apprehensive of the inconvenience which such a decision would cause to traders, especially to the money-lenders, who all over the country form firms and advance money on land. It may be argued, as in *The Menglas Tea Estate case*, that things ought to be called by their right names: and that such letters are not "instruments of gift of immoveable property," but rather disposals of a share in a partnership of which the business is money-lending and the mortgage securities merely incidental thereto.

For another reason, based, however, on somewhat the same consideration, I am of opinion that we should reverse the District Judge's decree. I agree with my learned brother, whose judgment I have had the advantage of perusing, that the plaintiff was entitled to give parol evidence that the two mortgages in question were the property of the partnership, and that he is now the sole remaining partner—*Forster* v. *Hale*. We may further find that the plaintiff has proved these facts.

I concur as to the nature of the relief to be decreed, by giving the plaintiff a declaration. We must now reverse the decrees of the lower Courts and pass a new decree The respondents to pay the plaintiff's costs of the suit and both appeals.

(1) 3 Ves. 696=5 Ves. 308.

1892
MARCH 7.
APPELLATE CIVIL.
17 B. 235.

TELANG, J.:—The first question argued on this appeal was whether the Exs. marked A, B, and C are or are not admissible in evidence, they not having been registered. The decision of that question raises several subordinate questions. The documents referred to are, in form, letters, as stated by the District Judge, addressed to Sadaram, the father of the plaintiff, by one Gangaram *alias* Godidas, who was one of the original mortgagees in the mortgage-deed under which the plaintiff claims. For the [249] appellant, the plaintiff, it was argued, that the mortgages were made to the firms of which Gangaram was a member, while the vakil for the respondents has contended that the mortgages must be taken to have been made, not to any firm, but to the individuals Gangaram and Mayaram and Panji named in the mortgage-deeds. Looking, however, at the fact that the mortgagees are described in those deeds respectively as "Gangaram and Mayaram, a firm of Khadkala," and as "Gangaram and Panji, a firm of Khadkala," that the full names of Gangaram and Mayaram and Panji are not given in those deeds, and that Gangaram and Mayaram and Gangaram and Panji are found to have been actually the names of the respective firms, it would be difficult to hold that the construction contended for on the part of the respondents is correct. That construction, evidently, was not the one adopted by the Subordinate Judge; and there is nothing in the judgment of the District Judge to show that he dissented on this point from the Subordinate Judge's opinion, but rather the contrary. Further, we may the more readily adopt the appellant's argument about the firms being the beneficiaries under the mortgages, as they were so treated by the mortgagees themselves in their subsequent transactions *inter se*, about the factum of which no dispute whatever has been raised on behalf of the respondents, and by which, as pointed out by the Subordinate Judge, the mortgages, after having been included in the successive divisions among the partners, came ultimately to the share of the father of the present plaintiff. In dealing, therefore, with the point of the admissibility of the documents referred to, it must be assumed that the mortgages in question were made to the partnership and formed a part of the assets of the partnership.

Now there can be no doubt that the partnership by virtue of those mortgages owned a certain interest in immoveable property—*Sparling* v. *Parker* (1) and *Gopal Narayan* v. *Trimbak Sadashiv* (2). And the question is, whether the share of Gangaram, as one of the members of that partnership, must also be deemed to include an interest in immoveable property, or whether the letters do, in fact, deal with such an interest, be the same properly [250] included in that share or not. Upon the latter point there is not apparently much room for doubt. For although the letters are, as might be expected, written altogether in inartificial language, the references made in them to the immoveable property amount to no more than a direction about its transfer from the name of the writer to the names of plaintiff's father and Panji. The words, at all events, do not themselves create an interest in immoveable property. Nor is it apparently the intention of the letters to create any such interest—except in so far as it results from the transfer of the share in the partnership, which doubtless is the principal matter dealt with in the letters. Although there are certain rather obscurely worded sentences in them, their effect taken altogether I find to be this: that Gangaram transferred his share in the partnership, subject to certain directions given, to Sadaram and Panji; and in order to carry out

(1) 9 Beav. 450.

(2) 1 B. 26

1892
MARCH 7.
APPEL-
LATE
CIVIL.
17 B. 235.

the transfer fully, so that his name might no longer be used in any way in any of the transactions of the firm, he directed that all the property, including immoveables, standing in his name should by the aid of the power of attorney already executed by him be transferred into the name of Sadaram.

The question therefore is neatly raised in this case—whether a share in a partnership which possesses a mortgage of immoveable property among its assets includes an interest in immoveable property within the meaning of the Registration Acts. The question does not appear to have been decided in any of the Indian Courts. The case of *Oo Noung* v. *Moung Htoon Oo* (1), which was the only authority cited to us in the arguments on this part of the case, related to a letter evidencing an equitable mortgage, and was decided on the authority of the familiar case of *Kedar Nath Dutt* v. *Sham Lall Khettry* (2) before Sir R. Couch. That case, however, has no application on the present point. The case of *In re The Kondoli Tea Co.* (3) was apparently a case of part-owners, not partners, and there all the owners jointly conveyed the immoveable property in question. The point there also was thus very different from the one we have here to deal with. The **[251]** earlier case of *The Menglas Tea Estate*(4) is also not in point. That, like the case of the Kondoli Tea Co., arose on the Stamp Act, and the only question there was whether the document of conveyance was a transfer of certain leases only, or whether it was a transfer of the whole of one partner's share in the partnership to which the leases belonged. The cases, thus being inapplicable, we must deal with the question on general principles as one of first impression.

Now, it is doubtless thoroughly well established that, in the language of Lord Justice Lindley, "what is meant by the *share* of a partner is his proportion of the partnership assets after they have been all realized and converted into money, and all the debts and liabilities have been paid and discharged. This it is, and this only, which on the death of a partner passes to his representatives or to a legatee of his share; which under the old law was considered as *bona notabilia*; which on his bankruptcy passes to his trustee; and which the Sheriff can dispose of under a *fi. fa.* issued at the suit of a separate creditor (5)." And in *Forbes* v. *Steven* (6), Sir W. James, then Vice-Chancellor, said: "It has long been the settled law of this Court, that real estate bought or acquired by a partnership for partnership purposes (in the absence of some controlling agreement or direction to the contrary) is, as between the partners and as between the real and personal representatives of a partner deceased, personal property, and devolves and is distributable and applicable as personal estate and as legal assets." And the learned Judge then went on to refer to *Darby* v. *Darby* (7) and *Myers* v. *Perigall* (8) as illustrating the doctrine so stated by him.

At first sight, this doctrine seems to lead logically to the conclusion, that a document effecting the transfer of a partner's share, which is thus a mere transfer of personalty, cannot be compulsorily registrable under the provisions of our Registration Act. It seems to me, however, that such a conclusion would not be quite correct. In the first place, Sir W. James only speaks of the equitable conversion "*as between the partners and as between* **[252]** *the real and personal representatives of the partner deceased*;" and Lindley, L.J., in another passage of his work (p. 347) says that the

---

(1) 13 C. 322. (2) 11 B.L. R. 405. (3) 13 C. 43.
(4) 12 C. 383. (5) Lindley on Partnership (5th Ed.), 339.
(6) L. R. 10 Eq. 178. (7) 3 Drew. 495. (8) 2 D. M. & G. 599.

doctrine "merely amounts to this, that on the death of a partner, his share in the partnership property is to be treated as money, not as land." This obviously would not affect matters either during the lifetime of a partner—Lindley, L.J., says in so many words that it has no practical operation till his death (1)—or as against parties strangers to the partnership, *e. g.*, the firm's debtors. Further, a mortgage debt also, in the view of English Courts of Equity, has long been treated as part of the mortgagee's personal estate. And those Courts have uniformly held from early times that "in all mortgages the money must go to the executor or administrator, and *not* to the heir of the mortgagee." This rule has been applied even where the mortgagee has entered into possession (2), and it has been decided that the mortgage does not, by virtue of such entry, become part of the mortgagee's real estate.

The rule in India has also been the same as in England. Yet it cannot be contended that an assignment of a mortgage does not, in the words of the Registration Act, purport or operate to create, assign or transfer an interest in immoveable property. The contrary has, in fact, been often held directly or indirectly in this Court—(See, *inter alia*, *Vasudev* v. *Rama* (3); *Gopal Narayan* v. *Trimback Sadashiv* (4); *Satra Kumaji* v. *Visram Hasgavda* (5); and *Ganpat Pandurang* v. *Adarji Dadabhai* (6)). It is therefore necessary in dealing with the question before us, to go beyond the proposition above set out from Lindley on Partnership, and to consider what is the nature of the rights which the several partners possess in and to the partnership property. Now, the general principle may here again be expressed in the language of Sir N. Lindley, who says that, "in the absence of a special agreement to that effect, all the members of an ordinary partnership are interested in the whole of the partnership property." And when it is remembered that a partnership firm is not a distinct *persona* in the eye of the law, but is only a **[253]** compendious mode of describing the group of individual partners, it seems to follow that any right or interest in immoveable property which is owned by the firm must be divided among the individual partners, whose fractional interests must make up the aggregate vested in the whole firm. Accordingly in *Farquhar* v. *Hadden* (7), where the testator by his will gave to his surviving partner "all my share of the leasehold premises in which my business is carried on," Sir W. James, L.J., said those words would carry "the interest which the testator had in this property at his death, namely, a right to a moiety subject to the application of the assets of the partnership in payment of the partnership debts." And Sir G. Mellish added: "It is said that that is an inaccurate description. I do not see that there is in it any substantial inaccuracy. He had an interest in the property subject to the payment of the debts, such an interest as a creditor of his might have taken in execution (8); that was the interest which he had, and that is what he leaves to his partner." Again in *Ashworth* v. *Munn* (9), which was a case of a testamentary disposition in favour of some charity of a partner's share in a mercantile concern, the Lord Justice James, after distinguishing between the case of corporations or

(1) Page 348.
(2) Fisher on Mortgage (4th Ed.), pp. 328-9; Coote (5th Ed.), 1121.
(3) 11 B. H. C. R. 149. (4) 1 B. 267. (5) 2 B. 97.
(6) 3 B. 313. (7) L.R. 7 Ch. 1.
(8) Cf. *Mayhew* v. *Herrick*, 18 L. J. (C. P.), 179, which arose on a *fi. fa.* executed against partnership goods.
(9) 15 Ch. D. 363 (369-70).

1892
MARCH 7.
APPEL-
LATE
CIVIL.
17 B. 235.

quasi-corporations and private partnerships (1), observed: "Now it appears to me that in a private partnership which has got land, it is difficult to say that the partner has not got an interest in land." And after discussing the nature of a partner's estate, and pointing out that the share of each of the partners is "not a share in any specific asset or any specific part of the assets real or personal," he went on to say, that "whatever is the amount coming due to that partner, that partner has an immediate or direct charge or incumbrance on that land for that very sum, and his right is to have the land sold for the purpose of realizing that charge or incumbrance which he has upon it." And finally he affirmed the order of the Vice-Chancellor "upon the simple ground that, if not an interest in land, it is at all events a direct charge on land." [254] Brett, L.J., in the same case said: "But when you come to the case of an ordinary partnership..... which holds land, one partner cannot dispose of his interest without the consent of the others, and supposing he dies, the partnership is at an end, and it may not be possible to ascertain his interest in the partnership without dealing with the land, which is the property of the partnership, and in which therefore he has an interest." And Cotton, L.J., remarked, that "we must consider whether this is not an interest or charge on land. If a charge, then it was an interest." And after discussing how the rights of partners would have to be worked out, he proceeded thus:—"It is, in my opinion, independently of any decision, an interest in land, and we cannot but say that a gift of his interest in partnership property being land, is a gift of an interest in land within the 3rd section of the Statute of Mortmain." All the members of the Court relied upon Lord Chancellor Cairns' decision in *Brook* v. *Badley* (2)—Cotton, L.J., expressly observing that the principle of that decision applied to a share in an ordinary partnership. Lord Cairns there had to deal with a will which gave the testator's real and personal estate to trustees with directions to sell the same, and after payment of his debts and certain legacies, to pay £ 3,000, part of the residue, to H. Hunt, from whom Miss Pargeter bought it. The Lord Chancellor, affirming the decision of Lord Romilly, M.R., held that the legacy forming part of Miss Pargeter's estate was an interest in land within the Statute of Mortmain. And having regard especially to the definition of immoveable property given in the Act, I cannot discover any reason for construing the phrases "immoveable property" or "any right, title or interest in immoveable property" in our Registration Act more narrowly than the words "any estate or interest in lands, tenements and hereditaments" used in the Statute of Mortmain (3). And it is to be remarked also that in all these cases the discussion has turned not so much on the signification of the words of the Statute, as on the nature of an individual partner's interest in partnership [255] property. And, therefore, I think that the cases on the Statute of Mortmain are of much value in reference to the point under consideration.

The latest case I have been able to find throwing light upon this question is the very recent case of *Smith* v. *Gray* (4), where Kekewich, J., held that a sale of a share in an ordinary partnership owning immoveable property fell within s. 4 of the Statute of Frauds, the words of which are "any interest in or concerning lands, tenements and hereditaments."

---

(1) Compare *Baxter* v. *Brown*, 7 M. and G. 198. (2) L R. 3 Ch. 672.
(3) See also *Crowshay* v. *Maule*, 1 Swanst., 508, per Lord Eldon quoted in 7 Man. and Gr. 216.
(4) 43 Ch. Div. 208.

That particular point was not decided by the Court of appeal, but Cotton, L. J., expressed his concurrence in the opinion of Kekewich, J. It appears to me that these authorities lead to the conclusion, that where an ordinary partnership owns land for the purposes of the partnership, the interest of each member of the partnership, although not a share in any specific asset or specific part of the assets, and although it would by English law devolve as part of such member's personal estate, must nevertheless be held to be an "interest in immoveable property" within the meaning of our Registration Acts. The case of *Attorney General* v. *Hubbuck* (1) is not inconsistent with this view, as the result in that case, which arose on a claim for Probate Duty on the part of the Crown, could not have been affected by the circumstance that the personal asset dealt with in that case carried with it a right of realization out of real property. Nor is the still more recent case of *Watson* v. *Black* (2) an authority adverse to the conclusion above expressed, but impliedly at least supports that conclusion, because the Court in that case held that on the true construction of the deeds relating to the property there in question, the individual members of the Stock Exchange had divested themselves of the Stock Exchange property, and vested it in trustees "*free from any equitable interest*" in themselves, retaining "an interest in the profits of the concern only," and, *therefore*, that they were not entitled to the benefit of the county franchise. The implication seems to be pretty clear, that, if there had not been any such divesting, the members *would* have had an equitable [256] interest sufficient to warrant their claim. There is no such divesting in the present case. On the other hand, it seems to me that the conclusion above stated is the only one which can be reconciled with such a case as that of *Baxter* v. *Brown* (3), in which it was held that if the shares of the partners in the real property belonging to the partnership are of sufficient value, the partners may, notwithstanding the equitable doctrine of conversion of partnership realty into personalty, lawfully claim the right to vote at elections of Members of Parliament. There is no doubt that that case has sometimes been dissented from, but the latest decisions show that the conflict of opinion is not in reference to any point here relevant. And it is still cited as good law by Lindley, L. J., in his last edition (4). On the whole, therefore, I am disposed to hold, that although a partner's share does not include any specific part of any specific item of the partnership property, still where the partnership is entitled to immoveable property, such share does include an interest in immoveable property, and therefore every instrument operating to create or transfer a right to such a share requires to be registered under our Registration Act. It is true that the authorities above referred to apply, in terms, only to immoveable property owned by a partnership. But I am, on the whole, disposed to hold that the principle of those authorities also applies to cases where immoveable property is held by a firm, not in full proprietorship, but only by right of mortgage (Comp. Fisher on Mortgages, 4th Ed., p. 512, as to the somewhat analogous case of sub-mortgages). In this particular case, I may mention that the property, in fact, was in the enjoyment of the mortgagees' firm ever since the mortgage, and that it is now in the possession of the plaintiff.

But, then, it is said that these letters and similar informa-documents are not instruments at all within the meaning of the Registration Act, and

---

(1) 13 Q. B. D. 275.
(2) 16 Q. B. D. 270.
(3) 7 Man & Gr. 198.
(4) See p. 348.

1892
MARCH 7.
APPELLATE CIVIL.
17 B. 235.

reliance is placed for that argument on certain remarks made in the course of the judgment of the Full Bench in *Waman* v. *Dhondiba* (1) delivered by Westropp, C.J. Those remarks, however, it is to be noted, amount to no more than the expression of a doubt, and are made only with reference [257] to "ordinary letters in a negotiation for a purchase of immoveable property." We have not here to deal with any letters of that character, and nothing that we may decide in this case will in any way affect the doubts expressed by the Full Bench. Here we have not even to spell out a grant or contract from any correspondence between two parties; we have only to deal with three letters written by one and the same person to the other party to the transaction, and each in substance merely reiterating what is said in the others. The cases referred to in the argument in *Waman* v. *Dhondiba* show that in spite of the definition given by Wharton, which is referred to by Westropp, C.J., letters have been spoken of by eminent Judges and masters of the English language like Sir J. Knight Bruce, and I think I may add Sir W. Grant, as "instruments." And I should not be prepared to lay it down, that while a document which runs in the form—"This indenture made between A, B of the one part and C, D of the other part" must be registered; the same document need not be registered if it runs in some form like this: "To A. B., Esquire, Dear Sir ... ... yours faithfully, C. D." I think that the question cannot be properly decided with reference to circumstances like this. I think, too, that a perusal of various sections of the Registration Act seems to show that the Legislature has used the words 'document' and 'instrument' interchangeably. And, further, it is obvious, that if it is once held that a letter, even though it evidences a transaction relating to immoveable property of the nature described in s. 17 of the Registration Act, is, notwithstanding s. 49, valid to effectuate such transaction even without registration, merely on the ground that it is in form a letter, the whole of the Registration Act may be practically rendered inoperative with the greatest ease. One often meets with vernacular assurances, wills, deeds of gift and deeds of sale, which are cast into the form of letters, but intended to operate as formal legal instruments. See (*inter alia*) *Ramasami* v. *Ramasami* (2); *Safdar Ali Khan* v. *Lachman Das* (3). Upon these grounds I have come to the conclusion, that we are not bound to give such effect to the remarks of Westropp, C.J., above alluded to, as to hold that the letters [258] before us need not be registered on the simple ground that they are letters.

But it was further argued that the letters in question do not themselves operate to transfer any right whatsoever, as they expressly leave it to the addressees to arrange as they please about the matters dealt with in the letters. I do not, however, think that that is the true meaning of the passage referred to. I understand it to mean merely that the mode of carrying out the writer's directions is left to the discretion of the addressees, the actual transfer of interests itself which they direct, being, however, in no way touched by that circumstance. Upon the whole, therefore, I should, if necessary, have been disposed to hold that the letters in question not being registered were rightly treated by the Court below as being inadmissible in evidence to prove directly a transfer of the share of Gangaram in the partnership to Sadaram. It is unnecessary to consider in this case whether the transfer might be proved by means of the letters in question only as a transfer of personalty, foregoing the charge in respect of it upon

(1) 4 B. 126. (2) 5 M. 115. (3) 2 A. 554.

the immoveable property, as was allowed to be done in the case of a transfer of a decree ordering a sale of immoveable property in the case of *Koob Lall Chowdhry* v. *Nittyanund Singh* (1). Such a use of the letters, even if allowable, will be of no avail to plaintiff, who to succeed in this case must show a right to the property itself.

The District Judge has treated his finding on the admissibility of the letters as conclusive of the case. He says in his judgment that the plaintiff relies on no other evidence of title than these letters; and, again, that "there being no other evidence of plaintiff's title besides these letters, I am of opinion that his suit must fail." But on this point I am unable to agree with him. It is, I think, quite clear, that even by English law, and in spite of s. 4 of the Statute of Frauds, a man may be admitted as a member of a partnership without any document whatever, and this even though the partnership is formed expressly to deal in land (2). In the case of *Gray* v. *Smith* (3), **[259]** already cited on another point, Mr. Justice Kekewich laid that down, following *Forster* v. *Hale* (4) and *Dale* v. *Hamilton* (5). And, again, there appears to be no doubt, that the fact of partnership may, if necessary, be proved without producing the deed of partnership (6). It seems to me, therefore, that it is open to the plaintiff to rely on the evidence referred to by the Subordinate Judge, to show that his father was at first admitted as a partner, and subsequently treated as a partner, and that as such partner the mortgages in question here ultimately fell to his share at the final division. And this the plaintiff can show, without even producing the letters dealt with above, or, if necessary, the letters may probably be admissible as either corroborating the plaintiff's story, or as rendering it probable that his father was, in fact, admitted as a partner. If and when the position of the plaintiff's father as a partner is thus established, his right to the property follows, as the Lord Chancellor said in *Forster* v. *Hale*, by operation of law, and no other proof of title is required. In this case, there appears to be no room for doubting that the plaintiff's father was, in fact, admitted as a partner. The District Judge, it seems pretty clear, was on that point of the same opinion as the Subordinate Judge. And, therefore, I think it is not necessary, as it would otherwise have been, to send the case down to the Court below for a finding on that point. But assuming that Sadaram did become a partner, and that by virtue of the divisions between the partners and the other transactions referred to by the Subordinate Judge the plaintiff is now the rightful representative of the original mortgagees, I think he is clearly entitled to relief in this suit. And it is unnecessary to consider any of the other points raised by Mr. Chaubal in argument in support of the appellant's case.

The question, however, remains what is the relief which the plaintiff is now entitled to. As mortgagee in possession his right was to have the attachment on the property itself removed—*Kassirav* v. *Vithaldas* (7). But it appears that the attachment was not removed by the Courts below, and the property was in **[260]** fact sold. Under these circumstances, the plaintiff is now entitled only to a declaration that he has a good and valid mortgage on the property, the subject-matter of the suit, for the amounts

---

(1) 9 C. 839.
(2) Lindley on Partnership (5th Ed.). 81—2 (where *Dale* v. *Hamilton* is said to have gone to the extreme verge of the law).
(3) 43 Ch. Div. 208. (4) 3 Ves. 696=5 Ves. 308. (5) 5 Hare 369.
(6) Taylor on Evidence, pp. 377—8; Field on the Indian Evidence Act, p. 408.
(7) 10 B.H.C.R. 100.

1892
MARCH 7.
APPELLATE CIVIL.
17 B. 235.

justly due and owing on foot of the mortgages of the 25th July 1866 and 19th September 1870 respectively, and that by virtue of the execution sale to the defendants Nos. 2 and 3, they are only entitled to the said property subject to such mortgages. There is no prayer for an account of the mortgages to be taken, or for a foreclosure or sale. And accordingly no relief of that nature can be given in the present suit. I am therefore of opinion that the decree of this Court must be that the decree of the District Judge should be reversed, and a declaration made as above set forth, and that the respondents should pay the appellant the costs of the suit and of both appeals.

Decree reversed.

---

17 B. 260 (F.B.).

FULL BENCH—APPELLATE CRIMINAL.

Before Sir Charles Sargent, Kt., Chief Justice, Mr. Justice Parsons, and Mr. Justice Telang.

QUEEN-EMPRESS *v.* BANA PUNJA AND OTHERS.*

[19th December, 1892.]

Penal Code (Act XLV of 1860), ss. 71, 148, 149, 326—Sentence—Separate sentences for rioting and grievous hurt.

When a prisoner is convicted of rioting and of hurt, and the conviction for hurt depends upon the application of s. 149 of the Indian Penal Code, it is not illegal to pass two sentences, one for riot, and one for hurt, provided the total punishment does not exceed the maximum which the Court might pass for any one of the offences.

When, however, the accused is guilty of rioting, and is also found to have himself caused the hurt, he may be punished both for rioting and for hurt.

In such a case the total punishment can legally exceed the maximum which the Court might pass for any one of the offences.

Queen-Empress v. *Ram Sarup* (1) approved.

[**N F.**, 11 Cr.L J. 415 (416) = 6 Ind. Cas. 880 = 3 S.L.R. 224 ; **F.**, 25 Ind. Cas. 633 = 17 O.C 184.]

THIS was a reference to the Full Bench.

[261] The accused Bana Punja and nine others were committed to the Court of Session on the following charges :—

(1) For having on the 9th June, 1891, joined an unlawful assembly armed with deadly weapons (Penal Code, s. 14).

(2) For rioting armed with deadly weapons (Penal Code, s. 148).

(3) For voluntarily causing grievous hurt by dangerous weapons (Penal Code, s. 326).

The Joint Sessions Judge of Kaira convicted all the accused of the offence of voluntarily causing grievous hurt with dangerous weapons, and sentenced, under ss. 326 and 149 of the Indian Penal Code, accused No. 1 to three months' rigorous imprisonment and the rest to six months' rigorous imprisonment.

Accused Nos. 1, 5, 9 and 10 were also convicted of the offence of rioting, armed with deadly weapons, and sentenced, under s. 148 of the Indian Penal Code, accused No. 1 to three months' rigorous imprisonment and the rest to eighteen months' rigorous imprisonment.

---

* Criminal Appeal No. 101 of 1892.

(1) 7 A. 757.

Accused Nos. 2, 3, 4, 6, 7 and 8 were also convicted of rioting and sentenced, under s. 147 of the Indian Penal Code, to six months' rigorous imprisonment.

The sentences for each of the offences were to begin one upon the expiration of the other.

Against these convictions and sentences the accused appealed to the High Court, contending (*inter alia*) that the cumulative sentences under ss. 147, 148 and 326 were illegal, and contrary to s. 71 of the Indian Penal Code.

Chitgupi (with him *Shivram V. Bhandarkar*), for the accused.

Starling (with him Rao Saheb *Vasudev J. Kritikar*, Government Pleader), for the Crown.

The following authorities were referred to in argument :—

Empress v. *Ram Partab* (1) ; *Nilmoney Poddar* v. *Queen-Empress* (2) ; *Queen-Empress* v. *Bisheshar* (3) ; *Queen-Empress* v. [262] *Sakharam Bhau* (4) ; *Ferasat* v. *Queen-Empress* (5) ; *Reg.* v. *Tukaya* (6) ; *Queen-Empress* v. *Dungar Singh* (7) ; *Queen-Empress* v. *Ram Sarup* (8).

The case was argued before a Division Bench composed of Jardine and Telang, JJ., who made the following reference to a Full Bench.

JARDINE, J.—This appeal has been fully argued, and we see no reason to differ with the view of the facts taken by the Joint Sessions Judge and the Assessors. The defence of *alibi* has not been made out. The object for which the prisoners assembled was unlawful. This was to enforce a right, or supposed right, to take earth from a dry tank by a show of force ; and, as the Joint Sessions Judge remarks, it is immaterial, in point of law, whether the right existed or not—*Ganouri Lal Das* v. *Queen-Empress* (9). They have all been rightly convicted of rioting, and the prisoners Nos. 1, 5 and 9, who had swords, and No. 10, who shot an arrow, under s. 148 of the Penal Code. One man, Pattar Nathu, was killed by a person not yet arrested : the witnesses Sona and Muudas (Exs. 17 and 30) each had bones fractured, and Gaman and Jhala (Exs. 19 and 22) received wounds said by the hospital assistant to be dangerous to life. The murder of Pattar is found by the Judge to be the act of one man, and not done in pursuance of the common object of the rioters. The other four persons above mentioned received injuries which are grievous hurts : and as some of them were caused by swords, and all of the prisoners were rightly held guilty of them under s. 149 of the Penal Code, they were all rightly convicted under s. 326.

They were not specifically charged with causing any of these different hurts, nor were those of the prisoners who are alleged to have caused these different hurts specifically charged with so doing, although there is evidence as to how, and by whom, these different hurts were caused, as also regarding other hurts, not grievous, caused to other persons by these rioters. No objection [263] has been made that the prisoners have been prejudiced, nor has any objection on matter of law been taken to the convictions. The committing Magistrate and the Joint Sessions Judge appear to have assumed that as s. 149 applied to the case, it was unnecessary to put specifications into the charge.

But, as regards the sentences passed, Mr. Chitgupi, as counsel for the appellants, urged that although a sentence under s. 326 of the Penal

---

(1) 6 A. 121.
(2) 16 C. 442.
(3) 9 A. 645.
(4) 10 B. 493.
(5) 19 C. 105.
(6) 1 B. 214.
(7) 7 A. 29.
(8) *Ibid.*, 757.
(9) 16 C. 206.

1892
DEC. 19.
FULL BENCH.
17 B. 260 (F.B.).

Code is legal, and one under ss. 147 or 148 is legal, on the Judge's view of the facts, it was illegal to pass sentences on the same person under both s. 326 and s. 147 or 148. This procedure, he argued, is contrary to s. 71 as interpreted in the case of *Empress* v. *Ram Partab* (1) and by the majority of the Full Bench in *Nilmony Poddar* v. *Queen-Empress* (2). Mr. Starling, who appeared for the Crown, cited *Queen-Empress* v. *Bisheshar* (3) and *Perasat* v. *Queen-Empress* (4). He also referred to *Queen-Empress* v. *Sakharam Bhau* (5). During the hearing the Court referred to the following cases:—*Regina* v. *Tukaya* (6), *Queen-Empress* v. *Dungar Singh* (7), *Queen-Empress* v. *Ram Sarup* (8) and *In the matter of the petition of Kali Roy and others* v. *The Queen-Empress* (9).

In the case before us, the total punishment inflicted on each prisoner is less than the maximum which may be imposed under s. 326. We have now to consider the decisions above mentioned. In *Ram Partab's case*, Straight, J., noticed that there was no evidence that the prisoners individually inflicted grievous hurt upon any person, and he says "It is only by praying in aid the provisions of s. 149 of the Indian Penal Code that he can be held responsible for the injuries inflicted on the parties assaulted by the other members of the unlawful assembly with which he was associated." He held the sentence for the hurt under s. 325 legal, but considered that the prisoner was made statutably responsible for the hurt inflicted by another **[264]** man's hand, under s. 149, as the prisoner was at the time "member of the unlawful assembly." But as membership of the unlawful assembly enters into the definition of rioting, he held the sentence under s. 147 for rioting to be illegal, although the total punishment did not exceed the maximum under s. 325.

In *Queen-Empress* v. *Dungar Singh* (7), Mr. Justice Brodhurst dissented entirely from these views, and pointed out that they were contrary to the previous decisions and the practice. After reviewing the differences between s. 454 of the Criminal Procedure Code of 1872 and s. 235 of the Code of 1882, the effect of s. 35 thereof and the amendment made in s. 71 of the Penal Code, that learned Judge observed at p. 34: "The offence of rioting and the offences of voluntarily causing hurt and voluntarily causing grievous hurt, each of the two latter offences being committed against a different person, are all distinct offences. The offence of voluntarily causing hurt or of voluntarily causing grievous hurt obviously can be committed without the commission of the offence of rioting, and, in like manner, rioting can be committed without the commission of the two other mentioned offences." He held also that the prisoner might receive the cumulative sentences, the various maximum imprisonments as awariable under each of the ss. 148, 323 and 326, the offence against the public tranquillity in rioting being different in kind from the injuries inflicted on individuals. He noticed that the word "punished" had been omitted from s. 235 of the Criminal Procedure Code, and adopted the reasoning of Mr. Mayne that the rules about assessment of punishment are now to be sought in s. 71 of the Penal Code. The same view has been adopted by this High Court in *Queen-Empress* v. *Sakharam Bhau* (5), which case has been followed here ever since and accepted by two other High Courts (10). As one of the Judges in that case, I would express my opinion that it supports the view of Brodhurst, J.,

---

(1) 6 A. 121. (2) 16 C. 442. (3) 9 A. 645. (4) 19 C. 105.
(5) 10 B. 493. (6) 1 B. 214. (7) 7 A. 29. (8) 7 A. 757.
(9) 16 C. 725. (10) 10 A. 146=12 M. 36.

although it is to be noticed that illustration G, which allows separate convictions under ss. 147, 325 and 142 of the Penal Code, is [265] in *both* the Procedure Codes of 1872 and 1882, an illustration of the first paragraph of s. 454 of the one and s. 235 of the other.

In *Queen-Empress* v. *Ram Sarup* (1), where the separate convictions under ss. 147 and 325 did not, when combined, exceed the maximum under either, Brodhurst, J., adhered to his opinion in the earlier case. The majority of the Bench (Petheram, C. J., Straight and Tyrell, JJ.) allowed the sentences to stand, distinguishing the case from that of *Ram Partab* on the ground that the hurt committed by the sentenced prisoner with his own hands was a distinct offence, "separate from and independent of the offence of riot, which was already completed. The fact of the riot was not an essential portion of the evidence necessary to establish their legal responsibility under s. 325 of the Penal Code."

In *Queen-Empress* v. *Bisheshar* (2) decided by Sir J. Edge, C. J., and Brodhurst, J., the whole subject is discussed by the Chief Justice. The case is very like the present, and the total sentences under ss. 147 and 325 were within the maximum of s. 325. They were held to be legal. The Court considered that s. 71 did not apply. The judgment seems to hold, as I do, that in *Ram Partab's case*, Straight, J., treated the word "punishment" in s. 71 as equivalent to "sentence." The Chief Justice points out that the Legislature does not use the word "sentence." Alluding to the illustrations to s. 235 of the Procedure Code, he remarks: "There would be little use in inquiring into and convicting an accused person of two offences if he could be legally sentenced for one only." He mentions that *Regina* v. *Tukaya* (3) has a bearing on the case. Even if s. 71 of the Penal Code were applicable, the total punishment being within the limit allowed was legal, as has been urged in the present case by Mr. Starling. But Sir John Edge holds that s. 71 does not apply at all, seeing that s. 149 does not, in his opinion, create any offence, but is, like s. 34, merely declaratory of a principle of the common law of England, and differs in principle from [266] s. 396, relating to dacoity with murder, which does create a substantive and distinct offence. Compare s. 114 with the reasons for the doctrine given in Plowden's Reports, p. 97. The strong inclination of my opinion is to Sir John Edge's view. Section 149 follows Lord Holt's judgment in *Plummer's case*, reported in Kelynge and discussed in Foster's Crown Law, 353. Also Mr. Justice Foster's charge at the trial of William Jackson, 18 Howell's State Trials, 1069.

I am of opinion that if we follow Sir John Edge and Brodhurst, J's. views of the law, we must hold that the words about punishment in s. 71 are not equivalent to directions about mere sentences; that s. 71 is not applicable, and that, even if it does apply, the punishments inflicted are below the maximum, and therefore legal. I have found no reported decision of this Court, but in Criminal Appeal No. 217 of 1889 (4), Scott and Candy, JJ., followed *Ram Partab's case* and reversed a sentence for rioting, although the total punishment was within the limit allowed for the hurt. No Madras case has been cited.

It remains to consider the decisions at Calcutta. In *Loke Nath Sarkar's case* (5), Tottenham and Ghose, JJ., held that s 71 did not apply. There the several hurts had been inflicted in the riot, and the

(1) 7 A. 757. (2) 9 A. 645. (3) I. B. 214.
(4) Criminal Ruling 63 of 21st Nov. 1889, Col. 154 of Rancholdlal's Criminal Rulings.
(5) 11 C. 349.

1892
DEC. 19.
FULL BENCH.
17 B. 260 (F B.).

convictions were under s. 148, s. 324 read with s. 149, and s. 324 for hurt caused by a particular prisoner. The aggregate punishment of the appellants exceeded the limits of ss. 324 and 148. The separate sentences were upheld, following *Queen-Empress* v. *Dungar Singh*. At p. 353 the learned Judges say :—

"It seems to us that the present case does not come within the purview of s. 71. The offences of which the prisoners have been convicted are distinct : (1) rioting armed with deadly weapons ; (2) voluntarily causing hurt with a dangerous weapon to Kamala Kant Poddar ; (3) a similar offence with regard to Joydhur.

"The several acts in support of which the prisoners were charged do not, in combination, form any other offence defined [267] by any law with which we are acquainted ; nor do they fulfil any other condition of s. 71, which would protect the accused from more than one punishment, or limit the severity of the sentence passed upon them.

"If it had been found that the causing of hurt was the force or violence which alone constituted the rioting in the present case, then we should be prepared to hold that the prisoners could not be punished both for causing hurt and for rioting. But the facts of the case do not warrant such a finding ; for rioting was being committed before the hurts were inflicted on the two men wounded.

"We note that the view of the law which we have taken was adopted by the High Court at Allahabad in the recent case of *Queen-Empress* v. *Dungar Singh*."

In *Nilmoney Poddar* v. *Queen-Empress* (1), the appellants were sentenced under s. 148 to three years' imprisonment and under s. 324 coupled with s. 149 to one year. The aggregate thus exceeded the limit of either section. They had not by their own hands caused any hurt. The majority of the Full Bench (Petheram, C. J., Mitter, Prinsep and Wilson, JJ.) followed *Ram Partab's case*, and held that para. 1 of s. 71 applied, and set aside the sentences of one year. They appear to treat s. 149 as an ingredient in the offence punished by s. 324 coupled with s. 149. The case of *Queen-Empress* v. *Bisheshar* does not appear to have been brought to the notice of the Court. Tottenham, J., differed from his colleagues and held that s. 149 did not make a divisible part of the offence under s. 324, and that it did not define or make punishable any specific offence. He evidently treats s. 149 as a mere declaration of a doctrine of law or legal principle.

In *Mohur Mir's case* (2), one prisoner, Kali Roy, had been sentenced under ss. 147 and 323 to a punishment higher than either section provides. The Court (Trevelyan and Beverley, JJ.) upheld the sentences on the authority of *Ram Sarup's case*, as the prisoners had individually committed the hurts.

[268] The latest case is *Ferasat* v. *Queen-Empress* (3), decided by Beverley and Ameer Ali, JJ. The report is not very clear, and there is no mention of s. 149. What is said at pp. 110 and 111 seems to show that the prisoners sentenced under ss. 148 and 332 to a punishment exceeding the maximum provided for either offence had individually committed the hurt. The Court held that s. 71 had no application, and that the sentences were legal. The ruling follows *Ram Partab's case* in holding that separate sentences may be passed for rioting and hurt when the person sentenced did individually commit the hurt. It follows *Loke Nath's case* in holding

(1) 16 C. 442. (2) 16 C. 725. (3) 19 C. 105.

that in such a case the minimum aggregate provided by s. 71 is not an obligatory minimum.

The result of the decisions seems to be as follows:—Sir J. Edge, C.J., Brodhurst, Tottenham, and Ghose, JJ., considered that rioting and hurt are distinct offences; that it is immaterial whether s. 149 is called in or not, and s. 71 does not apply at all, either to prohibit two separate sentences or to impose a minimum on the total of punishment. The cases are Dungar Singh's, Bisheshar's, and Loke Nath's.

Mr. Justice Straight in *Ram Partab's case* went the length of holding separate sentences illegal when the conviction for hurt depended on s. 149, even though the minimum punishment allowed by s. 71 had not been exceeded. No other reported case has gone so far.

Sir C. Petheram, C.J., Straight, Tyrell, Mitter, Prinsep, and Wilson, JJ., limit the application of *Ram Sarup's case* to cases where s. 149 has to be called in, and do not apply s. 71 to the prisoner, who, during the riot, has himself committed the hurt. The cases are those of Ram Sarup and Nilmony. Trevelyan, Beverley, and Ameer Ali, JJ., agree in the non-application of s. 71 where the rioter sentenced has himself inflicted the hurt. See *Mohur Mir's* and *Ferasat's cases*.

In *Loke Nath's case* a view of the law is stated as follows:—

"If it had been found that the causing of hurt was the force or violence which alone constituted the rioting in the present case, **[269]** then we should be prepared to hold that the prisoners could not be punished both for causing hurt and for rioting. But the facts of the case do not warrant such a finding; for rioting was being committed before the hurts were inflicted on the two men wounded." This proposition is not assented to in *Mohur Mir's case* and is distinctly dissented from by Sir John Edge at p. 651 of the report, I.L.R., 9 All., in *Bisheshar's case* for reasons which at present commend themselves to me. I do not think it necessary to consider the proposition in determining the present case, as it has not been put forward as a defence for any of the prisoners. Neither has it been argued. I would add, however, that force and violence have not the same meaning as, and are not commensurate with, the word "hurt" in the Indian Penal Code, and that probably the burden of proving a fact exempting, from ordinary punishment, an accused person guilty of both riot and hurt,—I mean a fact bringing the case within s. 71, assuming that section to apply,—would lie on the accused person under s. 105 of the Evidence Act.

The inclination of my opinion is to hold that the words in s. 71 of the Penal Code about punishment are not equivalent to prohibitions of separate sentences: that s. 71 does not apply at all either to forbid two sentences, one for the hurt and one for the riot, or to require that the total punishment shall not exceed the maximum of one offence: that it matters not in this regard whether the prisoner did the hurt with his own hand, or is found guilty by applying the doctrine of s. 149.

But as learned Judges in the High Courts at Calcutta and Allahabad have differed in their views of the law, and the questions are of great importance and frequently occur in cases like the present, I think we should refer the following points of law to a Full Bench before we determine the appeal:—

1. Whether where the prisoner is convicted of rioting and of hurt, and the conviction for hurt depends on the application of s. 149 of the Indian Penal Code, it is illegal to pass two sentences, one for rioting and one for hurt?

1892
DEC. 19.
FULL BENCH.
17 B. 260 (F.B.).

2. Whether in such a case the two sentences are legal, provided the total punishment does not exceed the limit which the Court might pass for any one of the offences?

[270] 3. Whether the two sentences are legal where the prisoner sentenced is proved to have himself caused the hurt?

4. Whether in such a case the total punishment can legally exceed the limit which the Court might pass for any one of the offences?

TELANG, J.—I concur in the proposed reference to a Full Bench.

JUDGMENT.

The judgment of the Full Bench (SARGENT, C. J., PARSONS and TELANG, JJ.) was delivered by

SARGENT, C. J.—We think that the first and third questions should be answered in the affirmative. This is quite independent of the question whether the case assumed by the first question falls under s. 71 of the Penal Code, as we agree in the view taken by Mr. Mayne, at p. 44 of his Commentaries on the Penal Code, of the combined effect of s. 71 of the Penal Code and s. 235 of the Criminal Procedure Code, *viz.*, that the assessment of punishment is to be found in the former section in cases falling within it; but the latter determines the procedure quite independent of it, and this Court has already ruled that in case of separate convictions for two distinct offences in the same case, the proper course is to pass a separate sentence for each offence (1). With respect to the second and fourth questions, they turn upon the meaning to be given to s. 71 of the Penal Code.

As to question 2, it can only be answered in the affirmative, whether s. 71 of the Penal Code be thought applicable to the case, as was held by the Allahabad High Court in *Empress* v. *Ram Partab* (2) and the Calcutta High Court in *Nilmony Poddar* v. *Queen-Empress* (3), or not applicable, as was held by Sir John Edge, C.J., in *Queen-Empress* v. *Bisheshar* (4). Question 4 must be answered in the affirmative. We agree in the decision in *Queen-Empress* v. *Ram Sarup* (5).

(1) Cr. Rul. No 17, dated 28th March 1892. (2) 6 A. 121. (3) 16 C. 442.
(4) 9 A. 645. (5) 7 A. 757.

17 B. 271.

1892
FEB. 8.

APPELLATE CIVIL.

17 B. 271.

[271] APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Birdwood.

DAMODARDAS MANEKLAL AND OTHERS (*Original Defendants Nos.* 1—4), *Appellants v.* UTTAMRAM MANEKLAL AND OTHERS (*Original Plaintiff and Defendants Nos.* 5 *and* 6), *Respondents.**

[8th February, 1892.]

Hindu law—Partition—Manager—Liability of manager to account on occasion of partition—Right of members who were minors at time of management to an account from manager—Manager also guardian of minors—Nature of account to be rendered by a manager on partition—Family idol and property appertaining thereto goes on partition to senior member of family—Right of mother to a share of estate on partition.

A manager of a Hindu family cannot refuse to render any account whatever of his management on the occasion of a partition, or require the other members of the family to accept his *ipse dixit* as to the property subject to partition. What that account should be so as to discharge him from his liability to account as manager, and what objections the other members of the family can take to it, must depend on the conduct of the manager and the other members of the family, the nature of the property, and the circumstances of the family, and cannot be stated in definite terms. Members who were minors during the management cannot be taken to have consented to the management, and are entitled, when they attain their majority, to hold the manager liable, not only for acts amounting to fraud, but also where the management has been grossly negligent and prejudicial to their interests; the presumption, however, being that, in the absence of evidence, the property for partition is such as it exists at the time of the suit for partition.

A brother sued his three brothers for partition of their father's estate, which consisted of moveables and immoveables and a banking business. As senior member of the family he also claimed the *rojseva* (family idol) and the property appertaining to it. The mother (Kashi) of the first three defendants and Manchha, the widow of a deceased brother of the plaintiff, and Nandkore, his aunt, the widow of his father's brother, were also defendants to the suit. The three brothers (defendants Nos. 1, 2 and 3) alleged that their father, Maneklal, had died in 1864 at which time they were minors; that the plaintiff had managed the estate ever since and had, in 1865, obtained a certificate of guardianship and administration to their estate under Act XX of 1864; that the plaintiff's management had been fraudulent, improper and wasteful and prejudicial to their interests as minors, and they contended that they were entitled to an account from him of the property at the date of their father's death and of the proceeds, income and profits from that date to the date of suit. They contended that as the plaintiff had been appointed administrator of their estate under Act XX of 1864, he was liable to account to them as a trustee, and was bound to show that all sales, purchases and other transactions entered into by him were necessary and for their benefit. The lower Court held that the family being united, the Minors Act did not apply, [272] and that the fact that the plaintiff had obtained a certificate of guardianship did not enlarge his liability to account, and that, on the authorities, the manager of a Hindu family was not bound to account for past transactions, nor for mesne profits, unless in cases of fraud or gross extravagance, and that the state of the family property as it existed at the time of partition was to be the basis of the distribution.

On appeal to the High Court,

Held that the defendants were entitled to an account from the plaintiff, and that it was open to them to raise objections with regard to the plaintiff's management.

Held, also, as to the nature of the account which the plaintiff should render of past transactions, that having regard to the circumstances of the family and the nature of the family property, the plaintiff, in producing the books of the firm

* Appeal No. 48 of 1890.

1892
FEB. 8.
APPELLATE CIVIL.
17 B. 271.

since the father's death, which contained an account of all transactions relating to the firm's property and of the moveable and immoveable property, had done all that he could be expected to do, whether as the family manager or as certificated administrator of the defendants' interests in the family property.

Held, also, that the circumstance that the plaintiff had obtained a certificate of administration of the estate of the minors, and sold their interests in certain houses, without the consent of the Court, could not give them a counter claim against the plaintiff unless they proved that they had been prejudiced by the sale. As to ornaments purchased since the death of the father, it was directed that they should be brought into hotchpot by all the parties in making the partition. As to remissions of tenants' rent and compromises of suits, although a considerable loss was shown to have resulted from them, it was held that the defendants had failed to show that they were improper or uncalled for, and there was no evidence to make the plaintiff himself liable for them, or to forbid their being transferred to the general account. The losses in trade also were properly debited to the general business of the firm, and the plaintiff was not personally liable for them.

Held, also, that the plaintiff was entitled to take the *rajseva* (family idol) and keep it with the property appertaining thereto as the family idol and the property thereof, with liberty to such members of the family as are or shall become *marjadas* to have access to it for the purpose of worship.

Held, also, that Kashi, the mother of the first three defendants (step-mother of the plaintiff), was entitled on this partition to a one-fifth share in the estate.

[R., 19 B. 532 (536, 537); 20 B. 659 (666); 29 B. 51=6 Bom. L.R. 268 (275); 20 C.L.J. 183.]

THIS was a first appeal from the decision of Khan Bahadur B. E. Modi, Subordinate Judge of Surat.

Suit for partition filed in 1886.

The plaintiff was the son of one Maneklal, who died in July, 1864. Maneklal left six sons, *viz.*, the plaintiff, and Chhaganlal, and Dayabhai by his first wife, and Damodardas Vizbhukandas, and Parshotamdas (defendants Nos. 1, 2 and 3) [273] by his second wife (defendant No. 4). At the time of Maneklal's death the first three defendants were minors and the family was then living as a united family. Dayabhai separated in May, 1868, and died in 1872, and Chhaganlal died in May, 1881. His widow, Manchha, was the fifth defendant in this suit.

The plaintiff claimed a fourth share of the family property, which included immoveable and moveable and also a banking business carried on in the name of Govindram Gosai. As the senior member of the family he also claimed the property appertaining to the *rajseva* (the family idol).

The defendants did not object to a partition, but they alleged that after their father's death in 1864 the plaintiff and Chhaganlal and Dayabhai took possession of the family property, and had the management of it, and they contended that no division should be made until an account had been rendered of the property at Maneklal's death and of the dealings with it and of the profits accrued since that time up to the date of suit. They further charged that the plaintiff, who had obtained a certificate of guardianship and administration of the estate on 17th March, 1865, had been guilty of waste and of fraudulent and improper management, the details of which they set forth in their written statement.

The Subordinate Judge framed twenty-four issues. He found (*inter alia*) that the plaintiff had not been guilty of fraud or negligence in managing the estate, and that he was not bound to account for past transactions, and that the estate should be divided into four equal shares among the plaintiff and defendants, and he prescribed the mode in which the account should be taken. He awarded separate maintenance, at the rate of Rs. 100 a month, to each of the three widows—Krishna *alias*

Kashi, Manchha, and Nandkore—and he held that the plaintiff was entitled to the *rajseva* and the property appertaining thereto.

Defendants Nos. 1, 2 and 3 appealed.

Shantaram Narayan, Government Pleader, (with *Shivram Vithal Bhandarkar*), for the appellants.—The plaintiff, having [274] undertaken the position of an administrator, is bound to give an account of past transactions—*Konerrav* v. *Gurrav* (1).

[SARGENT, C. J.—Must you not bring a separate suit under the Minors Act?]

Though this is not a suit under the Minors Act (XX of 1864), still as the plaintiff was the manager of the family concern, consisting of trade and other moveable and immoveable property, he is liable to render a strict account. The plaintiff was appointed administrator under the Minors Act, and therefore on this ground also he is liable to account as a trustee. He could not alienate property without sanction of the Court.

The plaintiff having taken upon himself the active management of the family affairs has rendered himself liable to give a strict account of his management—*Abhayachandra Roy* v. *Pyarimohan* (2); *Jugmohandas* v. *Sir Mangaldas Nathubhoy* (3).

Further, we contend that Krishna *alias* Kashi, the mother of the defendants Nos. 1, 2 and 3, is entitled to a separate share. The Subordinate Judge misunderstood her claim. She claimed a separate share in the property, and not merely maintenance—*Damoodur Misser* v. *Senabutty Misrain* (4); *Lakshman* v. *Satyabhamabai* (5). Not only a mother, but a stepmother is also entitled to a share. The term "mother" includes a "step-mother"—Mitakshara, Ch. I, s. 7, pl. 1; Viramitrodaya, p. 80. This view is also confirmed by the Vyavahar Mayukha, Ch. IV, s. 4, pl. 18 and 19. The following authorities were referred to:—West and Buhler, pp. 360, 820, 824; Steele on Castes and Custom, pp. 48, 49 and 56; Second Appeal No. 346 of 1889, decided on the 12th June 1890; *Mahabeer Persad* v. *Ramyad Singh* (6); *Pursid Narain Singh* v. *Honooman Sahay* (7); *Sunder Bahu* v. *Manohur Lal* (8); *Sumrun Thakoor* v. *Chunder Mun Misser* (9); *Kishori Mohun Ghose* v. *Moni Mohun Ghose* (10); *Lakshman Ramchandra* v. *Satyabhamabai* (5); *Bilaso* v. *Dina Nath* (11).

[275] We have no objection to the plaintiff retaining the *rajseva* (family idol) during his lifetime, but he cannot alienate it. It should be kept apart from his share in the family property.

Rao Saheb *Vasudev Jagannath Kirtikar*, for respondent No. 1 (plaintiff Uttamram Maneklal).—The family being undivided, we dealt with the property in our capacity as manager, and cannot be called upon to render an account. We deny that our conduct has been fraudulent, or that we have mismanaged the property. The appellants are entitled to a division of the property as it exists at the time of partition, and they cannot ask for an account—*Konerrav* v. *Gurrav* (1). The fact that we obtained a certificate of administration under the Minors Act (XX of 1864) cannot enlarge our liability to account as manager.

So far as the Bombay Presidency is concerned, the right of a mother to share with her sons on partition is nowhere recognized. There is no decision which shows that she is entitled to a share. She is only entitled to maintenance. Even if according to the texts she is entitled to a share, her right has become obsolete, and in Bombay no mother claims a share:

(1) 5 B. 589 (595). (2) 5 B. L.R. 347. (3) 10 B. 526. (4) 8 C. 537.
(5) 2 B. 494. (6) 12 B.L.R. 90. (7) 5 C. 845. (8) 10 C.L.R. 79.
(9) 8 C. 17. (10) 12 C. 165. (11) 3 A. 88.

1892
FEB. 8.
APPELLATE CIVIL.
17 B. 271.

see Mandlik's vernacular edition of the Vyavahar Mayukha. If a mother's right to a share is not now recognized, much less can that of a step-mother. Even so far back as 1820 a mother was held to be entitled to maintenance in dispute between sons for partition—*Muncha* v. *Brijbookun* (1). The word "mother" does not include a step-mother—*Bai Daya* v. *Natha Govindlal* (2). There can be no objection to maintain a step-mother; but her maintenance would be a charge upon the property which would go to her sons, and not step-sons—*Kedar Nath* v. *Hemangini Dassi* (3). This leads to the inference that, even supposing that a mother is entitled to a share, she should share equally with her sons only, and not the step-sons. As the plaintiff is the senior member of the family, he is entitled to the *rajseva*. He gives up his claim to the property appertaining to it.

Dhandu Moroba Sanzgiri, for respondent No. 3 (Bai Nandkore).

JUDGMENT.

[276] SARGENT, C. J.—One Maneklal Govindram died in 1920, on 23rd July 1864, leaving three sons, the plaintiff, Chhaganlal, and Dayabhai, by his first wife, and three sons, Damodardas, Vizbhukandas, and Parshotamdas, who are the three first defendants, and were minors at the time of his death, by his second wife, the defendant No. 4. The family were living in union at the time of his death, and continued so until Dayabhai separated on 5th May 1868. Dayabhai died in 1872 (*Samvat* 1928) and Chhaganlal in *Samvat* 1937, on the 14th May 1881. The first defendant, Damodardas, after attaining his majority also separated from the family on 4th September 1869, after executing a release (*fargati*). However, on 9th September 1872, he filed a suit to have it set aside, which suit was dismissed by the Court of first instance, but on appeal was granted by the High Court on the 25th September 1878, with a declaration that Damodardas and the defendants in that suit continued to be members of a united Hindu family.

The plaintiff by the present suit, brought in 1886, seeks for a division of the family estate and to have possession of his share after making provision for the maintenance of the defendants Nos. 4 and 5, widows of Maneklal and Chhaganlal. Defendants Nos. 1, 2 and 3 by their written statement allege that after their father's death the plaintiff with Chhaganlal and Dayabhai took possession and had the management of the family estate, which included moveable and immoveable property and also a banking business carried on in the name of Govindram Gosai, and they contend that no division can take place until an account has been rendered of the family property at the time of their father's death, and also of what the same may have produced, either by sale or annual income, or by the profits of the said business from the time of their father's death until the date of suit. They also charge that the plaintiff, who obtained a certificate of guardianship and administration of their estate on 17th March 1865, committed unauthorized acts prejudicial to their interests as minors, and also since they attained majority has committed acts with the fraudulent object of injuring them, the nature of which they set out in detail in their written statement. Nandkore, widow of Pranjivandas Govindram, uncle of the parties, was subsequently on 2nd April 1889 made a party as the sixth defendant.

---

(1) Cases decided by the Sadar Divani Adalat, Bombay, 1820—1840, p. 1.
(2) 9 B. 279.
(3) 13 C. 336.

1892
FEB. 8.
APPELLATE CIVIL.
17 B. 271.

[277] The Court below has framed twenty-four issues, of which the 19th and 23rd raise the questions as to the liability of the plaintiff to account and the extent and nature of that liability whether as guardian or as manager of the family estate. It was contended by the defendants Nos. 1, 2 and 3 that, as the plaintiff was appointed administrator of their estate under Act XX of 1864, he was liable to account to them as a trustee, and was bound to show that all sales, purchases and other transactions entered into by him were necessary and for their benefit. [The Court below held, on the authority of *Shivji* v. *Datu* (1), that as the family was united, and the Minors Act had no application to the minors, the circumstance of the plaintiff having obtained a certificate of administration under the Minors Act did not enlarge his liability to account as manager of the family, as to which it held that the authorities showed that the manager is not bound to account for past transactions, unless in case of fraud or gross extravagance, nor to account for mesne profits, and that the state of the family property as it exists at the time of the partition is alone to be the basis of the distribution; that the manager must lay an account of the property as it exists at the time of partition, and, unless the other members can show, at least by a few instances or otherwise, that there has been fraud or gross misconduct or gross extravagance or gross disproportion as to the expenses of the different members, past transactions cannot be re-opened.] The lower Court held that the defendants had failed in proving fraud or misappropriation or gross extravagance, and that the plaintiff was, therefore, "not bound to explain past transactions or to account for mesne profits;" but at the same time "that he must submit an account of the transactions themselves, so far as he could, and, if possible, from the death of his father in 1864," as to which the Court held that he had discharged his obligation by producing all the account books, including day books, ledgers, *samadaskhats* and *nunds* from *Samvat* 1920 (A. D. 1864) to *Samvat* 1942 (A. D. 1886). In answer to this account defendants presented 14 statements, I. N. to J. A. based on the account books themselves, and which were used by the Subordinate Judge in connexion [278] with the various objections set out in detail in paragraph 19 of the written statement.

Owing to the peculiar constitution of an undivided Hindu family, which renders it difficult to define with precision the legal position which the manager of the family holds relatively to the other members, the nature and extent of his responsibility have, as might be expected, given rise to much difference of opinion. In *Ranganmani* v. *Kashinath* (2), Mr. Justice Markby laid it down broadly that a member of the family who takes upon himself the active management of the family affairs does not thereby render himself liable to render to the rest of the family an account of his management. However, a Full Bench of the Calcutta High Court, in which Mr. Justice Mitter took part, declined to adopt Mr. Justice Markby's view of the manager's position, and held that the manager was bound, in equity and good conscience, to account for his management, and would be liable to a suit if he did not do so. This decision, however, leaves the question still open as to the nature of the account which the manager must render, and which Mr. Justice Mitter admitted would be different from that of a managing member of an ordinary partnership. In Bombay, West, J., after remarking that, in the absence of fraud and gross misconduct, the object of such an account is simply to determine

(1) 12 B. H. C. R. 281.

(2) 3 B. L. R. (O. C.J.) 1.

1892
FEB. 8.
APPELLATE CIVIL.
17 B. 271.

the nature and value of the property, says in *Meghasham* v. *Vithalrao* (1): "The manager is not a trustee required, as in ordinary case of trustee, to keep accounts of his own expenditure, or of that of the ordinary members, or of supplies taken out of the common stock. The remedy for his misconduct is his deposition or partition, in which an adequate account can in general be taken." Mr. Justice West is here speaking of the manager's liability *to a suit for an account*, and we do not understand him as meaning that the manager is exempt from any liability to account *on the occasion of a partition* of a family estate between the members. In *Konerrav* v. *Garrav* (2), Melvill, J., lays it down as the ordinary rule that a Hindu co-parcener seeking a partition cannot demand [279] an account; but he is there speaking of a partition between members who have been in possession of different portions of the property, and he considered that there was nothing in the extent of the property in the possession of either of the parties to take the case out of the ordinary rule, and he remarks that where one member of the family has been entirely excluded from the enjoyment of the property, there might be good grounds for ordering an account. Mr. Justice Melvill is not considering the case of a member who has had the exclusive management of the family property in his hands, and we think it would be difficult to hold that there is anything in the custom of a Hindu family which can justify the manager in refusing to render any account whatever of his management on the occasion of a partition and requiring the other members to accept his *ipse dixit* as to the property subject to partition. What that account should be, so as to discharge him from his liability to account as manager, and what objections the other members can take to it must, we apprehend, depend on the conduct of the manager and the other members, the nature of the property and the circumstances of the family, and cannot be satisfactorily stated in definite terms. However, it has never been said that members who were minors during the management cannot ask for an account, and as they cannot be taken to have consented to the management, they are entitled, when they attain their majority, to hold the manager liable, not only for acts amounting to fraud, but also where the management has been grossly negligent and prejudicial to their interests: the presumption, however, being, as West, J., points out, that in the absence of evidence the property for partition is such as it exists at the time of the suit for partition. In the present case, as the plaintiff of his own accord applied for and obtained a certificate of administration of the appellants' estate under the Minors Act, there is all the more reason for holding him accountable for acts of mismanagement and extravagance, if proved against him.

It was said, however, that the defendants have been guilty of laches in not sooner impeaching the plaintiff's management, and should not be allowed to do so now; but the second and third defendants were, by virtue of s. 3 of the Indian Majority Act (IX of 1875), not of age until they attained twenty-one, which would not [280] have been, as Mr. Vasudev admitted more than a year and three years respectively before the present suit for partition was brought by the plaintiff, with whom they had lived and been on good terms up to that time. We must, therefore, in answer to the 22nd issue raised by the Subordinate Judge, hold in the affirmative

(1) S. A. 148 of 1871, 14th Sept. 1871.

(2) 5 B. 589.

that it is open to the defendants to raise objections with reference to the plaintiff's management.

As to the nature of the account which plaintiff should render of past transactions, we agree with the Subordinate Judge that, having regard to the circumstances of this family and the nature of the family property, the plaintiff in producing the books of the firm since Maneklal's death, which contain an account of all transactions relative to the firm's property and as well of the business as the moveable property and also the immoveable property with provisional rent, has done all that he could be expected to do, whether as the family manager or as certificated administrator of the defendants' interests in the family property. The defendants indeed complain that no books are forthcoming before Maneklal's death, and suggest that they have been kept back, but this objection, it is to be remarked, was not taken when the plaintiff produced his books at the trial, nor after the defendants had had an opportunity of examining them, and is now taken on appeal for the first time. The plaintiff was not examined in the Court below, but the *gumasta* of the firm (witness No. 460) says that the books were burnt in the fire which admittedly took place in Bulsar. The same account was also given in the *fargati* suit, as appears from the defendant Damodar's deposition in this case, and should, we think, be accepted in default of any rebutting evidence. The sale of some old books stated in entries (Exs. 402 and 410) to have taken place in 1874 and 1882, might have been explained if the *gumasta* had been asked about it.

It is not in dispute that the plaintiff Uttamram and Chhaganlal carried on separate money transactions, and Damodar's affidavit and the notice to produce books show that Damodar considered that they had been doing so before Maneklal's death. The plaintiff's own case is that his separate business was carried on by means of his own and his wife's money. **[231]** He made a statement to that effect in the *farkhat* Suit No. 2251 of 1872, naming at the same time the persons with whom he had those transactions, and has repeated it in answer to defendants' interrogatories in this case. The Subordinate Judge in the *farkhat* suit found that the plaintiff Damodar had failed to prove that the private transactions of Uttamram and Chhaganlal had been carried on with the moneys of the family. This is important, as Damodar had been quarrelling with Uttamram for several years before the partition in 1869, and although only eighteen or nineteen at that time, must have been in a position to ascertain the truth. It is not contended that the firm's books, in which Uttamram and Chhaganlal had separate *khatas*, afford any support to the defendants' case. The defendants' suggestion would appear to be that moneys were taken by Uttamram and Chhaganlal when Maneklal was suffering from paralysis two or three years before his death or after his death, but it rests upon no evidence whatever to support it.

Upon the whole, we agree with the Subordinate Judge that, having regard to the long period (commencing probably even before Maneklal's death) during which these separate transactions have been openly going on side by side with the firm's transactions, it was incumbent on the defendants to give some evidence that the family funds were used in them, as they allege, and none is forthcoming. The Subordinate Judge has, therefore, in our opinion, decided the issue raised by the 10th item of the 19th paragraph of the written statement and the 12th issue correctly in holding that the cash balances and outstandings relating to the dealings carried on by the plaintiff in his and his brother Chhaganlal's names are

1892
FEB. 8.
APPEL-
LATE
CIVIL.
17 B. 271.

not liable to be included in the partition. There is, however, a sum of Rs. 2,500 debited to the defendant Damodar in the firm's books for 1924, which the judgment in the *farkhat* suit held not to have been paid to Damodar. The plaintiff must, therefore, account for that sum, but without interest.

Passing to the consideration of the specific charges of mismanagement set out in the 19th paragraph of the defendants' written statement, we think that the Subordinate Judge has correctly disposed of the first three. The circumstance that the plaintiff [282] had obtained a certificate of administration of the interests of the minors and sold their interests in the houses without the consent of the Court, could not, in any view of the Minors Act and quite independently of the remarks of the Court in *Shivji* v. *Datu* (1), give the defendants any counter claim against the plaintiff in this suit without proving that they had been prejudiced by the sale. Here Chhaganlal and Dayabhai may be presumed to have consented to the sales of the houses and shops, and there is no evidence to show that they were not sold with a due regard to the interests of all the members of the family. The same remark applies to the purchases of the houses between *Samvat* 1920 and *Samvat* 1940 for Rs. 5,088 and the plot of ground purchased in *Samvat* 1922 for Rs. 16,200 and afterwards built on.

The 4th item relates to the purchase of ornaments. It was suggested that there were family ornaments in existence at the time of Maneklal's death, and it was urged that this might be inferred from what plaintiff admitted in the *fargati* suit, *viz.*, that he, Dayabhai, and Chhaganlal had about Rs. 2,000 each of ornaments at the time of Damodar's separation, and the entries of ornaments made since Maneklal's death. This, however, would only show that the sons by the first wife had had ornaments given to them for their own use during their father's life, and presumably by him; in the absence of evidence to show the contrary, such gifts, if not of an unreasonable amount, might be validly made by the father even out of ancestral moveable property—Mitakshara, ch. I, s. 1, para. 27. The decision of *Lakshman* v. *Ramchandra* (2), referred to by the defendants, does not militate against this view. The family was a wealthy one, and the father might well have given his eldest son, the plaintiff, and his wives ornaments of the value of Rs. 1,300, even assuming that the gift of ornaments of such an amount can be fairly inferred from the evidence, which, however, is far from being the case. However, as to ornaments purchased since the death of Maneklal, we think that they must be brought into hotchpot by all the parties in making the partition of the family property. It was said indeed [283] for the defendants that there was no sufficient proof that they had received the ornaments stated in the accounts to have been purchased for them. The *gumasta* said they had been given to their mother. Kashi, however, was not called by either party, and there would be no presumption, as the Subordinate Judge thinks, that the minors received them. On the whole, we think it would be more satisfactory that the question whether the defendants or any or either of them have or has received the ornaments so stated in the accounts to have been received by them or him should be distinctly considered by the Court in executing the decree as regards bringing the ornaments into hotchpot. The plaintiff should also bring into hotchpot the ornaments,

(1) 12 B.H.C.R. 281.

(2) 1 B. 561.

or their value, mentioned in Ex. I N as being of the value of 83 rupees, 35 rupees and 14 rupees respectively, but not stated to have been made for any member of the family in particular, and of which the plaintiff is unable to give any satisfactory account.

As to the remissions of tenants and compromises of suits, although they show a loss to the family firm of a considerable sum between 1920 and 1942, the defendants have failed to give any proof that they were improper or uncalled for. The circumstance that Damodar was not made a party to the suits, may have afforded the defendants an opportunity of taking a technical objection, but cannot by itself and without any other evidence afford sufficient reason for concluding that they were compromised without adequate cause, or contrary to the interests of the family. As to the remissions to debtors, the Court below has considered they were satisfactorily explained by plaintiff, and that to Rajaram Ganda was, we think, the only one seriously disputed before us. Rajaram owed Rs. 1,024 to the firm, which was compromised at Rs. 551. The defendants say that Rs. 150 was advanced to Rajaram on the same day and is included in the Rs. 551, and that Rajaram's debt to plaintiff was compromised at Rs. 150 with the Rs. 150 purporting to be advanced to Rajaram. The plaintiff by his vakil says that Rajaram paid no money, but gave a transfer on Pestonji Bomanji and paid the plaintiff his debt when compromised in the same way—and the *samadaskat* of 1925 was referred to to establish this. Mr. Shivram could not deny that **[284]** it so appeared by the *samadaskat*, and upon this evidence, which the defendants have not been able to rebut in any way, we think the explanation must be accepted. As to cl. 14, which relates to the items of Rs. 375, Rs. 740, and Rs. 1,000 (mentioned in T 2) debited to Chhaganlal, the first sum was, as the books show, taken by Chhaganlal himself and afterwards debited to his daughter Harkor's marriage deposit account. The Rs. 740 were written off for expenses incurred by Chhaganlal on his visit to Bombay, and the Rs. 1,000 were given by him to a widowed daughter on his deathbed. The entries must, we think, in the state of the evidence, be presumed to be correct. Chhaganlal himself, as the evidence shows, took part with plaintiff in the affairs of the family and wrote in the books. In any case, there is no evidence to make plaintiff personally liable for them, or to forbid their being transferred to the general account.

As to the losses sustained in trade, amounting to Rs. 8,935-1-3, mentioned in statement T. S, the defendants say that such trade was not part of the firm's legitimate business, and that plaintiff should be held liable for them. The ledger, however, of 1920 shows that business in molasses, grain, &c., was carried on in Maneklal's lifetime, and the conclusion is therefore that it was part of the firm's business. As to the transactions themselves, plaintiff's vakil says that no contract books were kept, and that the particulars of the business are to be found either in the firm's books or those of the parties with whom they traded, and the plaintiff was not questioned about them in the interrogatories. No case has therefore been made out for holding plaintiff personally liable for the losses, and they were properly debited to the general business account of the firm.

As to the expenses of litigation, to which items 17 and 18 of cl. 19 of the written statement taken in connexion with the defendants' statements relate, we cannot agree with the Subordinate Judge that the expenses incurred by plaintiff in the *fargati* suit should be made a charge on the estate. The plaintiff and Chhaganlal were declared by the judgment

1892
FEB. 8.
APPEL-
LATE
CIVIL.
17 B. 271.

of the High Court to have taken advantage of Damodar's youth, and to have given him less than his fair share of the family property. [285] and the *farkhat* executed by Damodar was set aside. No part, therefore, of the expenses incurred by the plaintiff, whether directly or by paying Damodar's costs (if any), can be properly thrown on the estate to the prejudice of the defendants. As to expenses incurred by plaintiff in the suits against debtors and tenants, it was urged that such as were caused by plaintiff's not making Damodar a party to the suits should not be charged on the estate. It was urged for plaintiff that he might have thought in good faith that as manager he could sue in his own name, and that it was not necessary to make Damodar a party, but this could not be so after Damodar objected to being represented by him. We think, therefore, that the expenses caused as above stated must also be excluded from the expenses of litigation to be charged on the family estate.

With regard to the expenses incurred by the plaintiff in the proceedings which Damodar instituted to set aside the certificate and for an account, as that litigation was exclusively between plaintiff and Damodar, in which the other defendants were in no way concerned, they ought not to be charged on the estate. The same remark applies to the Rs. 3,994-8-0 referred to in sub-cl. 18 of cl. 19 of the written statement, being the expenses incurred by Damodar in the *farghati* suit exclusive of what Damodar has recovered as costs from plaintiff, as the other defendants are in no way responsible for the plaintiff's misconduct in the partition which was set aside. As to item 13 of cl. 19 of the written statement, the plaintiff admits he must account in partition for the Rs. 15,000 drawn out by him on 1st October, 1885, a few months before the institution of the suit, and also for the Rs. 5,048 drawn out on the 13th January, 1886. In making up the partition account, Damodar must bring in the houses which he received in 1869 when he separated from the family, and also account for the rents received by him for the same, excepting the house in which he lived. Damodar, on the other hand, must be credited with the several annual sums, mentioned in the statement I Z on account of maintenance and such sums as he may have expended in repairs or rebuilding of the houses or any of them, in taking account as shown in I Z to which he was entitled after he was restored to family.

[236] It remains to consider the objections taken to the maintenance awarded to Mancha, widow of Chhaganlal, Krishna *alias* Kashi, widow of Maneklal and mother of the first three defendants, and Nandkore, widow of Maneklal's brother Pranjivandas. It has not been seriously contested before us that maintenance is forbidden by the custom of the caste, as stated in the written statement of Damodar. The lower Court awarded Rs. 100 per annum and a residence to the three widows. The first three appellants object to maintenance being awarded to Manchha and Nandkore, because they say Manchha is provided for by Chhaganlal's separate business, which is managed by plaintiff, and Nandkore did not ask for any. This was not the objection as regards Manchha taken in the Court below, and there is no evidence to support it. It was there only said that she should bring in the joint family property she possessed, but the lower Court found, and no attempt has been made to dispute the correctness of the Court's finding, that she had no property of any sort except perhaps a few hundred rupees and ornaments which are unproductive property. As to Nandkore, she was made a party, and it was admitted by Damodar, and this is not disputed by the other defendants, that she was entitled to maintenance if the other widows were. No reason has

been shown for interference with the award of the Court as regards their maintenance, which is almost nominal in amount.

As regards Krishna *alias* Kashi, the mother of the first three defendants, she contends that she is entitled to a one-fifth share of the family property, and not merely to maintenance. This objection raises a question which has never been the subject of express judicial decision in this Presidency, although it is referred to by Mr. Justice West in his elaborate judgment in *Lakshman* v. *Satyabhamabai* (1). However, in *Damoodur Misser* v. *Senabutty Misrain* (2), it was decided in a partition suit (Mr. Justice Mitter delivering the judgment of the Court) where a deceased father had left sons by different wives, that each wife, that is, both mother and step-mother, according to the leading authorities of the Mitakshara school, shared equally with all the [287] sons. The conclusion is based, in the main, on the Mitakshara, ch. I, s. 7, v. 1, where it is said that "heirs dividing after the death of the father let the mother also take an equal share." This leaves it in doubt whether the term "mother" inlcudes step-mother, but the Court adopted the opinion of the author of the Viramitrodaya at p. 80 that it was intended by the author of the Mitakshara to include it from the circumstance that the passage is introduced by the remarks "It has been ordained that the wives are entitled to share equally with the sons in partition during the lifetime of the father," which shows that the division is the same whether the partition is effected before or after the death of the father. This view is also confirmed by the language of the Mayukha, ch. IV, s. 4, vs. 18 and 19.

It was urged indeed by Mr Vasudev for the respondent that Kashi should only share equally with her own sons, but that would be clearly contrary to the rule laid down in the Mitakshara on a division during the father's lifetime. It was said, however, that the right of a mother to share with the sons on partition was obsolete. Mr. Mayne says it is so in Southern India, but there is no sufficient reason for thinking that it is so here. It may be that no instance of its being recognized is to be found in the reports; but this is scarcely a matter for surprise, as, when partition takes place between brothers, the widows still living are generally only the widows of deceased brothers. However, the questions and answers in West and Buhler, pp. 360, 820, 824, conclusively show that the mother is still considered to be entitled to a share in this Presidency, and not to a mere setting apart of a maintenance. They, as well as the remarks of the learned authors, are inconsistent with the opinion which is expressed by Rao Saheb Mandlik in his work that the claim of a mother to a share is obsolete.

On the whole, we think that no case has been made out for treating the mother's claim as obsolete. The conclusion arrived at by the Calcutta High Court on the question as to the right of a step-mother to share equally with all the sons, although not entirely free from doubt on the several Hindu texts and authorities, appears to us to be in accordance with the opinion of the author [288] of the Mitakshara, the principal authority in this Presidency, and should be adopted. Krishna will therefore be entitled to a one-fifth share in the estate, but subject to the liability to contribute with the other co-sharers towards the maintenance of Manchha and Nandkore; as we cannot hold that she has waived her right to share in the family estate because she did not claim it when Dayabhai separated from the family in 1868, or Damodar asked for his

(1) 2 B. 494 (504).

(2) 8 C. 537 (539).

1892
FEB. 8.
APPELLATE CIVIL.
17 B. 271.

share in 1869. There is no evidence to show that she took any part in those transactions, which were apparently managed exclusively by the plaintiff, the eldest son, with the tacit consent of Chhaganlal.

It remains to consider the question as to the custody of the *rajseva*. We think that question has been rightly decided by the Subordinate Judge. We think that the findings on issue 8 should be varied by declaring that the plaintiff Uttamram is entitled to take the *rajseva* and keep it, with the property appertaining thereto, as the family idol and the property thereof, which, we agree with the Subordinate Judge, is rightly stated in the inventory attached to the plaint, with liberty to such members of the family as are or shall become *marjadas* to have access to the same for the purposes of worshipping them.

This disposes of all the questions raised by the appeal except as to the costs of the suit, which the Court below has thrown on the estate. As the Court below has found, and we think correctly, that the defendants have failed in establishing any fraudulent or dishonest conduct on the part of the plaintiff in the management of the estate, the rule in ordinary partition suits, that the costs of the suit should be borne by the estate, was properly followed. The decree must therefore be varied in accordance with the remarks made in this judgment and also as to the costs of Bai Krishna, Bai Manchha, and Bai Nandkore, each of which must be calculated on the claims as allowed by this judgment, but subject thereto the decree is confirmed; and we think that parties should pay their own costs of this appeal, except costs of Bai Krishna, which should be paid by the plaintiff.

Decree varied.

---

17 B. 289.

[289] APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Telang.

KALIAN MOTI (*Original Plaintiff*), *Appellant v.* PATHUBHAI FALJIBHAI (*Original Defendant*), *Respondent.** [10th March, 1892.]

Talukdars Act (Bombay Act VI of 1888), s. 31, cl. 2—Construction—Retrospective operation—Alienation of estate—Sanction.

A decree upon a mortgage bond passed against part of a *talukdar's* estate on the 15th August, 1887, was transferred under s. 320 of the Civil Procedure Code (Act XIV of 1882) to the Collector for execution. The property was sold on the 5th August, 1889, but the Collector refused to confirm the sale, as the sanction of the Governor in Council under cl. 2, s. 31 of the Talukdars' Act (Bombay Act VI of 1888), which came into force on the 25th March, 1889, had not been obtained.

Held, that the section was not retrospective in its operation, and that the sale should be confirmed, although no sanction had been obtained. When the Act passed, the plaintiff had already acquired a vested right by the decree to have the property sold, and the presumption was that the Legislature did not intend to interfere with that vested right. That presumption was not rebutted by any intention to interfere appearing in the Act itself.

[**F.**, 1 Bom.L.R. 849; **R.**, 19 B. 80 (82); 22 B. 884 (887, 888, 889); 1 Bom.L.R. 154 (155); 11 Ind. Cas. 912 (913)=7 N.L.R. 125]

THIS was a second appeal from an order passed by E. M. H. Fulton, District Judge of Ahmedabad, in execution of a decree.

* Second Appeal No. 586 of 1891.

1892
MARCH 10.
APPELLATE CIVIL.
17 B. 289.

The plaintiff, Kalian Moti, obtained a decree on the 5th August, 1887, in the Court of the Subordinate Judge of Dhandhuka on a *san* mortgage relating to certain land which formed part of a *talukdar's* estate. The decree directed that the amount due upon the mortgage should be recovered by the sale of the land, and it was, therefore, transferred to the Collector for execution under s. 320 of the Civil Procedure Code (Act XIV of 1882). The property was sold on the 5th August, 1889, but the Collector refused to confirm it, as it was not sanctioned by the Governor in Council under cl. 2, s. 31 of Bombay Act VI of 1888 * which came into force on the 25th March, 1889. He sent back the papers to the Court, stating that no sale could be [290] made. Subsequently the plaintiff, who himself was the purchaser at the auction sale, presented an application that the Collector should be ordered to give a certificate of sale. The Subordinate Judge held that the order of the Collector was right, and rejected the application.

The plaintiff appealed to the District Court, which confirmed the order of the Court below.

After referring to cl. 2, s. 31 of Bombay Act VI of 1888, the District Judge made the following observations in his judgment :—

"The Act came into force on the 25th March 1889. By s. 2 the word alienation is defined as meaning 'transfer of ownership.' Section 316 of the Civil Procedure Code provides that after a sale of immoveable property has become absolute (by confirmation), a certificate shall be granted to the purchaser, and declares that such certificate shall bear the date of the confirmation of the sale; and, so far as regards the parties to the suit and persons claiming through or under them, the title to the property sold shall vest in the purchaser from the date of such certificate and not before.

"It follows, then, from the wording of these two sections combined with that of cl. 2 of s. 31, Bombay Act VI of 1888, that no sale of *talukdari* estate has any validity unless it was confirmed prior to the 25th March 1889, or has been sanctioned by the Governor in Council.

"But it is urged that the Gujarat Talukdars Act, 1888, cannot be given retrospective effect so as to affect the rights of the plaintiff in respect of his prior mortgage and decree. There is, no doubt, a general presumption against the intention of the Legislature to interfere with vested rights, unless such intention is unmistakeably expressed, and the effect of s. 6 of Act I of 1868 has to be considered. By this section it is enacted as follows :—'The repeal of any Statute, Act, or Regulation shall not affect anything due * * * or any proceeding commenced before the repealing Act shall have come into operation.' Now it appears to me that this provision does not apply to the present case, because though the result of the Gujarat Talukdars [291] Act is to supersede, in certain cases, s. 312 of the Civil Procedure Code, which directs the Court to pass an order confirming the sale when no objection to it has been established, still it does not repeal it. The section seems applicable only to cases where a law has been expressly repealed. If, then, such be the case, it is manifest that the objection to the sale founded on s. 31 of Bombay Act VI

---

* Clause 2, s. 31 of Bombay Act VI of 1888.—No alienation of a talukdar's estate, or of any portion thereof, or of any share or interest therein made after this Act comes into force shall be valid unless such alienation is made with the previous sanction of the Governor in Council, which sanction shall not be given except upon the condition that the entire responsibility for the portion of the *jama* and of the village expenses and police charges due in respect of the alienated area shall thenceforward vest in the alienee and not in the talukdar.

1892
MARCH 10.

APPELLATE CIVIL.

17 B. 289.

of 1888 must prevail, unless on general principles it can be held that it was not the intention of the Legislature to affect previously formed contracts or pending proceedings. * * *."

The plaintiff appealed to the High Court.

Nagindas Tulsidas Murphatia, for the appellant.—Both the lower Courts were wrong in refusing to order the Collector to give us a certificate of sale. Clause 2, s. 31 of the Talukdars Act (Bombay Act VI of 1888) applies to a private sale effected by a *talukdar* himself, and not to a judicial sale. It could not have been the intention of the Legislature to make a decree, which gives a vested right to parties beneficially affected by it, inoperative by giving retrospective effect to a subsequent enactment. The decree under which we seek to recover our money, having been passed before the Act came into force and having directed a sale of mortgaged property, must end in execution: otherwise it would be merely a dead letter. To hold that the decrees passed prior to the passing of the Talukdars Act, but not executed, cannot afford relief to the decree-holders would be to deprive money-lenders of their money without having any source open to them for its recovery. In such a case the creditor cannot fall back upon the mortgage, because it has become merged in the decree, and he cannot take advantage of the decree, because owing to the absence of the Government's sanction the Act would not allow it to be executed. It cannot be said that the Legislature intended to pass an Act which, according to the construction put upon it by the lower Courts, sets aside a mortgage effected before the Act came into force.

There was no appearance for the respondent.

JUDGMENT.

SARGENT, C. J.—In this case the appellant had obtained a decree on 5th August, 1887, on a mortgage bond on the lands in [292] question, part of a *talukdar's* estate, and which decree had been transferred, under s. 320 of the Code of Civil Procedure, to the Collector for execution. The sale of the property took place on 5th August 1889, but the Collector refused to confirm it, as there was no sanction of the Governor in Council to it. Both the Courts below have held the Collector's refusal well founded.

By cl. 2, s. 31 of the Bombay Act VI of 1888, "no alienation of talukdar's estate or of any portion thereof, or any share or interest therein made after this Act comes into force shall be valid, unless such alienation is made with the previous sanction of the Governor in Council, which sanction shall not be given except upon the condition that the entire responsibility for the portion of the *jama* and of the village expenses and police charges due in respect of the alienated area shall thenceforward vest in the alienee and not in the talukdar." We agree with the lower appeal Court that s. 6, Act I of 1868, does not apply to the present case. In any view of that Act, here the proceeding in execution of the decree had not commenced before the Talukdars Act. We also agree with the lower appeal Court that the sale by the Court followed by confirmation of such sale and grant of certificate, effecting, as they do, the transfer of ownership to the auction-purchaser, is an alienation within the definition of that term; but when the Act passed, the plaintiff had already acquired a vested right by the decree to have the property sold, and the important question for decision is whether the presumption against the Legislature having

intended to interfere with that vested right is rebutted by a clear intention to do so appearing on the face of the Act itself.

The District Judge held that the words of the section were plain as having a retrospective effect. No doubt, the language of the section is distinct in prohibiting alienations after the passing of the Act, but none the less clear was the language of the Mercantile Law Amending Act, by s. 9 of which the effect of all writs of *fieri facias* as against the goods of a debtor to the prejudice of *bona fide* purchaser for value was taken away, but which in *Williams* v. *Smith* (1) was held not to apply to a [293] *fieri facias* taken out before the Act. The object of the Act, as stated in the preamble, is to remove doubts as to the applicability of certain portions of the Bombay Land Revenue Code to *talukdars'* estates and to make provision for the revenue administration of the same, and if the sanction of Government had been required by the Act only to insure that object, it might be said that the necessity for the sanction would equally arise where the alienation was in execution of a decree; but the language of the Legislature clearly leaves it absolutely in the hands of Government to refuse such sanction, and thus to prevent the alienation being carried out without assigning any reason whatever; and we think that, without clearer proof than is afforded by the language of the Act, we ought not to conclude that it was intended to be exercised when a decree of the Civil Court had already before the Act directed that the property should be sold. The case of *Pryor* v. *Pryor* (2) is important as showing how unwilling the Court is to construe an Act in such a manner as to take away an existing right under an unexecuted decree. In that case the Act only affected the particular course of procedure after decree in a partition suit, yet the Court refused to give it a retrospective effect.

We must, therefore, reverse the order of the Court below, and direct the Court to give the necessary instructions to the Collector in accordance with the above remarks.

Order reversed.

---

17 B. 293.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice and Mr. Justice Birdwood.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL (*Original Defendant*), *Appellant v.* JETHABHAI KALIDAS (*Original Plaintiff*), *Respondent.** [7th April, 1892.]

Declaratory decree—Declaration of title to land—Specific Relief Act (I *of* 1877), *s.* 42—*Criminal Procedure Code* (X *of* 1882), *s.* 133—*Order for removal of an obstruction standing upon certain land—Ownership of such land—Effect of Magistrate's order under s.* 133—*Jurisdiction of Civil Court after order made.*

A Magistrate made an order against the plaintiff, under s. 133 of the [294] Criminal Procedure Code (Act X of 1882), for the removal of a certain *otta* standing in front of the plaintiff's shop as an obstruction to the public way. The plaintiff thereupon brought this suit against the Secretary of State for India in Council for a declaration that the land on which the *otta* stood was his property, and not that of the Government.

Held, that the public roads being vested by s. 37 of the Land Revenue Code (Bombay Act V of 1879) in the Government of Bombay, they were "interested

---

* Second Appeal No. 806 of 1890.

(1) 4 H. & N. 559.

(2) L.R. 10 Ch. 469.

1892

APRIL 7.

APPELLATE CIVIL.

17 B. 293.

to deny" the plaintiff's title to the land, and therefore under s. 42 of the Specific Relief Act (I of 1877), the plaintiff (subject to the discretion of the Court) was entitled to a declaration as against the Government of his right to the land, and the plaintiff was not called upon to wait until the Government had taken possession of the land.

It was contended that the jurisdiction of the Court to make the declaration prayed for was taken away by the last clause of s. 133, which provides that "no order made by a Magistrate under this section shall be called in question in any Civil Court."

Held that the Magistrate's order under this section is not a conclusive determination of the question of title.

[R , 22 B. 230 (232) ; 76 P. L.R. 1904.]

THIS was a second appeal from the decision of E. M. H. Fulton, District Judge of Ahmedabad.

Suit for a declaration of ownership. The plaintiff sued for a declaration that certain land on which his *otta* stood was his property, and not that of the Government. He alleged that this *otta* had stood in front of his shop for 60 years; that a notice had been issued to him under s. 133 (1) of the Criminal Procedure Code (Act X of 1882); that in reply to the notice he had stated that the land underneath the *otta* was his own, and that notwithstanding the said reply, he had been ordered by the Magistrate to remove the *otta*.

The defendant pleaded that the suit was not maintainable, as s. 133 provided that no order duly made under it by a Magistrate shall be called in question in a Civil Court, and that the land was not the property of the plaintiff.

The Assistant Judge of Ahmedabad (Dayaram Gidumal) found that the suit was not barred under s. 133 of the Criminal Procedure Code, but dismissed it on the ground that the land was not the property of the plaintiff.

[295] The Assistant Judge made the following remarks in his judgment:—

"Section 133 of the Criminal Procedure Code says: 'No order duly made by a Magistrate *under this section* shall be called in question in any Civil Court.' The order which can be made under this section is merely a conditional order which after a certain procedure can be made absolute under s. 137, Criminal Procedure Code. The plaintiff complained of the absolute order, but his amended plaint raises merely a question of title between the plaintiff and Government without impugning the legality of the magisterial order. The Calcutta High Court has recently discussed the question in all its bearings in a Full Bench judgment (*Chuni Lall* v. *Ram Kishen* (2)), and reviewed all the authorities. That judgment says: "In the Bombay Presidency no difficulty arises, because by s. 37 of the Bombay Act V of 1879 the soil of the public roads is vested in the Secretary of State. Accordingly every question of highway becomes of necessity a question of conflicting titles to the soil, and can be treated as such.' And, again, 'in this Court White and Field, JJ., in *Mutty Ram Sahoo* v. *Mohi Lall Roy* (3) held that the Magistrate's decision did not preclude a Civil Court from enquiring into the question of title. And in the Bombay High Court this view has been repeatedly accepted both under the earlier and the present Acts. It was taken by Melville and

(1) Section 133 empowers a Magistrate to require the removal of an obstruction from any public place.

(2) 15 C. 460 (467, 470).

(3) 6 C. 291.

Kemball, JJ., in *Lalji Ukheda* v. *Jowba Dowba* (1); by Westropp, C. J., and F. Melville, J., in *Nilkanthapa Malkapa* v. *Magistrate of Sholapur* (2); and by Melville and West, JJ., in *Balaram Chatrukalal* v. *Magistrate of Taluqa Igatpuri* (3).' The suit is, therefore, clearly maintainable."

The plaintiff appealed, and the District Court reversed the decree and allowed the plaintiff's claim, holding that plaintiff was proved to be the owner of the ground in dispute.

In his judgment the District Judge observed: "It is not **[296]** disputed that at the time when the Magistrate issued his order for the removal of the *otta* as an obstruction to the public way, the ground on which it stood was in possession of the plaintiff. The burden, therefore, of showing that he was not the owner rested, under s. 110 of the Indian Evidence Act, on the defendant, unless the effect of the magisterial order was such as to shift it on to the plaintiff. The learned Assistant Judge appears to have considered that it had that effect, but I am unable to agree with him. He argued, I think, very correctly that the words in s. 133 of the Criminal Procedure Code, 'No order duly made by a Magistrate under this section shall be called in question in any Civil Court' were no bar to this suit, in which it is not sought to set aside the Magistrate's order, but to obtain a declaration of title against the Secretary of State. It might, no doubt, have been argued that the plaint, which merely alleges that the plaintiff had received notice from a Magistrate to remove his *otta*, revealed no cause of action against the Secretary of State, who was in no way responsible for the Magistrate's orders. Possibly the suit might have been successfully resisted on the ground that it was premature, and that until the *otta* had actually been removed and the ground thrown into the road,—or, in other words, until the Secretary of State had obtained possession under s. 37 of the Land Revenue Code,—there could not be any cause of action against him, as Government in its executive capacity had no control over the magisterial order and therefore could not be liable to any suit until he had taken possession of the land from which the Magistrate had directed the plaintiff to remove his *otta*. But this defence was not raised. * * The defence as put forward was understood to mean that under s. 133 the Magistrate's order was conclusive as to title, and would continue so after it had been carried out, and the ground has fallen into the possession of the defendant.

"Assuming, then, that the defendant accepted the Magistrate's order as giving Government a right to possession, and did not question the existence of a cause of action otherwise than on the contention that the order of the Magistrate conclusively established his title to the grounds, I think the Assistant **[297]** Judge was right in holding that the suit could be maintained. The decisions which he has quoted show clearly the opinions of the High Courts of Bombay and Calcutta on the subject, and satisfy me that s. 133 is not a final determination as between the person complaining of the interference with his enjoyment of ground in his possession and the Secretary of State on the question of title. It, therefore, remains to consider what effect it has in determining this question. Probably the existence of the order is relevant under s. 42 of the Evidence Act, but it is not in itself, I think, sufficient to shift the burden of proof from the defendant to the plaintiff, who was admittedly in possession."

The defendant appealed to the High Court.

---

(1) 8 B.H.C.R. A.C.J. 94. (2) 6 B. 670. (3) 6 B. 672.

1892

APRIL 7.

APPELLATE CIVIL.

17 B. 293.

Rao Saheb *Vasudeo Jagannath Kirtikar* (Government Pleader), for the appellant.—Section 133 of the Criminal Procedure Code (Act X of 1882) expressly debars a civil Court from calling in question the propriety of an order made by a Magistrate under that section. Although the present suit is brought ostensibly for the declaration of the respondent's title to the ground underneath the *otta* still the real object of it is to reverse the Magistrate's order. The respondent is indirectly attempting to do what the law forbids him to do directly. Even if this Court makes the declaration asked for, the Magistrate's order for the removal of the *otta* stands untouched. This Court cannot interfere with that order, or the Magistrate may pass a fresh order under the section after the declaration. In such a case the decree of a civil Court would give no relief.

[SERGENT, C. J.—A party may after getting a declaratory decree go to the Magistrate and pray for a cancellation of his order, because the section proceeds on the assumption that the ground forms part of a public road.]

We submit that a Magistrate has no power to cancel his own order. There was no clause in the former Criminal Procedure Code similar to the clause in s. 133; nevertheless the rulings in *Buroda Pershad Moostafee* v. *Gora Chand Moostafee*(1) and [298] *Meechoo Chunder* v. *J. H. Ravenshaw*(2) show that the jurisdiction of civil Courts in such matters was barred: *a fortiori* it is barred now when there is a specific clause to that effect in s. 133. *Khodabuksh Mundul* v. *Monglai Mundul* (3) supports our contention. The rulings of the Bombay High Court referred to by the Assistant Judge were under the old Act, and the present question was not raised and discussed. The Full Bench decision in *Chuni Lall* v. *Ram Kishen* (4) is against us, but it proceeds upon the assumption that the Bombay cases were decided under the present Code. We further submit that the respondent has no cause of action against the defendant. It is the order of the Magistrate that is prejudicial to him, and not any act of the Executive Government. In any event, his cause of action has not yet arisen, because the ground is not yet closed by the removal of his *otta*. The suit is therefore premature. The lower appellate Court wrongly placed the burden of proof upon us. The order of the Magistrate raises a presumption in our favour—*Navalchand* v. *Amichand* (5).

Chimanlal Hiralal Setalvad, for the respondent, was not called upon.

JUDGMENT.

SARGENT, C.J.—The plaintiff in this case seeks for a declaration that certain land on which he had erected an *otta* was his property, and not that of Government. It appears that the Magistrate had made an order, under s. 133 of the Criminal Procedure Code (Act X of 1882), for the removal of the *otta* as an obstruction to the public way. The public roads are vested by s. 37 of Bombay Act V of 1879 in the Government of Bombay, who are thus "interested to deny" the plaintiff's title to the land, and therefore, under s. 42 of the Specific Relief Act (I of 1877), the plaintiff (subject to the discretion of the Court, was entitled to a declaration as against the Government of his right to the land. Under the circumstances, it appears to us to be a proper case for a declaratory decree, as we cannot think that the plaintiff was called upon to wait until the Government had taken possession of the land. These objections,

(1) 12 W.R. C.R. 160.
(2) 19 W.R.C.R. 345.
(3) 14 C. 60.
(4) 15 C. 460.
(5) P. J. for 1889, p. 259.

moreover, as [299] the District Judge remarks, were not expressly taken in the first Court.

It has, however, been throughout contended that the jurisdiction of the Court is taken away by s. 133 of the Criminal Procedure Code, which provides that " no order duly made by a Magistrate under this section shall be called in question in any Civil Court." We entirely agree with the lower appeal Court that the decisions of this Court, as well as of the Calcutta High Court, are distinct authorities that the Magistrate's order is not a conclusive determination of the question of title—*Chuni Lall* v. *Ram Kishen* (1).

With respect to the *onus* of proof we agree with the District Judge that the existence of the Magistrate's order does not of itself shift the *onus* of proof from the defendant to the plaintiff who is in possession. It was for the Court itself to appreciate the whole of the evidence and to come to a conclusion whether it was such as to rebut the ordinary presumption of ownership derived from possession. The District Judge held that it did not rebut it, and was, therefore, right in making a declaration that the plaintiff was the owner of the land on which the *otta* stands. We must, therefore, confirm the decree with costs.

Decree confirmed.

---

17 B. 299.

APPELLATE CIVIL.

Before Mr. Justice Jardine and Mr. Justice Telang.

SWAMIRAO (*Applicant*) *v.* THE COLLECTOR OF DHARWAR (*Opponent*).* [20th June, 1892.]

Land Acquisition Act X of 1870—*Assessor—Disqualifications in an assessor—Bias—Objections to assessor's appointment not raised in time—Waiver—Estoppel—Minor—Assessor not competent to act as witness.*

Certain land belonging to the applicant, a minor, was taken by the Municipality of Hubli under the Land Acquisition Act (X of 1870). The Mamlatdar of Hubli, [300] who was an *ex officio* member of the Municipal Committee, took part in the negotiations for the purchase of land. He also gave evidence as to its value in the inquiry before the Collector. As the price offered by the Collector was not accepted by the applicant, the matter was referred to the District Judge, under s. 15 of the Act, for the purpose of determining the amount of compensation.

On this reference the Mamlatdar acted as an assessor appointed by the Collector, and was also examined as a witness as to the value of the land. But no objection was taken to his acting as an assessor. The District Judge evetnually upheld the Collector's award. On an application under s. 622 of the Civil Procedure Code (Act XIV of 1882).

Held, that the award was bad. The Mamlatdar had, under the circumstances, a substantial interest in the matter, sufficient to disqualify him from acting as an assessor.

Kashinath v. *The Collector of Poona* (2), followed.

Held, also, that the minor applicant was not estopped from objecting to the competency of the Mamlatdar by the fact that his guardian had not raised any such objection in the Court below, and might, therefore, be taken to have waived it.

Assuming that there was a waiver, it could not bind the minor, as it was not for his benefit.

---

* Application No. 40 of 1892.

(1) 15 C. 460.

(2) 8 B. 553.

1892
JUNE 20.

APPELLATE CIVIL.

17 B. 299.

Held, also, that a person who is appointed an assessor under s. 19 of the Land Acquisition Act (X of 1870) performs *quasi*-judicial functions, and is, therefore, incompetent to testify as a witness in the same proceedings.

[R., 37 C. 340 (351) = 11 Cr. L. J. 121 = 14 C.W.N. 422 = 5 Ind. Cas. 365.]

THIS was an application under s. 622 of the Code of Civil Procedure (Act XIV of 1882).

Certain land was taken up by the Municipality of Hubli under the Land Acquisition Act, X of 1870.

The applicant, a minor, was owner of the land in question. As he did not accept the compensation offered by the Collector, the matter was referred to the District Judge under s. 15 of the Act.

The Collector appointed the Mamlatdar of Hubli as an assessor on his behalf. This Mamlatdar was an *ex officio* member of the Municipal Committee, and had taken part in the negotiations for the purchase of the land in question. But no objection was taken before the District Judge to the Mamlatdar's acting as an assessor, or to his giving evidence as to the value of the land in question.

[301] The District Judge, agreeing with the Mamlatdar, upheld the Collector's award.

Against this decision the present application was made to the High Court under its extraordinary jurisdiction.

A rule *nisi* was issued to the Collector of Dharwar to show cause why the District Judge's decision should not be set aside.

Rao Saheb *Vasudev J. Kirtikar*, Government Pleader, showed cause.—The applicant did not take any objection in the lower Court to the Mamlatdar's appointment as an assessor. He must, therefore, be deemed to have waived the objection. The nomination of qualified assessors is a provision made by law for the benefit of the claimants to compensation. That benefit they may waive if they please. It is, therefore, too late for the applicant to contend that the Mamlatdar was not qualified to act as an assessor, and on that ground to upset the whole proceedings—*Park Gate Iron Co.* v. *Coates* (1); *Queen* v. *Meyer* (2); *MacAllister* v. *The Bishop of Rochester* (3); *Ardesar Hormasji Wadea* v. *The Secretary of State for India in Council* (4); *Unniraman* v. *Chathan* (5); Maxwell on the Interpretation of Statutes, 474.

Manekshah Jahangirshah, contra.—The applicant is a minor; his guardian had no authority to waive the objection to the Mamlatdar's competency. If there was any waiver, it cannot bind the minor, as it is clearly of no benefit to him—*Rhodes* v. *Swithenbank* (6). The Mamlatdar had a real bias in the matter. He had, as a member of the Municipality, taken part in the negotiations for the purchase of the land in dispute. He was examined as a witness for the Municipality both before the Collector and before the Judge. He was, therefore, disqualified from acting as an assessor—*Loburi Domini* v. *The Assam Railway and Trading Co.* (7); *Kharak Chand Pal* v. *Tarack Chunder Gupta* (8); *Kashinath* v. *The Collector of Poona* (9).

JUDGMENT.

[302] JARDINE, J.—The applicant objects to the award of compensation made by the District Judge under the Land Acquisition Act, X of

(1) L.R. 5 C. P. 634. (2) 1 Q.B.D. 173. (3) 5 C.P.D. 194.
(4) 9 B.H.C. R. 177. (5) 9 M. 451. (6) 22 Q.B.D. 577.
(7) 10 C. 915. (8) 10 C. 1030. (9) 8 B. 553.

1870, on the ground that the assessor nominated by the Collector, namely, the Mamlatdar of Hubli, with whose opinion the Judge concurred, had a substantial interest in the matter, sufficient to disqualify him according to the principle enforced by this Court in *Kashinath* v. *The Collector of Poona* (1). It appears that the Mamlatdar is a member of the Municipal Committee which seeks to acquire the land, and that while holding that position he had acted for the Collector in the negotiations and had given evidence before the Collector as to the value. We are of opinion that these facts bring the present case under the above decision.

It is, however, urged for the opponent that as the applicant took no objection in the Court below to the competency of the Mamlatdar, his conduct amounts to a waiver, and his acquiescence there estops him here. Whether a party acting for himself could have waived the objection to the Mamlatdar acting, as a party can waive the common law objection of interest in the Judge—*Sergeant* v. *Dale* (2)—we need not determine. Even if the applicant's acquiescence were tantamount to waiver, it was a matter beyond the ordinary conduct of the litigation; and as in *Rhodes* v. *Swithenbank* (3), where the next friend had waived the right of appeal, the question arises whether it was for the benefit of the minor whom the applicant represents. We cannot hold this to have been the case. In the case of *Kashinath* v. *The Collector of Poona* the assessor is treated as performing a *quasi*-judicial function, as an "associate in judgment;" and the learned Chief Justice points out that the opinion of either assessor who carries the Judge along with him determines irrevocably the amount of compensation. The Court set aside the award on the ground that the Mamlatdar, one of the assessors, had a substantial interest which could scarcely have failed to create in him a real bias. This principle pervades the decisions from those collected in Viner's Abridgment (Title, Judges A) to such recent cases as *Queen* v. *Meyer* (4); and it conflicts with it to **[303]** suppose that a minor can be benefited in his cause by the presence of a judicial officer having such an interest as imports a bias against him.

It further appears that the Mamlatdar, during the progress of the case before the District Judge, testified as a witness to the value of the land. Having regard to the legal effect of an assessor's opinion, we think the views expressed in *Empress* v. *Donnelly* (5) on the course to be adopted when a sole Judge has testified as a witness, ought to influence this Court in its disposal of the present case, if there were any doubt.

We must, therefore, set aside the award and direct that fresh proceedings be taken on the reference and a new award passed.

The opponent to pay the costs incurred here. Those incurred in the District Court to be dealt with by that Court when passing a new award.

Rule made absolute.

(1) 8 B. 553.
(2) 2 Q.B.D. 567.
(3) 22 Q.B.D. 577.
(4) 1 Q.B.D. 173.
(5) 2 C. 405.

1892
JUNE 22.

APPEL-LATE CIVIL.

17 B. 303.

17 B. 303.

APPELLATE CIVIL.

Before Mr. Justice Jardine and Mr. Justice Telang.

NAGESH (*Original Defendant* 1), *Appellant v.* GURURAO (*Original Plaintiff*), *Respondent.** [22nd June, 1892.]

Hindu law—Inheritance—Succession—Succession among the remoter gotraj sapindas—Gotraj sapindas—*Succession* per capita—*Practice—Second appeal—New point raised in second appeal.*

Among the remoter *gotraj sapindas* the inheritance goes *per capita* and not *per stirpes*.

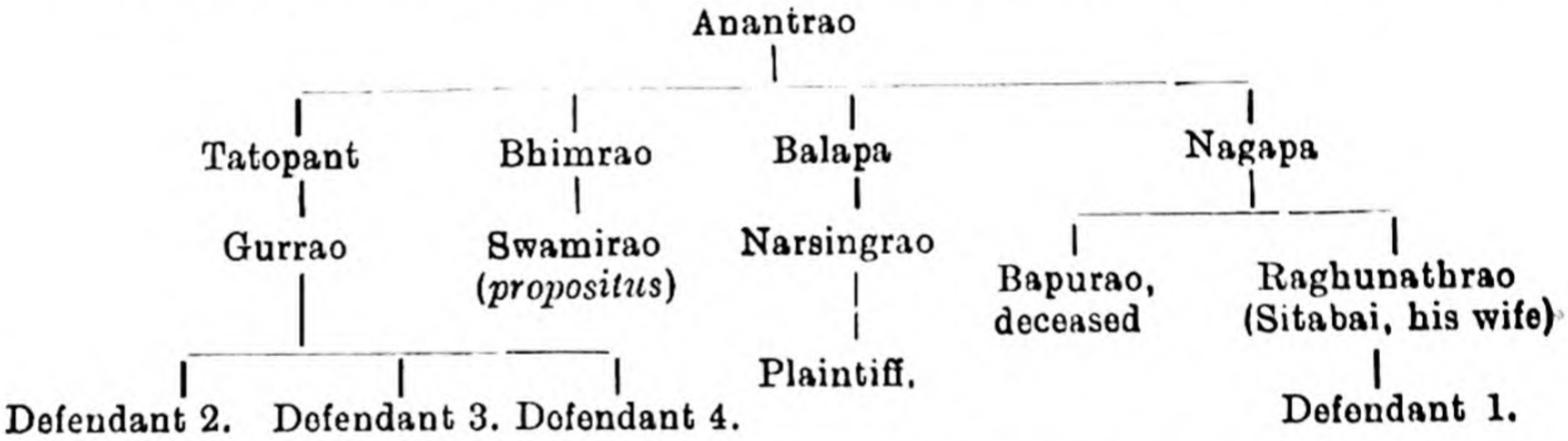
The High Court will allow, on second appeal, a new point to be raised for the first time, provided it is purely a question of law, arising on the findings of the Courts below, and not affected by any facts outside those findings.

[R., 18 B. 679 (683); 27 B. 452 (466); 1 N.L.R. 1 (2).]

SECOND appeal from the decision of T. Hart-Davies, Assistant Judge of Dharwar, in Appeal No. 72 of 1890 of the District File.

The plaintiff sued as one of the heirs of one Swamirao Bhimrao, deceased, to recover one-third share of certain property belonging to the deceased.

[304] The following pedigree shows the relationship of the parties :—



Defendants pleaded (*inter alia*) that plaintiff was not the heir of the deceased Swamirao.

The Subordinate Judge held that defendant No. 1's mother, Sitabai, was the nearest *gotraj sapinda* of the deceased, and as such excluded the plaintiff. He, therefore, rejected the plaintiff's claim with costs.

On appeal, the Assistant Judge held that Sitabai, not being a childless widow, could not inherit in preference to her son, the defendant No. 1, and as all the parties stood in the same degree of relationship to the deceased, they took the property *per stirpes*. He therefore awarded to the plaintiff one-third share of the property in suit.

Against this decision the defendant No. 1 appealed to the High Court.

Balaji A. Bhagvat, for appellant.—All the parties stand in the same degree of propinquity to the *propositus*. They take *per capita*, not *per stirpes*. Nephews take *per capita*: see Mayne's Hindu Law, s. 526: so, too, daughter's sons take *per capita*. I contend that by analogy sons of nephews take similarly. The principle is that those who take on their own right take *per capita*: see West and Bühler, 459, 445, and Mandlik's Translation of Vyavahar Mayuk, 81.

* Second Appeal No. 232 of 1891.

1892
JUNE 22.

APPELLATE CIVIL.

17 B. 303.

N. G. Chandavarkar, for respondent.—The point is not covered by any text or authority. Succession by *stirpes* is the common rule.

JUDGMENT.

TELANG, J.—The point which is discussed by the Assistant Judge in this case, as to a female member of a family excluding her own son from inheriting to a distant relation, is now covered by authority (1), and was properly abandoned by the pleader for the [305] appellant. He has, however, argued that the Assistant Judge was wrong in giving the plaintiff a third share of the estate, seeing that the plaintiff is one of six members of the family all equally distant in relationship from the *propositus* Swamirao. At the hearing, we intimated our opinion, that as the question was purely a question of law, which arose on the findings of the Court below, and could not be affected by any facts outside those findings, we ought to allow (2) the appellant to argue it although it was not raised in either of the Courts below. And we think that the question must be decided in favour of the appellant's contention. The Assistant Judge has held that the inheritance must go *per stirpes*, and that as the plaintiff represents one *stirpes* out of the three into which the family is now divided, he must get one-third of the estate. There is, however, no authority for this view. Succession *per stirpes* is laid down expressly in the case of a partition among the male descendants of a deceased person. But that is distinctly stated to be a special rule (3) based on a special text. The similar rule in relation to the distribution of *stridhan* is also based in the Mitakshara (4) on a special text. It is not, therefore, a matter of course to apply that rule in a case to which no express text extends it. On the other hand, it is to be remarked, that the remoter heirs succeed in their own right, and directly to the *propositus*. According to the Mitakshara, no doubt, they succeed as belonging to the "line" of this or that ancestor of the *propositus*. But that is not material on the present point. In this case, for instance, it is true that the remoter heirs succeed as representing the line of Anantrao, the grandfather of Swamirao, but all the members of the family shown in the genealogy belong in common to that same "line", and the subdivisions of that line into the branches of Tatopant, Balapa and Nagappa are irrelevant on the present inquiry. Among them all, an heir nearer in degree would exclude a remoter one, and no regard would be paid to the fact of their respectively representing two co-ordinate *stirpes* of the family of the *propositus*. There is thus no positive [306] reason in favour of applying the rule of succession *per stirpes* to the case of the remote *gotraja sapindas*; while there are certain important considerations pointing the other way; and the rule itself is laid down as an exceptional rule in the cases in which the authorities show that it must be applied. It follows from this that it is not a rule which should be applied in the present case. And this conclusion derives some support from the analogies which were relied upon in argument. As regards daughter's sons, it has always been held that they succeed not *per stirpes* but *per capita*, and this Court has recently so decided (*Pandurang Gopal* v. *Ramchandra Damodar and another* decided on 27th January, 1892). So in the case of brother's sons, the same rule has been laid down. In both cases the succession is direct, the nephews being entitled to claim as nephews,

(1) *Rachava* v. *Kalingapa*, 16 B. 716. (2) Cf. *Girriapa* v. *Ningapa*, 17 B. 100.
(3) See Stokes H. L. Books, p. 391; *cf.* Smriti Chandrika, VIII, para. 5.
(4) See Stokes H. L. Books, p. 462.

1892
JUNE 22.
APPEL-
LATE
CIVIL.
17 B. 303.

and being liable to be excluded by any uncle or aunt, as the case may be, if one happens to survive the *propositus*. The similarity between the succession of these nephews with that of the remoter *gotraja sapindas* is more complete than that between the succession of the latter and that of lineal descendants. And this is a consideration which supports the application of the rule of succession *per capita*, in preference to that of *succession per stirpes*, to the case of the remoter *gotraja sapindas*.

We must, therefore, vary the decree of the Court below by substituting, in lieu of the third share awarded therein, a sixth share, which is admitted to be what the plaintiff is entitled to, according to the genealogy held proved by the Assistant Judge and to the opinion above expressed. But as this point was made for the first time in this Court, the appellant cannot be allowed the costs of this appeal.

Decree varied.

---

17 B. 307.

[307] ORIGINAL CIVIL.

Before Mr. Justice Parsons.

DHONDIBA KRISHNAJI AND OTHERS (*Plaintiffs*) *v.* THE MUNICIPAL COMMISSIONER OF THE CITY OF BOMBAY (*Defendant*).*

[5th March, 1892.]

Negligence—Easement—Right of support of house by adjoining soil—Principal and agent or contractor—Liability of principal for acts of contractor—Bombay Municipal Act (III of 1888), s. 527—Notice of suit—What is sufficient notice.

The plaintiffs were owners of a house consisting of a ground floor and upper storey and measuring 77 feet in length. On the south side of the house was a gully, 3 feet 6 inches wide, separating it from another upper-storied house. The plaintiffs in this suit complained that in January, 1891, the defendant by his servants dug a trench, 8 feet deep, along the whole length of the gully for the purpose of laying a drain pipe, and that the work was done so negligently that the plaintiffs' house was injured and became in such a dangerous condition that it had to be pulled down. The plaintiffs claimed Rs. 3,996 as damages. The defendant denied the negligence, and alleged that the work was not done by his servants or agents, but by a contractor.

Held, that the defendant was liable for the act of his contractor. The work was necessarily attended with risk, and the defendant could not free himself from liability by employing a contractor. The defendant, as well as the contractor, was liable to the plaintiffs.

For the defendant it was contended that the notice of action given by the plaintiffs under s. 527 of the Bombay Municipal Act (III of 1888) was insufficient. The notice stated "that one S. L., a contractor under you, and as such being your agent and servant, excavated a trench, &c." It was argued that this was not a good notice, as it only alleged a cause of action arising out of the acts of the defendant's servants and agents, and not out of the acts of a contractor.

Held, that the notice was sufficient. The section only required the notice to state with reasonable particularity the cause of action, and this was done. The individual by whom the damage was done was specified, and the acts which caused the damage were clearly set forth.

SUIT to recover Rs. 3,996-13-0 as damages for loss caused to the plaintiffs by the negligence of the defendant.

The plaint set forth that the plaintiffs were owners of a chawl situate in Haines Road in Bombay, consisting of a ground floor and upper storey and measuring 77 feet in length and 19 feet and 6 inches in breadth;

* Suit No. 241 of 1891.

that on the south of this chawl was a gully, 3 feet 6 inches wide, separating the plaintiffs' chawl from another upper-storied chawl; that in January, 1891, **[308]** the defendant by his servants excavated a trench, 8 feet deep, in the said gully for the purpose of laying a drain pipe; that the trench was made along the whole length of the plaintiffs' chawl at one time instead of being done in short lengths; that the sides of the trench were left unsupported, and that the whole work was done so negligently that the foundation of the south wall of the plaintiffs' chawl was undermined and slipped outwards, carrying the superstructure with it, so that the whole building became in a dangerous condition, and in consequence thereof, the defendant, under the provision of the Municipal Act, caused the chawl to be pulled down, and the materials removed. The plaintiffs claimed Rs. 3,996-13 as damages.

The plaintiffs further alleged that prior to bringing the suit, *viz.*, on the 27th January 1891, they had given the defendant the notice required by s. 527 (see note*) of the Bombay Municipal Act (III of 1888). The notice was from the plaintiffs' solicitors (Messrs. Payne, Gilbert, and Sayani), and stated (*inter alia*) as follows:—

"We are instructed that one Sitaram Luxmon, a contractor under you, and as such being your agent and servant, during the last week excavated a trench 8 feet **[309]** deep in the gully situate on the south of our clients' chawl for the purpose of laying down a drain pipe, with the result that the foundations of the south wall of the chawl were undermined and slipped outwards, carrying the superstructure with it, so that the south wall and other portions of the building were put into the dangerous condition attributed to it by the Municipality, and which necessitated the proceedings taken by them to remove the chawl.

"The shock caused by the slipping of the south wall has also broken the north exterior wall of the chawl, and this wall has an horizontal crack along its whole length at a height from 2 to 3 feet above ground level, and the masonry to this wall and to the said exterior walls which are also cracked will have to be rebuilt.

"Our clients charge that the damage to their said chawl was caused by the careless manner in which the excavation of the aforesaid trench was done. The sides of the trench were not shored or supported in any way, and the trench was opened the full length of the gully instead of in short lengths. The work, having regard to the depth of cutting, the narrowness of the gully and its close proximity to our clients' chawl, required the utmost care, yet the most ordinary precautions were neglected.

"Our clients estimate their damages at Rs. 4,000, and unless their claim is settled within one month from the date hereof they will take legal proceedings against you in the High Court to enforce it, which please note.

---

* *Note.*—Section 527 of Act III (Bombay) of 1888, is as follows:—

(1) No suit shall be instituted against the Corporation, or against the Commissioner, or a Deputy Commissioner, or against any Municipal officer or servant, in respect of any act done in pursuance or execution or intended execution of this Act or in respect of any alleged neglect or default in the execution of this Act:—

(*a*) until the expiration of one month next after notice in writing has been, in the case of the Corporation, left at the chief Municipal Office, and in the case of the Commissioner, or of a Deputy Municipal Commissioner, or of a Municipal officer or servant, delivered to him or left at his office or place of abode, stating with reasonable particularity the cause of action and the name and place of abode of the intending plaintiff and of his attorney or agent if any, for the purpose of such suit: nor

(*b*) unless it is commenced within six months next after the accrual of the cause of action:

(*c*) the plaintiff shall not be permitted to go into evidence of any cause of action except such as is set forth in the notice delivered or left by him aforesaid:

(2) At the trial of any such suit:

(*d*) the claim, if it be for damages, should be dismissed if tender of sufficient amends shall have been made before the suit was instituted, or if after the institution of the suit a sufficient sum of money is paid into Court with costs.

1892
MARCH 5.

ORIGINAL CIVIL.

17 B. 307.

"Our client Dhondiba Krishnaji resides at the bazaar opposite the Victoria Garden; Harriba Tukaram resides on the Parel Road; and Raghoba Ramji resides at No. 107, Haines Road. They all live on their properties."

The suit was filed on the 1st May, 1891.

The defendant filed a written statement. He denied the statements made by the plaintiffs as to the excavation of the trench, the negligence, &c., and stated that the excavation was made not by the defendant, his agents or servants as alleged in the plaint, but by a contractor. He also stated that, even if no excavation had been made, the plaintiffs would have been required to pull down the chawl as being in a dangerous condition, and that its said condition was not attributable to the excavation. The defendant also submitted that the notice of action given by the plaintiffs was not sufficient under s. 527 of the Municipal Act, and that the plaintiffs were not, therefore, entitled to bring this suit.

Latham (Advocate General) and *Jardine*, for plaintiffs :—The fact that the defendant gave the work to a contractor does not [310] exonerate him from liability—*Hughes* v. *Percival* (1); *Bower* v. *Peate* (2); *Dalton* v. *Angus* (3).

Russell and *Scott* for defendant :—They contended that the notice of suit of the 27th January 1891 was not sufficient under s. 527 of Bom. Act III of 1888, and they cited *Ullman* v. *The Justices of the Peace for the town of Calcutta* (4); *Steel* v. *The South-Eastern Railway Company* (5).

JUDGMENT.

PARSONS, J.—In dealing with this case it will be advisable to consider the points of law first, *viz.*, as to the sufficiency of notice and the liability of the defendant for the action of his contractor.

The material part of the notice before suit given to the defendant by the plaintiffs is as follows : (His Lordship read the notice of the 27th January above set out and continued :) It is contended that this alleges a cause of action arising out of the acts of the defendant's agents and servants only, and not out of the acts of a contractor, and that therefore the plaintiff cannot recover if the contractor has been in default and the defendant guilty of a breach of duty. The law, however, (s. 527 of the Bombay Municipal Act, III of 1888) only requires the notice to state with reasonable particularity the cause of action, and I am of opinion that this has been done when it is stated that "one Sitaram Luxmon, a contractor under you, and as such being your agent and servant, excavated a trench, &c." The proposition that he was an agent and servant may not be strictly tenable in law, but the individual was specified by the use of the word "*contractor*," his position was particularised, and the various acts which caused the damage are clearly and plainly set out. While therefore the plaintiffs must of course be limited to the cause of action in the said notice set forth, I hold that the cause of action is wide enough to enable the plaintiffs to maintain this suit, and I find the 5th and 6th issues accordingly.

The next point is whether the defendant is liable for the acts of his contractor in the present suit. The case of *Ullman* v. *The Justices of the Peace for the town of Calcutta* (4) has been cited to [311] show that if a person has to do a lawful act, and he employs a competent person to do that lawful act, and damage occurs, the original employer is not liable;

(1) 8 Ap. Ca. 443. (2) 1 Q. B. D. 321. (3) 6 Ap. Ca. 740 (790, 829, 831).
(4) 8 B.L.R. 265. (5) 16 C.B. 550.

(see also *Steel* v. *The South-Eastern Railway Company* (1)). Since, however, this case was decided, the law has been somewhat modified. The case of *Dalton* v. *Angus* (2) must now be taken as embodying the law on the subject. In that case, at p. 829, Lord Blackburn says: "Ever since *Quarman* v. *Burnett* (3) it has been considered settled law that one employing another is no liable for his collateral negligence, unless the relation of master and servant existed between them. So that a person employing a contractor to do work is not liable for the negligence of that contractor or his servants. On the other hand, a person causing something to be done, the doing of which casts on him a duty, cannot escape from the responsibility attaching on him of seeing that duty performed by delegating it to a contractor. He may bargain with the contractor that he shall perform the duty, and stipulate for an indemnity from him if it is not performed, but he cannot relieve himself from liability to those injured by the failure to perform it—*Hole* v. *Sittingbourne Railway Company* (4); *Pickard* v. *Smith* (5); *Tarry* v. *Ashton* (6)." And at p. 831, Lord Watson says: "When an employer contracts for the performance of work, which, properly conducted, can occasion no risk to his neighbour's house which he is under obligation to support, he is not liable for damage arising from the negligence of the contractor. But in cases where the work is necessarily attended with risk, he cannot free himself from liability by binding the contractor to take effectual precautions. He is bound, as in a question with the party injured, to see that the contract is performed, and is, therefore, liable, as well as the contractor, to repair any damage which may be done."

This law is affirmed in *Hughes* v. *Percival* (7). The propositions of law so laid down apply to the present case. The work here to be performed was hazardous, and a duty was cast on the **[312]** defendant in respect of it by reason of the plaintiffs having a right of support from the ground on which the defendant was operating. I find the 1st and 7th issues accordingly.

It only remains to deal with the question of fact raised in the 2nd, 3rd, and 4th issues. (His Lordship referred to the evidence and continued:—) It is clear that the trench was affecting the stability of the house; while the trench was there, the house was sensibly getting into a more and more unsafe condition; and nothing shows this more conclusively than the fact that it was hurriedly filled up immediately the condition of the house became known, and was not proceeded with until after the house had been pulled down. There is a great conflict of evidence as to the way in which the trench was dug. Practically speaking, I do not think that it makes very much difference whether the trench was dug all at one time and along the whole front of plaintiffs' house, or by lengths or along part of the front only, or whether it was shored at all or not, or whether a bridge of earth was left or not. To lay the drain so deep and so near to the plaintiffs' house was admittedly a hazardous operation, and one that required great care and precautions. The worse the condition of the plaintiffs' house, the more care and the greater precautions were necessary. There is no doubt that sufficient care and precautions were not taken, and the result was that the plaintiffs' house was undermined, its foundations slipped, its floor and walls cracked and became unsafe and ruinous. The evidence of H. A. Kanga as to the condition of the trench when he saw it is very

(1) 16 C. B. 550. (2) 6 Ap. Ca. 740. (3) 6 M. & W. 499.
(4) 6 H. & N. 488. (5) 10 C. B. (N. S.) 473. (6) 1 Q. B. D. 314.
(7) 8 Ap. Ca. 443.

1892
MARCH 5.
ORIGINAL CIVIL.
17 B. 307.

strong; there is no evidence on the defendant's side at all to be compared with it for certainty or credibility. I must believe him fully as to the facts on which he has given evidence. It is quite clear that there was no shoring used in the trench. No two witnesses for the defendant agree as to the extent of the shoring they allege was there. Moreover, if there had been shoring, it would have been known what was done with it when the trench was so hurriedly filled up. Not much reliance can be placed on witnesses, who, we find, see shoring which never existed, and who do not see a trench 12 feet long by 2 feet deep, which the contractor of the work, Kesow himself, a witness called by the defendant, says that he excavated. If the witnesses would [313] not see this trench, it is hardly surprising that they would not see the much deeper trench that evidently was there.

It is unnecessary to say more or discuss the evidence at any greater detail. I have purposely not gone into the expert evidence, the evidence, that is, of persons who examined the premises after the mischief had been done and the plaintiffs' house demolished, for, as I said before, it is, in my opinion, almost useless. It is no assistance to be told in one breath that a crack might be caused in one way, and in another breath that it might also be caused in two or three other ways. No doubt such injuries as this house had sustained might have been caused in other ways than by the disturbance of the trench, but they could have been caused by it; and on the evidence it is clear that, in point of fact, they were caused by it, and by nothing else.

I find the issues 2, 3 and 4 accordingly. The amount of damages claimed has hardly been disputed, and is proved in the case. I pass a decree for the plaintiffs for Rs. 3,812-7-0 and costs.

Attorneys for the plaintiffs:—Messrs. *Payne, Gilbert and Sayani.*

Attorneys for the defendant:—Messrs. *Crawford, Burder, Buckland and Bayley.*

---

17 B. 313.

INSOLVENT JURISDICTION.

Before Mr. Justice Farran.

IN THE MATTER OF HORMARJI ARDESIR HORMARJI, AN INSOLVENT. [13th, 20th, 26th, 27th and 28th July and 4th, 5th and 6th August, 1892.]

Insolvency—Indian Insolvent Act (Stat. 11 and 12 Vic., c. 21), ss. 50 and 51— Conduct of insolvent amounting to offences within those sections—Conduct of insolvent considered with reference to the following charges filed against him by opposing creditors, viz., reckless speculation; contracting debts without reasonable expectation of paying them; misconduct in contracting debts; concealment of property; obtaining forbearance by false representations; contracting debts by false pretences; undue preference.

The insolvent had for many years carried on business in Bombay as a merchant. His firm (Messrs. B. and A. Hormarji) had been established in 1830 by his uncle and father. On the death of the latter in 1882 the insolvent was left the sole surviving partner, and from that time until his failure he carried on the business [314] alone. The failure took place in April, 1891, and on the 1st May 1891 he was adjudicated an insolvent. His liabilities were stated to be Rs. 47,98,591, his good assets Rs. 5,13,903 and his doubtful assets Rs. 60,014. His discharge was opposed by six banks in Bombay with which he had had dealings. The grounds of opposition were as follows:—

(1) Reckless speculation; (2) contracting debts without any reasonable expectation, at the time when the same was contracted, of paying the same; (3) gross

misconduct in contracting debts; (4) concealment of property; (5) obtaining forbearance from the opposing creditors by making false representations to them (6) contracting debts by means of false pretences; (7) fraudulently and with intent of diminishing the sum to be divided among his creditors, or of giving an undue preference to creditors, having discharged a debt due by the insolvent.

1892
AUG. 6.

INSOLVENT JURISDICTION.

17 B. 313.

It appeared that down to the end of 1889 there was nothing in the dealings of the firm to which objection could be taken. In the first half of the year 1890 he must have sustained heavy loss, as his mercantile assets over liabilities which on 31st December 1889 were Rs. 5,50,794, were on the 30th June 1890 reduced to Rs. 2,29, 612. The charges, however, against the insolvent were based upon his conduct subsequently to the latter date. On that day (30th June 1890) the insolvent nominally possessed 4 lakhs of rupees, the saleable value of which was about 2½ lakhs. With his finances in this state the insolvent speculated in exchange, and in six months (*viz.*, before the 31st December 1890), he had lost his 4 lakhs of nominal capital and 19 or 23 lakhs of rupees besides. The Court *held*,

(1) As to the first ground of opposition, that the insolvent was guilty of rash and reckless speculation. This, however, was not an offence within the meaning of s. 51 of the Indian Insolvent Act (11 and 12 Vic., c. 21). When the insolvent entered into the contracts which had resulted in the loss he had a fair capital, and though his speculations were excessive in the amount he had a fairly reasonable expectation that there would not be such a fall in exchange as would more than absorb his assets.

(2) As to the second and third grounds of opposition, that they were proved in respect of the insolvent's transaction subsequently to December 1890, and that the insolvent was guilty of gross misconduct in contracting debts having no reasonable or probable expectation, at the time when they were contracted, of paying them, and that his conduct fell within the purview of s. 51 of the Indian Insolvent Act. In December 1890 the insolvent was bankrupt to the extent (at all events) of over 16 lakhs, and had on hand large forward contracts which then showed a further probable loss. In that position he entered into further large speculative sales of exchange. He had then no assets with which to meet any loss.

(3) As to the fourth ground of opposition, that it was proved.

(4) As to the fifth ground of opposition, that it was not established. On 18th April 1891 the insolvent called a meeting of creditors and laid a not very candid or truthful statement of his affairs before them. Nothing was then arranged and the meeting was adjourned for a week, in order that a committee should examine the insolvent's position, &c. It was understood and arranged that in the meantime no steps should be taken against the insolvent, and that he should keep **[315]** his affairs in *statu quo*. The insolvent, however, swore that he understood he was to make no large payments, but that he was to keep the firm going. During that week the insolvent paid Rs. 3,193 due on a bill to one of the banks and Rs. 472 on redraft account, a few insignificant current expenses and Rs. 1,000 to his solicitors, who were preparing a trust-deed to be carried before the creditors. The Court was of opinion that the conduct of the insolvent in making these payments did not amount to the offence charged in the fifth ground of opposition, *viz.*, obtaining forbearance from the opposing creditors by making false representations to them.

(5) As to the sixth ground, that it was not established. On the 14th March the insolvent in answers to enquiries had assured the manager of the Chartered Bank that his firm was quite sound and solvent, it being then to his knowledge hopelessly insolvent. On that day the manager accepted the insolvent's bills for £20,000 for which security was given and subsequently the insolvent sold one of his own bills for £10,000 to the bank. This, however, was in pursuance of a previous contract. The evidence of the manager showed that it was because of this contract, and not because of the false representation of the insolvent, that he purchased the draft for £10,000. The Court was of opinion that the transaction did not come within s. 50.

(6) As to seventh ground (undue preference), that it was not proved. On the 16th April 1891, the day but one before the insolvent held a meeting of his creditors, he sent £5,000 to Messrs. Elliott & Sons in England. That firm had accepted bills of the insolvent which he was bound to take up, but the earliest did not fall due until the 20th May, 1891. His practice had been to remit money a day or two before bills became due. The Court was of opinion that the

1892
AUG. 6.

INSOLVENT JURISDICTION.

17 B. 313.

transaction was not an undue preference within s. 50. It was no doubt a voluntary payment, but it was not shown to be a fraudulent discharge of a debt within the section. A mere voluntary payment of a debt is not within the purview of the section. Such a payment must be fraudulent and must be made with the intent of diminishing the sum to be divided amongst creditors, or of giving an undue preference to any of the creditors. From the mere fact of a voluntary payment, fraud of a penal nature cannot be inferred. Here nothing more was proved than a voluntary payment by a man in insolvent circumstances. The insolvent knew he was in difficulties, but was of so sanguine a nature that he believed he could surmount them, and so £5,000 were sent rather with a view to keep up his English connection than with the fraudulent intent of giving an undue preference. Where an undue preference is made penal the Court must be satisfied that the guilty intention necessary to constitute the offence existed in the mind of the insolvent, and ought not to assume it unless the circumstances point to no other probable conclusion.

The release by an insolvent of a debt due to him without receiving payment would undoubtedly fall within the scope of s. 50 of the Indian Insolvent Act (Stat. 11 and 12 Vic., c. 21).

THE insolvent for many years carried on business as a merchant in Bombay under the firm of Messrs. B. and A. Hormarji & Co. **[316]** He was adjudicated an insolvent on the 1st May 1891. His liabilities were stated to be Rs. 47,98,591, his good assets to be Rs. 5,13,903, and his doubtful assets to be Rs. 60,014.

His discharge was opposed by the Chartered Mercantile Bank, the Chartered Bank of India, Australia and China, the National Bank of India, the Hongkong and Shanghai Bank, the Agra Bank, and the New Oriental Bank.

The grounds of opposition filed were as follows :—

(1) Reckless speculation.

(2) Contracting debts without any reasonable expectation, at the time when the same was contracted, of paying the same.

(3) Gross misconduct in contracting debts.

(4) Concealment of property.

(5) Obtaining forbearance from the opposing creditors by making false representations to them.

The above grounds of opposition were common to all the opposing creditors. The Chartered Bank also filed a separate ground of opposition, *viz.*—

(6) Contracting debts by means of false pretences.

After the cross-examination of the insolvent, leave was given to file a further ground of opposition, *viz.*—

(7) Fraudulently and with intent of diminishing the sum to be divided among his creditors, or of giving an undue preference to creditors, having discharged a debt due by the insolvent.

He now applied for his discharge under s. 47 of the Indian Insolvent Act, Stat. 11 and 12 Vic., c. 21.

Inverarity and *Scott*, for the opposing creditors :—They cited as to the first three grounds of opposition, *Ex parte Heyn* (1) ; *Ex parte Johnson* (2) ; *Ex parte Dornford* (3) ; *Ex parte Rufford* (4) ; *Ex parte White* (5) ; *Ex parte Salaman* (6). As to undue preference, *Nunes* v. *Carter* (7); *Brown* v. *Kempton* (8) ; *Rust* v. *Cooper* (9) ; *Butcher* v. *Stead* (10) ;

(1) L.R. 2 Ch. 650. (2) 4 DeG. & Sm. 25. (3) 4 DeG. & Sm. 29.
(4) 2 DeG. M. & G. 234. (5) 14 Q. B. D. 600. (6) 14 Q. B. D. 936.
(7) L. R. 1 P. C. 348, per Lord Westbury. (8) 19 L. J. (C. P.) 169.
(9) 2 Cowp. 629 (634). (10) L.R. 7 Eng. & Ir. Ap. 839.

[317] *In re Skegg* (1); *Ex parte Griffith* (2); *Ex parte Hill* (3); *Singleton* v. *Butler* (4); *Wilson* v. *Balfour* (5). As to false pretences, *Reg* v. *Welman* (6); *Reg* v. *Willot* (7). Reference was also made to ss. 50 and 24 of the Indian Insolvent Act; Stat. 11 and 12 Vic., c. 21, corresponding to ss. 48 and 32 of Stat. 7, Geo. III, c. 57. Also to Stat. 1 and 2 Will. IV, c. 56; English Bankruptcy Act, 1849; Stat. 12 and 13 Vic., c. 106, s. 256; Stat. 24 and 25 Vic., c. 154, s. 221; Stat. 32 and 33 Vic., c. 71, s. 13.

Lang (Acting Advocate-General), *Jardine* and *Russell*, for the insolvent:—They cited *Morgan* v. *Brundrett* (8); *Ex parte Downman* (9); *Miller* v. *Sheo Pershad* (10); *Ex parte Jenkins* (11); *Runnett* v. *Vinayak Pandurang* (12). They referred to Stat. 12 and 13 Vic., c. 106; Stat. 6 Geo. IV, c. 16, s. 73.

JUDGMENT.

FARRAN, J.—Hormarji Ardesir was adjudicated an insolvent on the 1st May, 1891. The debts and liabilities of the insolvent, as stated in his schedule, amount to Rs. 47,98,591-13-7, against which he was possessed of assets amounting to Rs. 12 or 14 lakhs according to the value to be properly placed upon them. They have realised Rs. 11,86,826-8-4. There may possibly be sums still recoverable from certain insolvent estates, and from the firm of Matheson & Co., of London, but substantially the above are the figures which I have to take into account in dealing with this matter.

The insolvent now seeks for his personal discharge under s. 47 of the Indian Insolvent Act, 11 and 12 Vic., c. 21. His discharge is opposed by the following banks, who are his creditors for the following sums:—The Chartered Mercantile Bank, Rs.4.05,430-10-1; the Hongkong and Shanghai Bank, Rs. 9,92,403-11-6; the National Bank, Rs. 8.65,622-14-10; the Agra Bank, Rs. 12,42,774-0-11; the Chartered Bank, Rs. 2,16,336-1-8; and the New Oriental Bank, Rs. 3,38,123-4-5. These sums aggregate Rs. 38,60,690-11-5. The remaining creditors are creditors [318] for, comparatively speaking, small sums, from Rs. 5,000 downwards, except Mulchand, who is a creditor for Rs. 11,327-1-5, for brokerage; Kushalchand, who is a creditor for Rs. 14,818-7, in respect of a draft, sold against pearls, of which account sales were not received when the schedule was made up; Premchund Roychund who is a creditor for Rs. 14,754-6-9, for his share in the Coorla Mill commission, which he had not received; and the Comptoir de Paris, who are creditors for Rs. 17,250-12-2: and also excepting John Elliott & Sons, of London, who are creditors for Rs. 3,33,120-12-11; and Matheson & Co. of London, who are entered in the schedule as creditors for Rs. 2,58,195-9-5 but on the other side are entered as debtors in Rs. 4,91,187-8-9. These accounts of Matheson & Co. are not as yet adjusted, and the balance may be in favour of the insolvent. If this is so, the total debts of the insolvent will be reduced by about Rs. 2,58,195-9-5, which would bring them to Rs.45,40,396-4-2. The above figures have not been proved before me, but they are taken from the schedule, and may be assumed, for the purpose of this enquiry, to be correct. It may therefore be taken, that the principal creditors of the insolvent, with the exception of John Elliott & Sons, of London, are all opposing his discharge.

---

(1) 25 Q. B. D. 505. (2) 23 Ch. D. 69. (3) 23 Ch. D. 695.
(4) 2 Bos. & P. 283. (5) 2 Campbell, 579. (6) 6 Cox. Cr. Ca. 153.
(7) 12 Cox. Cr. Ca. 68. (8) 5 B. & Ad. 289. (9) 32 L.J., (Bankruptcy), 49.
(10) 10 I.A. 98. (11) 39 W. Rep. 430. (12) 9 B.H.C.R. 27.

1892
AUG. 6.
INSOLVENT JURISDICTION.
17 B. 313.

The grounds of opposition filed were—(1) Reckless speculation; (2) contracting debts without having any reasonable or probable expectation, at the time when the same were contracted, of paying the same; (3) gross misconduct in contracting debts, in that his whole debts so greatly exceeded his means of providing for the payment that during the time when the same were in course of being contracted (reference being had to his actual and expected property) as to show gross misconduct in contracting the same; (4) concealment of property; (5) obtaining forbearance from the opposing creditors by making false representations to them. These grounds of opposition are common to all the opposing creditors. The Chartered Bank has filed a ground on its own behalf in addition to the above, which it also relies on (6) contracting debts by means of false pretences.

At the close of the cross-examination of the insolvent, counsel for the Chartered Mercantile Bank applied for leave to add [319] several other grounds of opposition. All of the facts relied upon in support of these were known to the opposing creditors when they filed the above grounds, or were within their means of knowledge. I refused to allow this to be done in the greater number of cases; as, for reasons which I then gave, I considered that the insolvent might have been prejudiced in his defence by not having had them put forward and relied upon at an earlier stage of the case, and as I thought that the power given to the Court by Rule 20 should be exercised with great caution. I allowed a ground of opposition resting on an admitted payment of a sum of £5,000 to John Elliott & Co. by the insolvent on the eve of his insolvency to be added, as the facts relating to it were within the actual knowledge of the insolvent, and of no one else. It is now added as ground (7), *viz.*, fraudulently, with intent of diminishing the sum to be divided among his creditors, or of giving an undue preference to creditors, having discharged a debt due from the insolvent.

The first ground of opposition is not within the words of s. 50 or 51, of the Insolvent Act,—that is to say, it is not specifically stated as a ground for putting the provisions of either of these two sections in force. I have no doubt but that, if it were proved, I should be justified on account of it in adjourning the insolvent's discharge under s. 47 of the Act. It has been so ruled in *Re Gopal Chunder Seal* (1), but I consider that unless the facts bring the case within the second and third heads of opposition I have no jurisdiction to treat it as an offence under s. 51. It clearly does not fall within the purview of s. 50.

The insolvent at the time of his adjudication was the sole owner of the firm of B. & A. Hormarji. The firm had been established in 1830 by the uncle and father of the insolvent. On the death of the latter in 1882 the insolvent was left as the sole surviving partner, and continued so until his failure. There is no evidence as to what the capital of the firm was when the insolvent became the sole owner of it, but since the adjudication, balance sheets have been prepared at the expense of the estate, [320] and under the supervision of the insolvent, which purport to show the position of the firm at the close of 1886 and subsequent years. These balance-sheets have been compiled from the accounts in the ledgers of the firm. Their accuracy was not disputed before me, save in two particulars which are these:—

(1) Towards the close of each year it was not uncommon for the firm to draw and sell bills of exchange on London constituents, and, receiving the proceeds, to place them to the credit of the firm with some

(1) 2 Boulnois 119.

of its bankers. The sums thus received by the insolvent's firm were received for the purpose of being remitted to London to meet the bills thus drawn which had to be met by the firm, and being thus credited in the books appear as part of the assets of the firm. Against that asset the liability to meet the bill should of course appear as a debit of the firm. It was, however, the practice not to enter that debit in the accounts of the year about to close. The practice was to enter that debit at the beginning of the following year, when the proceeds of the bill were remitted by wire or otherwise to London to meet the bill. The moneys, when drawn from the bankers for this purpose and remitted, were credited to the banking accounts and debited to the constituent on whom the bill was drawn, and the bill drawn was at the same time placed to his credit. The accounts then became correct in the following year. This practice, it was said, was adopted in order to enable the constituents' accounts to be balanced to the end of the year, so that it might exactly tally with the account of the London constituents as balanced in London to the end of the year. There was nothing improper in this way of keeping the books; but whenever it occurred, the balance-sheets, made up from the ledgers, failed to show the true position of the firm by the amount of bills drawn on London and sold and not entered in the balance-sheets as a liability, though the proceed of such bills appears in them as an asset. I shall hereafter, for the sake of brevity, refer to such bills as "suspense bills."

(2) The other particular in which the balance-sheets are objected to is that the assets of the firm are said to be overvalued in them. This objection is principally urged against the valuation of the Coorla shares of the insolvent. The value of **[321]** the assets is put down in the balance-sheets as it is shown in the ledgers. The original cost price is entered there. In this respect the opposing creditors ask the Court, I think, to adopt too strict a view. When a merchant is about to embark upon a large speculation he is bound to consider his position in order to ascertain whether, if it results in loss, his assets will suffice to meet the probable loss. In estimating his assets for this purpose, he is of course under an obligation not to fraudulently or dishonestly overvalue them, but, on the other hand, he is not bound to subject each item to a strict scrutiny. A sanguine man will estimate the value of his assets at a higher figure than a more desponding or perhaps a more cautious man will do. In judging of a man's conduct by after events, I think that the Court should acquit him of moral or commercial impropriety if he estimates his assets honestly at the figure which he at the time of entering into the speculation believed that they were worth. The balance-sheet for 1886 shows an excess of assets over liabilities of Rs. 5,08,928; that of 1887 shows an excess of Rs. 6,04,226; that of 1888 shows an excess of Rs. 5,93,933; that of 1889 shows an excess of Rs. 5,50,794; and that of the first six months of 1890, ending June 30th, shows an excess of Rs. 2,29,612. These balances are made up after the drawings of the insolvent for each year (whatever they may have amounted to) had been entered in the books. The Homarji house property is not included amongst the assets.

The insolvent states that during this period, ending 30th June, 1890, he was doing a safe and profitable business which brought him in an income of about one lakh of rupees per annum. The business was partly commercial, partly financial, but the latter portion of it was the more important. It is necessary to consider its nature and extent. The transactions were carried on with Hamborough & Co., Matheson & Co.,

1892
AUG. 6.

INSOLVENT JURISDICTION.

17 B. 313.

the Chartered Mercantile Bank in London, the National Bank of India in London, and on a small scale with Elliott & Co. They were complicated. I will describe the nature of them with Hamborough & Co. The insolvent used to draw bills on Hamborough & Co., usually at four months' usance. These he *sold* in Bombay. With the proceeds he *purchased* bills drawn at six months' usance. [322] Thus his transactions were more or less simultaneous. The six months' bills he remitted to Hamborough & Co. with directions to discount them, and with the proceeds to take up the four months' bills. The profit on the transaction consisted in a nice calculation of the London discount rate as compared with the cost in Bombay of the six months' bills. To enable him to make this calculation he received daily a telegram giving the London rates. Sometimes the bills drawn on Hamborough & Co. were demand bills, which he sold, and with the proceeds purchased six months' bills. By wire he advised Hamborough & Co. to discount the six months' bills to arrive, and thus secured the rate. The profit was made in the same way as in the case of the four months' bills. Sometimes he drew demand bills on Hamborough & Co., sold them in Bombay, used the proceeds until the demand drafts were about to fall due, and then remitted the proceeds of the demand drafts or their equivalent by wire to meet the demand drafts. The profit in this case was that acquired by the use of the money in Bombay.

With Matheson & Co. the process was different. He drew on them at four months' and sold the bills in Bombay, remitted the proceeds by wire (telegraphic transfers) on demand bills to Matheson & Co. In London, Messrs. Matheson & Co. allowed him interest on the proceeds received from the telegraphic transfers on demand bills at 5 per cent. until the four months' bills became due, and then met the four months' bills with such proceeds. The transactions with the Banks were similar, and there were subsidiary arrangements which it is not necessary to detail. The financial business with Messrs. Elliott & Sons was comparatively small in amount. The insolvent stated that he needed to sell and buy bills to meet the requirements of this class of his business to the extent of about a million pounds sterling per annum. As about three sets were drawn during the year, there would be about £300,000 to £400,000 current at a time. It will readily be seen that a very small rate of profit in discount on such large sums would bring in considerable income. The amounts I have given are only rough estimates. It would appear from the cross-examination of the insolvent that the figures are probably understated. The statement of [323] the mode of business is not intended either to be strictly accurate.

With reference to this financial business it is to be observed:—(1) That it rested solely on credit and could not be carried on unless the parties to it were in high repute as to their solvency in the commercial world. (2) That, resting as it did upon credit it required little, if any, capital of the insolvent to be embarked in it, and enabled him to keep all, or almost all, his capital invested in shares and Government notes upon which he received dividends and interest, and it also enabled him to finance the Coorla Mills, of which he was the agent. (3) That as long as it was carried on through perfectly solvent houses, there was little, if any, risk of loss. As the transactions were embarked in on a calculation based upon actual discount rates and the actual state of the money market, it was not in its nature speculative. The element of speculation entered into it when forward contracts in exchange were made in order to obtain

1892
AUG. 6.
—
INSOLVENT JURISDICTION.
—
17 B. 313.

favourable rates for the bills, which the insolvent proposed to draw for his financial undertakings. The houses with which the insolvent did business were houses, it is admitted, of first-class repute. The evidence before me does not enable me to determine with exactness whether those *a priori* conclusions were borne out by corresponding results, except that the insolvent stated that it was so. There were no profit and loss accounts for each year put in evidence, and the balance-sheets, on account of the suspense bills not appearing in them, and the drawings of the insolvent for each year not being shown, are only approximate guides. The small variation in them down to 31st December, 1889, however, lends confirmation to the insolvent's statement. The fair inferences to be drawn from them, coupled with the evidence of the insolvent, is that the capital of the firm did not materially alter in amount down to that date, and that he drew out for expenditure, in one form or other, all the profits of the firm, and possibly a little more.

In addition to the above financial business, the firm did ordinary commercial business, taking consignments of produce, pearls, &c., for sale in England on account of Native shippers, **[324]** and selling goods consigned to the firm here from abroad. There is no evidence as to the extent of this business. It seems to have been of the ordinary character, and conducted with prudence. To carry it on would require the sale of bills against produce in Bombay to a considerable extent.

Down to the close of the year 1889 there is nothing, therefore, shown against the insolvent to which exception can be successfully taken. In the first half of 1890 the insolvent must have met with heavy losses. His mercantile assets above liabilities, which on the 31st December, 1889, stood at Rs. 5,50,794 were reduced on the 30th June, 1890, to Rs. 2,29,612. This period has not been examined into, and the cause, therefore, of the loss has not been shown. The charges against the insolvent are based upon his conduct subsequently to the latter date. It becomes, therefore, necessary to consider his exact position on the 30th June, 1890, as it appears from the balance-sheet (Ex. No. 6).

(After stating the figures His Lordship continued).—Adding this to his mercantile capital, the insolvent's estate upon the most favourable estimate showed a balance in his favour of 4 lakhs on the 30th June, 1890. It was, however, in a very embarrassed position. Except in the Oriental Bank, the accounts in all the other Banks were largely overdrawn, to the extent of more than Rs. 5,30,000 on, I presume, the security of his available property. However, he nominally possessed 4 lakhs. Its saleable value was about $2\frac{1}{2}$ lakhs.

With his finances in this state the insolvent began (or rather continued, for he began his operations earlier in the year) to speculate in exchange, or, as he expressed it, "to work for a rise in exchange." The silver market, which governs exchange, was then in a very excited state. "Working for a rise in exchange" was, in effect, the same as making large purchases of silver deliverable to him at forward dates. On account of the great number of exchange transactions which the firm necessarily had to enter into for the purpose of its financial business, it is very difficult to separate these speculative transactions in exchange from the rest of the business. The two, in fact, were worked, the one with the other. This difficulty is increased by the insolvent not **[325]** having handed over any register of his forward contracts to the Official Assignee. It would be possible to ascertain the particulars and amount of the forward contracts from the lists of sales and purchases made out by the different Banks, but

1892
AUG. 6.

INSOLVENT JURISDICTION.

17 B. 313.

the process would be a laborious one. From fear of falling into error I have refrained from it. A less accurate estimate is sufficient for the purposes of this judgment. In 1890, the insolvent sold bills to the extent of £4,071,800, and bought in the same year bills amounting to £2,681,400. The latter figure does not include some bills which he purchased from Messrs. Ralli Brothers and Messrs. Volkart Brothers. The deduction of a million pounds from each side on account of the insolvent's financial business leaves his speculative business as sales, £3,071,800; and purchases, £1,681,400; the latter figure being liable to increase on account of purchases from Messrs. Ralli Brothers and Messrs. Volkart Brothers. These speculative transactions were, therefore, entered into on an enormous scale. Unfortunately, I cannot divide the figures between the early and the latter half of the year 1890. The insolvent's account shows a total loss in exchange between 30th June, 1890, and his failure in 1891 of Rs. 37,50,725. In the statement he made out for his creditors in April, 1891, he roughly divided his losses into periods, putting the net losses, which meant his realized losses, from the 1st of July to the 11th of November, 1890, at Rs. 16,49,951-7-3 and from the latter date to the 31st December, 1890, at Rs. 2,34,802-3-0. This statement makes the total losses in exchange to be Rs. 32,54,836-11-9 only, which is too small. The above figures are, therefore, probably under-estimated. The statement, however, was made out for the insolvent himself, and he admits the figures to be correct as far as they go. The balance-sheet made out down to 31st December, 1890, make the insolvent's mercantile assets to be less than his liabilities by Rs. 6,11,669; or, when the Hormarji house is taken into calculation, by Rs. 4,11,669. This balance-sheet is, however, wholly incorrect, in not including "suspense bills" to the extent, as estimated by the insolvent, of £170,000.

On the 31st December, 1890, therefore, the insolvent's liabilities must have exceeded his assets by considerably more than [326] Rs. 20,00,000. The loss on speculation by this mode of computation amounted to at least 23 lakhs of rupees between July 1st and December 31st. Whether this figure is taken on the insolvent's statement, the result is, that the insolvent, starting with a nominal capital of 4 lakhs, had in these enormous speculations lost it, and some 19 or 23 lakhs of rupees besides, before the 31st December. Within the limits of his means the insolvent was at liberty to speculate if he pleased, but this speculation is, in my judgment, far in excess of the amount which his capital, as it stood in July, 1890, justified him in entering into. The result is the same if the final account is considered. Starting in July, 1890, with a nominal capital of 4 lakhs, he has lost before May, 1891, at least Rs. 37,00,000.

This, in my judgment, amounts to speculation both rash and reckless. That, however, as I have said, is not, in terms, an offence under s. 51 of the Indian Insolvent Act. What I have to determine under that section is, whether the insolvent's debts, or any of them, were contracted without his having any reasonable or probable expectation at the time when he contracted them of paying the same or whether his whole debts so greatly exceeded his means of providing for the payment thereof during the time when the same were in the course of being contracted (reference being had to his actual and expected property) as to show gross misconduct in contracting the same. Now as to the contracts, which culminated in the loss of Rs. 16 lakhs or more in November, 1890, I do not think I shall be justified in holding that they were entered into

without reasonable or probable expectation of fulfilling them in paying the losses which might result from their breach. When the insolvent entered into them he had a fair capital; though the rise in the silver market had been rapid and considerable, there was not, according to the advice under which the insolvent acted, any apparent reason why there should be any rapid or considerable fall, and appearances pointed only to ordinary fluctuations of the market and a probable rise. The insolvent, therefore, though his forward contracts in the beginning of the second half of 1890 were excessive in amount, had a fairly reasonable expectation that there would not be a fall in exchange, or, at all events, such a fall as would more than absorb his assets.

[327] The position in November and December, 1890, had, however, changed. The insolvent was then bankrupt to the extent of 16 to 20 or 23 lakhs. It is not very material which figure is adopted, and, moreover, had on hand forward contracts to a large extent, which then showed a further probable loss. In this position he entered into further large speculative sales of exchange. I cannot give the exact figures without an elaborate examination of the returns made by the Bank, but the bills sold by the insolvent in 1891, before his failure in April, amounted to £1,365,700, while those purchased by him were £1,847,900. A considerable number of the latter were cross purchases to close previous sale transactions. Deducting one-third of a million sterling from the figures on the other side, for financial bills sold and purchased, we find that he sold about £1,000,000 when absolutely and irretrievably insolvent. In so far as these transactions consisted of bills sold under forward contracts, the action of the insolvent was simply gambling with the moneys of the Banks. From an examination of the list of sales of bills made out by the Banks, I have satisfied myself that the £1,000,000 of bills sold included a large amount of forward sale; the insolvent indeed himself admits it. This gambling with the creditors' moneys had been going on at least as far back as the 11th November, 1890. It would perhaps be incorrect to say that the insolvent when he contracted fresh liabilities after 11th November, 1890, had no probable or reasonable expectations of being able to pay them, for by keeping up appearances and selling more bills he might have expected to be able to satisfy these particular liabilities by incurring fresh ones, but I cannot entertain any doubt, but that the liabilities incurred in respect of forward contracts after the 11th November, 1890, were, when they ripened into debts, such as to indicate gross misconduct in contracting the same. The assets with which he could hope to meet them were a huge minus quantity.

I am, therefore, of opinion that the third ground of opposition is established, and that the insolvent's conduct falls within the purview of s. 51 of the Act. It is argued by the Advocate-General that the conduct of the Banks in entering into these forward contracts with the insolvent was such that they are not **[328]** now entitled to oppose his discharge upon the above ground. I do not yield to that argument. No doubt the Board of the Chartered Bank thought that he was speculating. The Home Board advised their Bombay agent of this at the end of 1890, and several times again in 1891, and the agent entered into few fresh unsecured transactions with him after that. In January it was proposed that all the Banks should make up a statement, so as to ascertain the extent of Hormarji's dealings, but nothing came of it. The managers at the beginning of 1891, or quite at the end of 1890, called the broker Mr. Weber's attention to the magnitude of the insolvent's operations. I think that at this time they certainly suspected that Mr. Hormarji was

1892
AUG. 6.

INSOLVENT JURISDICTION.

17 B. 313.

speculating. It would, however, have been a strong measure to have refused his forward bills at that time. It is the business of the Banks to sell their own bills, forward as well as ready, and to cover themselves by buying the forward or ready bills of merchants. When this is done there is no speculation. It is difficult for Banks to inquire, in the case of merchants offering to sell their forward bills, whether they are speculative sales or not.

I think that I should not be justified in deciding that Banks forfeit the protection which the provisions of s. 51 afford them, because they do not refuse the forward bills of a finance house like Hormarji's, which they believed to be solvent, on the suspicion that they are speculative in character. As to the position and strength of the house, the magnitude of its operations for so many years, and the boastful way in which Hormarji was accustomed to speak of his firm no doubt misled them. At the same time the extreme facilities which the Banks afforded the insolvent in carrying on his speculations must have been a great temptation to him to continue them. I shall take this into account when dealing with the insolvent's conduct.

The fifth ground of opposition, that of obtaining forbearance fraudulently and by means of false pretences, I do not consider to be established. On the 18th of April, 1891, the insolvent called a meeting of the Bank managers, and laid a not very candid or truthful statement of his affairs before them. Nothing was [329] then arranged, and the meeting was adjourned for a week, but a committee of inspection on behalf of the Banks was appointed to examine the insolvent's position, and that the insolvent should lay some definite proposal before the Banks. It was understood at the meeting and expressed that the Banks in the interval should take no steps against Hormarji, and that he should keep his affairs in *statu quo*. Hormarji says that he understood that he was to make no large payments, but was to keep the firm going. During the week Hormarji made a payment of Rs. 3,193-15-3, due on a bill, to one of the Banks, and a sum of Rs. 472-6-1 on re-draft account, a few insignificant current expenses, and Rs. 1,000 to his solicitors. The payment of Rs. 3,193-15-3 to one of the Banks shows that it was not intended that no payments whatever were to be made. The payment of Rs. 1,000 to the solicitors, who were preparing a trust-deed to be laid before the creditors, does not seem to me, in spirit, to be a breach of the somewhat indefinite understanding which the opposing creditors rely on. I fail, however, to see how the making of this payment subsequently to the meeting can be said to be an obtaining of the forbearance which was granted at the meeting fraudulently or by means of false pretences. It is not shown that Hormarji at the time of the meeting intended to make this payment.

The next matter to be considered is the ground of opposition relied on by the Chartered Bank, that the insolvent contracted a debt to them by means of false pretences. The facts may be briefly stated. On the 14th of March the Manager, Mr. Stiven, received a telegram from his head office to the effect that it was rumoured in London that the firm of B. & A. Hormarji were in difficulties, and asking him to report. Mr. Stiven sent for Hormarji and made inquiries in reference to the truth of the rumours mentioned in the telegram. It is unnecessary to go into the details of the interview. The result was that Harmarji led Mr. Stiven to believe that though his firm had met with losses, they were such as the firm was well able to bear, and that the firm was quite sound and solvent. It was at this time absolutely and hopelessly insolvent to

the knowledge of Hormarji, though he may have entertained the [330] insane delusion that by a rise in the silver market and by further speculations he would be able to retrieve his position.

That his representation as to his position was a false representation or false pretence is clear enough. It is, however, necessary to bring the case under s. 51 that the debt should be contracted by false pretences. On that day Mr. Stiven accepted the bills of Mr. Hormarji himself for £20,000 in lieu of a Bank telegraphic transfer which Hormarji had contracted to give him. Mr. Stiven, however, would not do this without security. Security was given and the bills were eventually accepted in London and paid. After this there was one or perhaps two small new unsecured transactions in bills, but the bills were paid. On the 16th April the insolvent sold one of his own bills on Messrs. Matheson & Co., for £10,000 to the Bank. This was in pursuance of a contract, dated the 16th July, 1890, by which the Chartered Bank had contracted to purchase a Bank telegraphic transfer, or a demand draft, on Messrs. Matheson & Co., or Messrs. Hamborough & Co., for £10,000, deliverable between 30th March and 30th April, 1891. Under that contract Hormarji was entitled to deliver his own demand bill. The evidence of Mr. Stiven goes to show that it was because he had made this contract that he purchased Hormarji's £10,000 draft, and not because of the false pretence which Hormarji had made to him on the 14th March, though, no doubt, if he had known Hormarji's real position, he would not have taken his demand draft without security. Stiven would, no doubt, have equally taken it, if he had not received a telegram on the 14th March, and had had no conversation with Hormarji as to his affairs.

Under these circumstances, I think it would be a straining of the law to hold that the debt which arose from the dishonour of the bill for £10,000 was contracted by false pretences. I must, therefore, hold that the sixth ground of opposition is not established.

I now turn to the more serious charges, the fourth and seventh, framed under s. 50 of the Act. On the 16th April, the day but one before Hormarji met his creditors, he despatched some time after 2 P.M., a draft of £5,000 to Messrs. Elliott & Sons. [331] That firm had accepted bills of Hormarji's which he was bound to take up, but the earliest did not fall due until the 20th May. His former practice had been to remit moneys to take up such bills a day or two before they became due, but in a few instances he had remitted a week, and a fortnight before the bills were payable. In those cases Messrs. Elliott & Co., on receipt of the money, placed it with a discount house, and credited Hormarji with the interest received. The £5,000 were sent by a telegraphic transfer of the Oriental Bank, which was paid for by a cheque on the Bank of Bombay, where the insolvent had a cash credit on the security of Government paper. There was no financial benefit to be gained by sending this money, and I entertain no doubt that it was sent to lessen the insolvent's liability to Messrs. Elliott & Sons. It was undoubtedly voluntary. The question is whether it is a fraudulent discharge of a debt within the meaning of s. 50 of the Act. I do not think that it is proved that it was. Under s. 24 of the Act, any voluntary payment made by a man when in insolvent circumstances within two months of his insolvency is deemed fraudulent and void against the assignees of the insolvent, and can be set aside on that ground. This is a section dealing with civil rights. Section 50 is a highly penal section, and in it the word "fraudulent" must have its

1892
AUG. 6.

INSOLVENT JURISDICTION.

17 B. 313.

ordinary meaning assigned to it. The offence of fraudulently discharging a debt is placed among such offences as concealing property, wilfully altering books, and other similar offences of a heinous nature, and the penalty which can be inflicted for it is two years' imprisonment on the criminal side of the jail. It is by no means clear what the section does mean. Releasing a debt due to the insolvent without receiving payment would undoubtedly fall within its scope. A mere voluntary payment of a debt is, I think, equally clearly not within its purview. It must be fraudulent and may be made "with the intent of diminishing the sum to be divided amongst creditors, or of giving an undue preference to any of the creditors." From the mere fact of voluntary payment I do not think you can infer fraud of a penal nature. I was myself for some time strongly inclined to limit the fraudulent discharge of a debt to the case where an insolvent releases a debt due to himself without consideration, but am now disposed **[332]** to think that it is of wider import. The intent to give an undue preference to a creditor occasions the difficulty. That can only be done, I think, by paying or securing him. I doubt if the words can be given effect to (as suggested by Mr. Lang) by concealing a debt due from the insolvent with intent of preserving it always for the creditor, notwithstanding the insolvency proceedings. However that may be, I think nothing more is proved here than a voluntary payment by a man in insolvent circumstances. When it was made, I think that Hormarji had not the idea of the Insolvent Court before his mind. He knew that he was in difficulties, but such is the sanguine nature of the man, that I feel pretty confident that he thought his financial and commercial business was of so valuable a nature, and that his commission from the Coorla Mills was so valuable an asset, that his creditors would certainly, on terms, allow him to carry on the one, and continue to receive the other, and accept payment of their debt by instalments, and that his only doubt was whether he could not continue to carry on his business without calling his creditors together, a doubt which his consultation with Mr. Craigie on the evening of the 16th April at once dispelled. If the insolvent entertained these views, I do not think that I can hold that he sent the £5,000 to Messrs. Elliott & Sons fraudulently with intent to diminish the sum to be divided amongst his creditors, or to give an undue preference to Messrs. Elliott & sons. I should rather say it was done with a view of keeping up his English connection and to prevent Messrs. Elliott & Sons refusing to do business with him any longer. I do not believe the insolvent when he says that he did as a piece of skilful financing. In that point of view it was detrimental. The cases cited by Mr. Inverarity are all, with one exception, decided (under a wholly different statute) cases arising out of the civil liability of a creditor voluntarily preferring to restore the payment which he has received. I do not say that they are not useful as guides; but when the conduct of the insolvent in giving a fraudulent preference is made penal, the Court must be satisfied that the guilty intention necessary to constitute the offence existed in the mind of the insolvent, and ought not to assume it, unless the circumstances point to no other probable, I will not say possible, conclusion.

[333] The last charge against the insolvent is of a painful nature. It has caused me much anxiety. The circumstances connected with it are these:—(His Lordship then discussed the evidence and continued:—) I do not, however, think, as suggested by counsel, that the insolvent formed a deliberate design in November, 1891, of setting aside the return commission as a fund for emergencies, or as a provision against insolvency.

I am rather inclined to credit his statement that he looked upon the return brokerage as something outside his business, a fund to which his business creditors had no claim, and that when he found himself in the possession of a considerable portion of it, when he was adjudicated an insolvent, the temptation to retain it unnoticed was too strong to be resisted, and that his moral courage was not sufficient to enable him to admit his error when the Official Assignee asked him for an explanation. The sum is too small to support the suggestion of the counsel for the opposing creditors, and it has probably been all spent before now. I must, however, record my finding that the fourth ground of opposition is proved.

For the reasons expressed through my judgment, I feel that a comparatively light punishment will be sufficient to meet the ends of justice in this case. The insolvent, whose discharge has already been suspended for more than a year, will suffer imprisonment, under s. 50, for three months, and will after that be entitled to his discharge when he has been in custody at the suit of the opposing creditors, under s. 51 of the Act, for twelve months; in all his discharge will thus be postponed for fifteen months from this day. The question whether judgment should be entered up against the insolvent under s. 86 can be decided when the insolvent comes up for his discharge.

On the application of counsel the costs of the opposing creditors together with the costs of the adjudication were ordered to be paid out of the estate.

Attorneys for the insolvent: Messrs. *Chalk, Walker and Smetham.*

Attorneys for the opposing creditors: Messrs. *Craigie, Lynch and Owen.*

1892 AUG. 6. — INSOLVENT JURISDICTION. — 17 B. 313.

---

17 B. 334.

[334] INSOLVENT JURISDICTION.

Before Mr. Justice Bayley (Acting Chief Justice) and Mr. Justice Candy.

IN THE MATTER OF HORMARJI ARDESIR HORMARJI, AN INSOLVENT. [29th and 31st August, 1892.]

Insolvency—Insolvent convicted and sentenced to imprisonment under s. 50 of the Indian Insolvent Act (Stat. 11 and 12 Vic., c. 21)—Appeal by insolvent under s. 73—Bail—No power in High Court to admit insolvent to bail, pending appeal.

An insolvent was convicted by the Insolvent Court of an offence under s. 50 of the Indian Insolvent Act (Stat. 11 and 12 Vic., c. 21) and sentenced to imprisonment. Under s. 73 of the Act he appealed against the decision and sentence of the Insolvent Court, and applied to be admitted to bail, pending the hearing of his appeal.

Held, refusing the application, that the High Court had no power to admit him to bail.

APPLICATION to admit to bail.

On the 24th August the insolvent was sentenced (1) by Farran, J., (sitting as Commissioner in Insolvency) to suffer imprisonment for three months under s. 50 of the Indian Insolvent Act (Stat. 11 and 12 Vic., c. 21). From this decision and sentence the insolvent lodged an appeal under s. 73 of the Act. He was in custody, and he now applied to the appellate Court to be released on bail, pending the hearing and determination of his appeal.

---

(1) See *supra* 17 B. 313 (333).

1892
AUG. 31.
INSOLVENT JURISDICTION.
17 B. 334.

Jardine, for the insolvent.—There is no section or provision of the Insolvent Act which deals with such an application as the present, nor have we been able to find any precedent in the records of the Court, either for, or against, such an application. But we contend that the appellate Court must have power to admit to bail. Otherwise the right of appeal given to insolvents by s. 73 would be nugatory. The appeal has been accepted and filed; but, if the insolvent is not admitted to bail, he will have suffered the whole or the greater part of his sentence, before his appeal from it can be heard and determined. The right of appeal would thus be a mere mockery.

[BAYLEY, C.J. (Acting).—The first question to be determined is whether this Court has power to grant such an application as this. By English law a person convicted, and under sentence, [335] cannot be admitted to bail. Even where a true bail has been found by a grand jury against a person, he cannot be bailed.]

The rules of the English law are against me, but I submit that the Indian criminal law is more nearly analogous. At common law, no doubt, there is no appeal from a conviction of an offence. But in India such an appeal is given. The Criminal Procedure Code (X of 1882) does not directly apply to proceedings such as these, but its provisions support the argument that the power to admit to bail must exist in this case where a right to appeal is given.

Scott, for the opposing creditors, opposed the application:—This Court is not an Insolvent Court, and can only interfere with proceedings of the Insolvent Court where it is expressly authorized to do so. It has not been given a power to admit to bail.

Cur. adv. vult.

JUDGMENT.

BAYLEY, C. J. (Acting).—This is a motion on behalf of the insolvent, H. A. Hormarji, that he may be liberated on bail until the hearing and final adjudication of the appeal filed by him from the decision of Farran, J.

On the 24th of August, 1892, Farran, J., sitting as Commissioner of the Insolvent Court, made an order in the following terms:—

"This Court doth order and adjudge that the said insolvent Hormarji Ardesir Hormarji be forthwith taken into custody of the Jailor of Her Majesty's Common Jail of Bombay on its Criminal Side by virtue of a warrant under the seal of this Honourable Court, to be detained there for a period of three calendar months to be computed from the date of his arrest under this order. And this Honourable Court doth further order and adjudge that the said insolvent Hormarji Ardesir Hormarji shall be declared entitled to the benefit of the said Act as to the several debts and sums of money due or claimed to be due at the time of making the order vesting the property, estate, and effects of the said insolvent pursuant to the said Act in that behalf in Charles Agnew Turner, Esq., the Official Assignee of this Honourable Court and the Assignee of the estate and effects of the said insolvent, on behalf of several [336] persons named in the schedule as creditors or claimed to be creditors for the sums respectively therein mentioned, and for which such persons gave credit to the said insolvent before the time of making such vesting order, and which were then not payable, and as to the claims of all other persons not known to the said insolvent who may be endorsees or holders of any negotiable security set forth in the schedule of the said insolvent as aforesaid at the expiration of the said three months, except as to the debts due to the

said opposing creditors, and that as to such last mentioned debts the insolvent shall be entitled to his discharge so soon as the said insolvent, Hormarji Ardesir Hormarji, shall have been in custody for the period of twelve calendar months in Her Majesty's Common Jail of Bombay on the Civil Side of the said Jail at the suit of any one or more of the said opposing creditors, the Chartered Mercantile Bank of India, London and China, the Agra Bank, the New Oriental Banking Corporation, the Hongkong and Shanghai Banking Corporation, the National Bank of India, Limited, and the Chartered Mercantile Bank of India, Australia and China, such term of twelve calendar months to commence after expiration of the aforesaid term of imprisonment for three calendar months."

This Court is sitting under the provisions of s. 73 (1) of the Indian Insolvent Act (Stat. 11 and 12 Vic., c. 21) which **[337]** is as follows. (His Lordship read the section and continued) :—It is admitted that no similar application to the present has ever been made in this Court, or, so far as has been ascertained, in the High Courts at Calcutta or Madras. It is, therefore, desirable to see what the state of English law was at the time of the passing of the Indian Insolvent Act, 11 and 12 Vic., c. 21, especially as for the power of the Court of the King's Bench to admit persons to bail.

Now I would premise that it has been held to be a clear principle of English law, that a person charged with a misdemeanour is entitled to be admitted to bail on producing sufficient sureties—*Reg.* v. *Badger* (2). As to persons convicted, however, the law is different. A man cannot be bailed "if he be convicted by verdict or confession"—Comyn's Digest, Bail, F (2). "It is to be observed that neither this Court (the Court of King's Bench) nor any other Court can bail persons in execution, or punished under any statute with imprisonment for their offence. And this is one reason why they cannot interfere where a party is committed for a contempt"—Bacon's Abridgment, Tit. Bail (D.), Vol. I, p. 356; see also Chitty's Criminal Law, Vol. I, p. 98. In the well-known case of John Wilkes (3), who was tried and convicted on a charge of printing and publishing a seditious and scandalous libel, &c., an attempt was made, pending the hearing of a writ of error lodged by the accused, to have him admitted to bail. The matter came before the Court of King's Bench, and was heard by Lord Mansfield, C. J., and Yates, Aston and Willes, JJ. It was urged for the prosecution that he was bailable under the provisions of Stat. 4 and 5 W. and M., c. 18. In delivering his judgment on this point, Lord Mansfield says (p. 2540): "Now whatever doubts there may be about what is within the Act of Parliament of the 4 and 5 W. and M., c. 18, it is most certain that a person convicted of a misdemeanour

---

(1) Section 73 of the Insolvent Act is as follows: —And be it enacted that it shall be lawful for any person who shall think himself aggrieved by any adjudication, order or proceeding of any such Court for the relief of Insolvent Debtors to present, within one calendar month thereafter, a petition to the Supreme Court of Judicature of the Presidency; and it shall be lawful for such Court to order that the whole of the evidence, if any, which shall have been so taken down in writing as aforesaid and the minutes and records of the proceedings, of which complaint shall have been made, shall be brought before it; and the said last mentioned Court shall enquire into the matter of the petition, and of such proceedings and evidence, and shall make such order thereon as to the same Court shall seem meet and just, and shall thereby direct by whom and in what manner the costs of such petition, and of the proceedings which shall have been had thereon, and of the taking down of any such evidence in writing, and of the proceedings of which complaint shall have been made, shall be paid; and such order shall be final and conclusive as to all parties and shall be compulsory and binding upon the Court in which such proceedings so complained of shall have been had.

(2) 4 Q. B. 468.

(3) 2 Burr. 2528.

1892
AUG. 31.
——
INSOLVENT JURISDICTION.
——
17 B. 334.

is not within it; because his case is not a bailable case. Nothing, therefore, can be clearer than that his case is not within an Act of Parliament that relates only to bailable cases." So, too, Aston, J., (p. 2542). This Act "cannot extend to cases of criminal misdemeanour, after conviction; because in such cases a defendant is not entitled to be bailed at all;" and [338] Willes, J., also says (p. 2542) "after actual conviction of a misdemeanour the defendant is not entitled to bail: whether he be or be not outlawed." An application was then made to admit the defendant to bail under the general discretionary power of the Court, but Lord Mansfield said he knew of no case in which this had been done. In *Rex* v. *Brooke and others* (1) the defendants were Magistrates who had discharged out on bail, pending the decision of their appeal, certain persons who had been convicted by a Justice of the Peace under the Vagrant Act and committed to the House of correction. They now appeared, on a rule coming on them, to show cause why information should not be filed against them for misdemeanour in discharging on bail the convicted persons. It was argued by counsel on behalf of the defendants (p. 193) that although no express power was given by the statute, under which the accused persons had been convicted, to bail a person convicted, "yet as he is permitted to appeal to the next sessions, it follows of course that he may bailed in the meantime, otherwise the appeal is nugatory: for the party may suffer his punishment before the appeal can be heard." On the other side it was stated in argument that "the law is clear that where a man is committed in execution, he is not bailable," and that it made no difference that an appeal was given by the statute. "Though an appeal is given in this case," counsel argued, "the ordinary course of punishment adjudged by the conviction is to take place in the same manner as in case of a judgment in a Court of a law upon a criminal proceeding, where the punishment may be inflicted before the writ of *error* can be determined." In delivering his judgment on the point, Ashhurst, J., said (pp. 194, 195): "If this matter had rested merely on the charge of the defendants having admitted the parties to bail after they had appealed against the convictions, I should have been very unwilling to have granted an information against them on that ground; because as the Act of Parliament gives a summary jurisdiction to a Magistrate to convict persons coming within the description of vagrants, and in the same breath gives the party convicted a right of appeal from such conviction, a Magistrate not very [339] conversant in the law, might naturally enough have conceived that the meaning of the Legislature was, that the party should not undergo the punishment till the appeal was determined; and, therefore, if the justices had acted *bona fide*, I should have not been inclined on this ground alone to have granted the information." Buller, J., observed, as to the construction of the Vagrant Act, "that he had no doubt upon the subject, that the commitments of the justice in this case were in execution, consequently the parties could not be bailed, notwithstanding that the statutes had given a right of appeal against the conviction to the next sessions." "It is said," says Buller, J., "that it is strange that the party should suffer the punishment while the appeal is pending, but we are to consider it like the case put at the bar of a writ of error, which does not suspend the execution of a judgment, which it is brought to reverse." And Grose, J., was of the same opinion. He says: "I am now clearly of opinion that it is a commitment in execution: but, whether

(1) 2 T.R. 190.

so or not, I am clearly of opinion that the party is not bailable." See also to the same effect *Rex* v. *Flower* (1); *Reg.* v. *Guteridge* (2); *Reg.* v. *Scaife* (3). The last English case I shall refer to is that of *Ex parte Hinton* (4), where it was held that the mere fact of an appeal having been lodged was no ground for staying execution of an order of the Bankruptcy Court.

Such was the state of the law in England when the Indian Insolvency Acts of 1828 and 1848 were passed by the British Parliament. It is perfectly clear that, in England, at that time a person was not entitled to bail after conviction, except at least with the consent of the prosecution. Here the opposing creditors oppose the application, and are perfectly justified in so doing. Mr. Jardine argued that an insolvent was like a person awaiting his trial, his appeal having been accepted and pending the final order of the Court of appeal. That argument, however, appears to me to be untenable. The adjudication that has been made is a final adjudication subject only to appeal, if the insolvent thinks it advisable to appeal. In the vast majority of cases that are decided by the Insolvent Court, no appeal is, as a matter of **[340]** fact, ever filed. Such an appeal is, to use the language of Buller, J., above quoted, "like a writ of error, which does not suspend the execution of a writ of error which it is brought to reverse."

The first Indian Insolvent Act is 9 Geo. IV., c. 73, and ss. 3 and 4 of that Act are to the same effect as s. 73 of the latter Act 11 and 12 Vic., c. 21—the Act now in force. This s. 73 has been construed strictly. It has been held that the Commissioner in Insolvency has no power under that section to extend the time for presenting a petition of appeal from an order of the Insolvent Court—*In re Gholam Rasul Khan* (5); nor in the case of an appeal under that section can the High Court impose on the appellant (an opposing creditor) that he shall give security for the costs of such appeal—*In re Ramsebak Misser* (6). In a case decided in Calcutta in 1836 by Sir R. Garth, C.J., and Wilson, J., it is said: "Orders in insolvency are not orders under the Code of Civil Procedure. They are orders under a special law, but they are under a special law in which different procedure is provided."—*In the matter of R. Brown* (7).

In the Civil Procedure Code (Act XIV of 1882), s. 638 enacts that nothing in this Code shall extend or apply to any Judge of a High Court in the exercise of jurisdiction as an Insolvent Court. The provisions, therefore, of s. 545 of that Code, giving the Court power to stay execution in the case of an appeal, have no application to the present case. Indeed it was not contended that they had.

The Criminal Procedure Code (X of 1882) admittedly does not apply to the present application. But that Code and the decisions under the previous code (X of 1872) show that where it was intended that sentence was to be suspended pending appeal, and the appellants released on bail, power to release on bail has been expressly given by the Legislature. See s. 426 of Act X of 1882, and the corresponding s. 281 of Act X of 1872.

[341] Under s. 390 of the earlier Code (X of 1872) it was held by a Full Bench of the Allahabad High Court—*Queen* v. *Thakur Parshad* (8)—that the Court of Sessions had no power under that section to admit a convicted person to bail, a convicted person not being an accused person within the meaning of that section. The High Court at Calcutta had

(1) 8 T.R. 314. (2) 9 C. and P. 228. (3) 9 Dowl. 553.
(4) 2 Deac. and Ch. 407. (5) 1 B.L.R. (O.C.) 130. (6) 5 B.L.R. 179.
(7) 12 C. 629 (634). (8) 1 A. 151.

1892
AUG. 31.

INSOLVENT JURISDICTION.

17 B. 334.

previously in three cases arrived at the same conclusions—*Queen* v. *Mahendranarayan Bangabhushan* (1); *Aradhun Mundul* v. *Myan Khan Takadgeer* (2); *Queen* v. *Ram Rutton Mookerjee* (3).

For the reasons that I have given I am of opinion that this Court has no power to admit the insolvent to bail; and that assuming it has such power, this is not a case in which, in the exercise of its discretion, this Court ought to allow the insolvent to be bailed until the hearing and final disposal of the appeal.

The application must, therefore, in my opinion, be refused.

Attorneys for the insolvent: Messrs. *Chalk, Walker and Smethan.*

Attorneys for the opposing creditors: Messrs. *Craigie, Lynch and Owen.*

---

17 B. 341 (P.C.)=20 I.A. 1=6 Sar. P.C.J. 256=17 Ind. Jur. 40.

PRIVY COUNCIL.

PRESENT:

Lord Hobhouse, Lord Macnaghten, Lord Hannen, Lord Shand and Sir R. Couch.

[*On appeal from the High Court at Bombay.*]

RAHIMBHOY HABIBBHOY (*Original Defendant*), *Appellant* v. CHARLES AGNEW TURNER (*Original Plaintiff*), *Respondent.*

[9th and 10th November, 1892].

Limitation—Application of s. 18, Act XV of 1877—Knowledge kept from the Official Assignee (11 and 12 Vic., c. 21), of his right to sue for an account of assets fraudulently transferred by an insolvent—Burden of proving when first the plaintiff had clear and definite knowledge—Party for purpose of discovery— Ss. 13 and 43, Civ. Pro. Code (XIV of 1882)—Account.

In order to make limitation operate when a fraud has been committed by one who has obtained property thereby, it is for him to show that the injured complainant has had clear and definite knowledge of the facts, constituting the fraud, **[342]** at a time which is too remote for the suit to be brought. Suggestion of his having been defrauded does not amount to such knowledge as is required by s. 18 of the Indian Limitation Act XV of 1877.

In a suit brought by the Official Assignee in 1887 it was established that the defendant receiving in 1869, upon a voluntary transfer, some of the insolvent's assets, joined and assisted him in defrauding his creditors; and that no disclosure of this fraud was made to the Official Assignee, while the defendant did what he could to prevent the latter from seeing the accounts of the assets transferred.

Held, that the burden of proof was on the defendant to show that the plaintiff had clear and definite knowledge of this fraud for more than the period of limitation. This burden had not been discharged by proof of the fact that some hints and clues had reached the Official Assignee which might have led to such knowledge; and *held*, that the Official Assignee had been kept from knowledge of his right to sue, within the meaning of s. 18 of the Limitation Act.

Also, this defendant having been "made a party," but only "for the purpose of discovery," to a prior suit brought by the plaintiff, according to an order in that suit, in which, however, there was no decree against him as a party, and no order as to his costs:

Held, that this irregular proceeding had not rendered him a party to that suit so as to make applicable either s. 18 or 43 of the Civil Procedure Code (XIV of 1882).

---

(1) 1 B. L. R. A. C. 7. (2) 24 W. R. C. R. 7. (3) 24 W. R. C. R. 8.

A decree that the defendant should account to the Official Assignee for the assets received by him from the insolvent after the date of the insolvency was affirmed.

1892
NOV. 10.

PRIVY COUNCIL.

17 B. 341 (P.C.) = 20 I.A. 1 = 6 Sar. P.C.J. 256 = 17 Ind. Jur. 40.

[F., 14 Bom. L.R. 771 = 17 Ind. Cas. 10 (11) ; 15 C.W.N. 102 (105) = 6 Ind. Cas. 154 ; 27 A. 540 (543) = 2 A.L.J. 350 = 25 A.W.N. 88. **R.**, 31 M. 230 (233) = 18 M.L.J. 19 = 4 M.L.T. 80 ; 15 C.W.N. 102 (105) = 6 Ind. Cas. 154 ; 15 C.W.N. 965 (970) = 11 Ind. Cas. 295 (298) ; 16 C.W.N. 894 = 16 Ind. Cas. 464 (465) ; 19 Ind. Cas. 163 = 9 M.L.T. 303 = (1911) 1 M.W.N. 192 ; 2 N.L.R. 98 (99); 18 C.W.N. 1266 ; 24 Ind. Cas. 249.**]**

APPEAL by special leave (1) from a decree (17th March, 1890) (2) of the appellate High Court, generally affirming, with a modification, a decree (10th December, 1888) (3) of the Court in the original jurisdiction.

This suit was brought by the Official Assignee on the 25th February, 1887, and arose out of the insolvency, in Bombay, of Alladinbhoy Habibbhoy. The adjudication under the Indian Insolvent Act was dated 9th January, 1867, and the petition, to which the vesting order related back, 17th December, 1866.

The defendant, against whom it was alleged that he had become liable to account to the Official Assignee, was Rahimbhoy Habibbhoy, the insolvent's brother, to whom the property of the insolvent had been transferred, whilst Rahimbhoy was carrying on business with another brother, Ahmedbhoy, with whom he remained partner in Bombay, trading under the name **[343]** of Ahmedbhoy Habibbhoy until August, 1869. These two brothers also had a branch firm styled Rahimbhoy Habibbhoy carrying on business in Hongkong, where also the insolvent, Alladinbhoy, had a firm as well as in Bombay.

The property, of which fraudulent possession was attributed to the defendant, was in six classes as set forth in the plaint and in the judgments of the Courts below (4).

As to three of these classes of property the suit in the original jurisdiction was dismissed. As to the remaining three an account was decreed of the dealings between the defendant's firm and the insolvent. On appeal, the High Court affirmed this decree with a variation of detail, but decided against the plaintiff as to one of the three classes that had been allowed in the first instance, and as to the other two classes restricted the account decreed, so that it should only commence with the assets received by the defendant after the date of the insolvency. No appeal was preferred by the Official Assignee. This appeal was, accordingly, limited to the transfer of the two classes of property, which were referred to as the China property and the Elphinstone shares. It involved the main question whether the transfer was not only voluntary and invalid against the creditors of 1866, but was a fraud which prevented the Official Assignee from having the knowledge of his right to recover the assets during the intervening years so as to bring into operation the saving effect of s. 18 of the Limitation Act. The question whether a decree made against Ahmedbhoy in 1882 had barred the claim was also considered ; as well as whether modifications in the taking of the account made by the appellate Court were correct.

In 1881 the Official Assignee sued Ahmedbhoy. In that suit an order was made for the present defendant Rahimbhoy to be made a party "for the purpose only of discovery." No relief was in that suit sought against Rahimbhoy, nor was any decree, made against him. But

---

(1) 15 B. 155. (2) 14 B. 408. (3) 14 B. 412. (4) 14 B. 411 (422).

1892
NOV. 10.
PRIVY COUNCIL.
17 B. 341 (P.C.) = 20 I.A. 1 = 6 Sar. P.C.J. 256 = 17 Ind. Jur. 40.

there was a decree, after a reference to arbitration, made against Ahmedbhoy for Rs. 3,60,000 in [344] connection with transactions with the insolvent's estate. In December, 1885, in the course of that suit, an order for the inspection of the account books then in Rahimbhoy's (the present defendant's) possession was obtained. This led to further discoveries and this suit was, in consequence, filed.

The facts are stated at length in the report in I. L. R., 15 Bom., p. 155. They are given in the judgments of the Courts below ; and they also appear in their Lordships' judgment on this appeal.

The High Court concurring with the first Court found that as to the China property the evidence established a fraudulent transaction as regarded the creditors on the part of the China and Bombay firms of Rahimbhoy and Ahmedhoy in complicity with the insolvent himself. Also, as to the Elphinstone shares, the Courts found that the conduct of the three brothers in 1866 left no doubt that although the transfer was for value, it was effected in furtherance of the general scheme for delaying and defeating creditors. As regarded limitation, both Courts treated the period as three years from the time of the adjudication in January, 1867. But they held that limitation did not apply where, as here, the plaintiff had by means of fraud been kept from the knowledge of his right to sue. The foundation for this was the conclusion at which the Courts had arrived, that there was designed fraud in the transaction by which the defendants, knowing to whom the rights belonged, concealed the circumstances giving those rights, until the Official Assignee obtained inspection of the China books in December, 1885.

As to the suit brought in 1881, the present defendant was not, according to the opinion of the first Court, then made such a defendant as that a substantial decree could have been passed against him. It was not in that suit asserted that the Elphinstone shares were claimed at all. The first Court also found as a fact that the claim originally made in 1881 in respect of part of the China assets was not taken into consideration by the arbitrator in determining the amount which he awarded to the Official Assignee. Lastly, the terms in which the accounts were directed appear in the judgments of the Courts below (1).

[345] Mr. *A. Cohen*, Q. C , and Mr. *J. H. A. Branson*, for the appellant, argued that the claims of the plaintiff both in respect of the China assets and the Elphinstone shares should have been held barred by limitation, the Courts below having erred in applying the saving provisions of s. 18 of the Limitation Act to this suit. The proceedings in 1881 showed that the Official Assignee before 1885 possessed, at least, the means of obtaining knowledge of the circumstances, and the means of ascertaining the particulars. It was upon his knowledge that he took those proceedings. Further evidence was afforded, to which reference was made in the record, upon which, as it was contended, the Official Assignee might have, but had not, acted against the present defendant. The Courts below should have found upon the facts that it was not proved that the plaintiff had by means of fraud, on the part of the defendant, been kept from the knowledge of his right, such "keeping from knowledge" being an essential part of the case. It was not sufficient that an invalid, or fraudulent, preference, on the part of the insolvent, should have been shown, or even that Rahimbhoy assisted him, for nothing less than continuance in concealing of the real state of things

(1) 14 B. 411 (422).

1892
NOV. 10.
PRIVY COUNCIL.
17 B. 341 (P.C.) = 20 I.A. 1 = 6 Sar. P.C.J. 256 = 17 Ind. Jur. 40.

by the defendant would satisfy the requirement of s. 18. In regard to having the means of knowledge, reference was made to *Barnes* v. *Addy* (1). It was also contended that the Courts below ought to have held that the judgment obtained against Ahmedbhoy in 1882, barred this suit, the prior suit having been based on allegations of a collusive and fraudulent transfer of the property of which an account was decreed. This defence was maintainable either under s. 13 of the Civil Procedure Code (XIV of 1882) in one view of the case, or in another, under s. 43, as the two classes of property now in dispute, if to be the subject of an account, might have been included in the prior suit.

Mr. *R. B. Finlay*, Q.C., and Mr. *J. D. Mayne*, for the respondent, were heard only as to the variation in the mode of taking the account.

Mr. *A. Cohen*, Q. C., replied on this last matter.

JUDGMENT.

[346] At the end of the arguments of counsel their Lordships' judgment was given by

LORD HOBHOUSE.—This suit is brought by the Assignee of Alladinbhoy, who became insolvent in the year 1867, against the appellant, to recover assets alleged to belong to the insolvent's estate, of which the appellant had wrongfully become possessed.

The dispute is now narrowed down to two items, one being what is called the China assets, and the other, certain shares in a joint stock Company called the Elphinstone Land Company.

There is no need to make a long story about the facts, of which very few are in dispute. The only peculiarity in the case is the length of time that elapsed between the insolvency and the bringing of the action. Their Lordships entirely accept the view which both the Courts below have taken, that the insolvent, his son, and his two brothers, Ahmedbhoy and the present appellant Rahimbhoy, combined together to conceal the property of the insolvent with the view of defrauding his creditors.

The first item which is in dispute, namely the China assets, is of the following kind. The insolvent had a business at Hongkong, and his brothers Ahmedbhoy and Rahimbhoy also carried on business at the same place in partnership. By the middle of 1866 the insolvent was in very embarrassed circumstances. In September, 1866, he absconded so as to conceal himself from his creditors. His petition in insolvency was presented on the 17th of December, 1866, and he was adjudicated insolvent on the 7th of January, 1867. Pending these transactions, that is to say on the 1st of January, 1867, between the date of the petition and the date of the adjudication, the whole of the insolvent's assets at Hongkong were handed over by his manager to the firm of his brothers Ahmedbhoy and Rahimbhoy, and his books were also handed over. It is not disputed that the transfer was a voluntary one; that it cannot be maintained, and that if this action had been brought in 1867 the assets must have been recovered. But it is said that as the action was not brought till 1887, it is barred by time. The answer is that the transfer was not only a voluntary one and bad against the creditors, but that it was committed in pursuance of a fraud, and was concealed from the **[347]** creditors; that it was a fraud which prevented the Assignee from having knowledge of his right to recover the assets, and, therefore, falls within the 18th section of the Limitation Act XV of 1877, which directs that in such a case the

(1) L.R. 9 Ch. 244.

1892
NOV. 10.

PRIVY COUNCIL.

17 B. 351 (P.C.) = 20 I.A. 1 = 6 Sar. P.C.J. 236 = 17 Ind. Jur. 40.

time for instituting an action shall be computed from the time when the fraud first became known to the person injuriously affected thereby.

The Assignee is positive that he did not know anything about this fraud until the year 1885, when he learnt it in the course of a suit brought against Ahmedbhoy to recover a number of other items, in conjunction with this one, belonging to the insolvent's estate.

Their Lordships consider that when a man has committed a fraud, and has got property thereby, it is for him to show that the person injured by his fraud and suing to recover the property has had clear and definite knowledge of those facts which constitute the fraud, at a time which is too remote to allow him to bring the suit. That is attempted in the present case. But their Lordships consider, —and in this they agree with both the Courts below—that all that the appellant Rahimbhoy has done is to show that some clues and hints reached the Assignee in the year 1881, which perhaps, if vigorously and acutely followed up, might have led to a complete knowledge of the fraud, but that there was no disclosure made which informed the mind of the Assignee that the insolvent's estate had been defrauded by Rahimbhoy of these assets in the year 1867.

Reference is made to a letter showing the transfer of the assets at that time, to an affidavit of documents which in themselves contain hints as to the conduct of the parties, and to certain memoranda called "the stitched book," which was kept by a treacherous servant of Ahmedbhoy, which again give hints and clues which might have led to knowledge. But all this while the appellant was doing what he could to keep back the books of the insolvent firm which he had got into his hands, and to prevent the Assignee from seeing accounts which he desired to see. Their Lordships cannot consider that this is such knowledge on the part of the Assignee as would deprive him of the benefit of the 18th section of the Limitation Act. They, therefore, **[348]** consider that the action is brought in good time, being brought within two years after the real knowledge came to the mind of the Assignee.

Then it is said that the suit against Ahmedbhoy is itself a bar to the present suit, because Rahimbhoy was made a party to it. There seems to have been a very irregular proceeding in that suit. Rahimbhoy was made a party expressly, as the order termed it, for the purpose of discovery only, but he was not treated as a party. There was no decree against him; he was dispensed from attendance unless and until the plaintiff gave him notice; and the Court has never made any order about his costs.

Their Lordships consider that the Courts below took a right view when they held that Rahimbhoy must not be considered a party to that suit, so as to be bound or protected by a decree made in it.

It is further urged that this item has in fact been recovered from Ahmedbhoy. It should have been mentioned that Ahmedbhoy and Rahimbhoy dissolved partnership in the year 1871, and they have since that time been severed in interest. No doubt there was the suit against Ahmedbhoy which has been already mentioned, and the item was claimed against him in that suit. But the suit resulted in a reference to an arbitrator, and it was agreed between the parties when they came before the arbitrator that this particular item should not be pressed. It was in effect withdrawn from the arbitrator, and as the decree only follows the arbitrator's award, that item must be considered as excluded from the suit.

1892
NOV. 10.

PRIVY COUNCIL.

17 B. 341 (P.C.) = 20 I.A. 1 = 6 Sar. P.C.J. 256 = 17 Ind. Jur. 40.

Their Lordships consider that there is nothing now to prevent the Assignee making his claim against the appellant Rahimbhoy, who is the other party to the fraud.

An objection was made by counsel for Rahimbhoy to a variation of the decree made by the first Court. The first Court directed a general account of the dealings between Rahimbhoy's firm and the insolvent. The appellate Court limited that account, by directing that it should only commence with the [349] assets received after the date of the insolvency. Their Lordships consider that the appellate Court have gone upon a right principle, and they decline to vary the decree in that respect.

The remaining item is that which has reference to the Elphinstone shares. As regards the question of fraud, this item stands in precisely the same position as that which relates to the China assets, and their Lordships come to the same conclusion upon it.

The appellant, however, complains of a variation made in the decree of the first Court by the appellate Court, by which it is directed that in taking an account of these shares two sums for which credit is claimed by the appellant shall be disallowed to him. The matter stands in this way. The shares belonged to Alladinbhoy. He mortgaged them to the Imperial Bank of Bombay. On the 15th of May, 1866, the firm of Ahmedbhoy and Rahimbhoy paid off the sum then due upon the mortgage of the shares, namely, Rs. 68,838-4, and they subsequently paid a call upon the shares of Rs. 22,785-8. When the reference was before the arbitrator in the suit against Ahmedbhoy. Ahmedbhoy claimed to be allowed those two sums. The appellate Court thought that inasmuch as that matter was before the arbitrator it must be taken as certain that he allowed those two sums, or allowed value for them, and made his award against Ahmedbhoy upon that footing. It does not seem to their Lordships that this is by any means certain. It appears that there was an agreement made between Ahmedbhoy and Rahimbhoy in the year 1871, by which a sum of Rs. 1,17,520, which under a previous award belonged to Rahimbhoy, was transferred by him to Ahmedbhoy and became Ahmedbhoy's property. There were several other items surrendered by Rahimbhoy to Ahmedbhoy, and Rahimbhoy took all the residue of the property of the partnership. That was the effect of the agreement of 1871. The appellate Court have considered that the two sums of Rs. 68,838-4 and Rs. 22,785-8, claimed in the reference in Ahmedbhoy's suit, were portions of the Rs. 1,17,520 which was assigned by Rahimbhoy to Ahmedbhoy, and they have directed that, so far as those sums form a portion of the Rs. 1,17,520, they shall be disallowed in taking the account.

[350] Their Lordships are not at all prepared to say that it may not turn out as the appellate Court anticipate; but they do not consider that there is evidence enough before them to warrant them in assuming any such thing. It may be that there is no identity between the two sums. It may be that the arbitrator, finding that the two sums were a charge upon certain shares which were not embraced in the suit against Ahmedbhoy, threw out the whole matter. Their Lordships cannot tell what circumstances may be brought out in the inquiry. Upon the general account directed by the first Court the whole facts will be ascertained; and then it will be competent for the Court to make a decree to meet the exact justice of the case.

Their Lordships think it, therefore, more prudent at the present stage of the case to make no direction as to those sums. What they say now is not intended to prejudice the question in any way. They merely think

1892
NOV. 10.

PRIVY COUNCIL.

17 B. 341 (P.C.) = 20 I.A. 1 = 6 Sar. P.C.J. 256 = 17 Ind. Jur. 40.

that it is right to suspend the judgment until the facts are accurately ascertained.

It should be observed that this matter is not mentioned in the pleadings. If it were the case that the two sums were taken into account by the arbitrator, and the shares thereby liberated from the charge, it would have been more natural to have disclosed that fact in the pleadings, in order that it might be sifted and elucidated in the course of the evidence and the hearing. But that has not been done, and therefore there is a certain amount of obscurity and darkness hanging over the point, which makes their Lordships desirous that the account should be taken in the general form settled by the first Court.

The result is that the decree of the appellate Court will be varied, by omitting therefrom the direction that the defendant is not to be allowed credit for the sums of Rs. 68,838-4 and Rs. 22,785-8 so far as the said two sums are included in the sum of Rs. 1,17,520, and affirmed in all other respects.

With regard to the costs of the appeal, their Lordships think that the variation now made ought to make no difference. Though it may prove to be a point of importance, the appeal was presented, not on this ground, but on the much broader and [351] more vital grounds which have been dealt with and decided adversely to the appellant.

Their Lordships think, therefore, that substantially this appeal has failed, and that the appellant must bear the costs.

Solicitors for the appellant: Messrs. *Lattey and Hart.*

Solicitors for the respondent: Messrs. *Payne and Lattey.*

---

17 B. 351.

ORIGINAL CIVIL.

Before Mr. Justice Starling.

MORARJI CULLIANJI (*Plaintiff*) *v.* NENBAI AND OTHERS (*Defendants*).* [25th November, 1892.]

Will—Construction—Charity—Bequest to charity—Sadavarat—*Bequest to a definite* sadavarat—*Bequest to two charitable objects, one of such bequest being invalid—Bequest of interest of a fund to A. with invalid gift over of interest after A.'s death—A. takes corpus of fund.*

Where a testator by his will directed certain rents to be used "for *sadavarat*," and where from the wording of the will it appeared that the testator intended his executors to establish a definite *sadavarat* in some definite place, and not merely, at their discretion, themselves to distribute the income of the property at any indefinite place, and perhaps at many places, to Brahmins and travellers,

Held, that the bequest to charity was good, and an enquiry was directed as to the place at which such *sadavarat* should, at the proper time, be established, and a scheme for its administration was ordered to be prepared.

A testator by his will directed that, if his daughters died without issue, the property of his daughters should be used by his executors for *dhurm* and for *sadavarat*.

Held, following *Boare* v. *Osborne* (1), that the bequest was good to the extent of one-half in favour of the *sadavarat*. The gift to *dhurm* being invalid, the other half was undisposed of.

A testator by his will directed that his wife should enjoy for life the interest of Rs. 4,000 which were deposited with a certain firm, and that after her death

---

* Suit No. 96 of 1891.

(1) L.R. 1 Eq. 585.

1892
NOV. 25.
ORIGINAL CIVIL.
17 B. 351.

the interest should be given to *dhurm*. There was no residuary clause in the will.

Held, that the gift to *dhurm* being clearly bad, and there being no residuary clause in the will, the *corpus* of the Rs. 4,000 was undisposed of, and went to the testator's widow.

[F., 12 C.W.N. 1083 (1086); R., 31 C. 895=8 C.W.N. 653 (655); 4 Ind. Cas. 1154=3 S.L.R. 185 (187, 188); 25 M.L.J. 556.]

[352] SUIT by an executor for the construction of a will and for administration, &c.

Jetha Pudumsey, the testator, died in 1875, having made his will, dated 24th August, 1875, which was duly proved in 1878.

The following are the clauses of the will which the plaintiff prayed to have construed :—

"After the decease of my wife shall have taken place, my executors shall use for *sadavarat* (purposes) the rent of the abovementioned house No. 7 situated in Dariasthan Lane. And should they deem it proper, they may sell off the same and realize interest (on the proceeds) and duly pay over (the interest) into the *sadavarat*. And there are two houses belonging to me, situated at Mody Bazar. Out of the rent of the said houses and the interest which may be realized in respect of my moneys in ready cash, whatever the same may be, my executors shall use Rs. 50 (namely, fifty) per mensem for *sadavarat* (purposes) and they shall pay Government (and) assessment bill and shall get repairs made."

"As regards the two houses situated at Mody Bazar and as regards the money, whatever the same may be, should there be no issue of the womb of my daughters, the same (*i.e.*) the property of (my) daughters shall be used by my executors for religious and charitable purposes (*dhurm*) and for *sadavarat* (purposes). Further, Rs. 4,000 (four thousand), credited to the name of my wife, Nenbai, at Thakor Dundar Gangji's place. My wife during her lifetime shall enjoy the interest of those rupees. After the decease of my wife, religious and charitable donations (*dhurm*) shall be made (given) out of the interest of those rupees."

"And as regards the above-mentioned Rs. 50 fixed for the *sadavarat* the same are to be paid at Shri Narayan Saraoji."

The testator's two daughters (Mulbai and Nenbai) survived him, but had died without issue before the date of this suit.

The first defendant was the testator's widow. The second and third defendants were co-executors with the plaintiff, and the fourth defendant was the husband of the testator's daughter **[353]** (Nenbai). The last-mentioned defendant, as heir of his wife, claimed the share of the residue to which he alleged she was entitled if the gifts to charity were held to be void.

The Advocate-General was a party defendant.

Lang (Acting Advocate-General) and *Inverarity*, for plaintiff.—They cited *Jamnabai* v. *Khimji Vullubdass* (1); Tudor on Charitable Trust (3rd ed.), pp. 29, 279; *Dawson* v. *Small* (2); *In re Birkett* (3); Theobald on Wills (3rd ed.), p. 378, para. 3.

Jardine and *Anderson*, for defendants Nos. 1, 2 and 3.—They cited Tudor on Charitable Trusts (3rd ed.), p. 38; Theobald on Wills (3rd ed.), p. 378.

(1) 14 B. 1. (2) L.R. 18 Eq. 114. (3) 9 Ch. D. 576.

1892

NOV. 25.

ORIGINAL CIVIL.

17 B. 351.

JUDGMENT.

STARLING, J.—In this suit there are three points to be determined: (1) whether the gift to "*sadavarat*" of the income of the house in Dariasthan on the death of the testator's wife is valid? (2) whether the gift to the "*dhurm*" (*i.e.*, religion) and "*sadavarat*" (*i.e.*, charity) of the residue of the income of the two houses at Mody Bazar, after the death of the testator's two daughters, is valid? (3) whether the gift to "*dhurm*" of the Rs. 4,000, on deposit with Dunji Gangji, is valid, and if not, whether the provisions regarding the two houses could apply to it, or whether it would be undisposed of residue?

With regard to the first question, the words of the will are: "After the decease of my wife shall have taken place, my executors shall use for '*sadavarat*' the rent of the above-mentioned house." Power is then given to sell the house, and invest the proceeds, and pay the income "into the '*sadavarat*'." Looking to the wording of the will, I am of opinion that the testator intended his executors, after the death of his wife, to establish a definite "*sadavarat*" in some definite place with the income of that house, and not merely, at their discretion, themselves to distribute the income at any indefinite place, and perhaps at many places to Brahmins and travellers. I, therefore, hold that this is a good charity, and there must, therefore, be an inquiry as to the place at which such "*sadavarat*" should at the proper time be [354] established, and a scheme must be prepared for its administration.

As to the second question, the wording of the will is different. It provides that, if the testator's daugnters die without issue, "the property of my daughters shall be used by my executors for '*dhurm*' and '*sadavarat.*'" The gift to "*dhurm*" is invalid; consequently it becomes necessary to determine whether one portion of the gift, the extent of which is uncertain, being invalid, the whole is invalid; or whether the valid portion takes a share or the whole of the gift. Under earlier authorities the whole gift would be held to be invalid, but later decisions have gone on the principle that, if possible, the valid portion should be upheld. I shall follow the later cases, and it will therefore be necessary to decide whether the whole or a portion is to go to the "*sadavarat.*" Mr. Inverarity argued that the whole should go, on the authority of *Dawson* v. *Small* (1) and *In re Birkett* (2). There are several other cases of a similar nature—*Hoare* v. *Osborne* (3); *Fisk* v. *Attorney-General* (4); *Hunter* v. *Bullock* (5); *In re Williams* (6); and *Vaughan* v. *Thomas* (7). In *Fisk* v. *Attorney-General*, *Hunter* v. *Bullock*, and *In re Birkett*, the gift was to a person other than the testator's executors or trustees, and the principle which seems to me to run through these cases is that a definite gift being made to "a paticular person," with a trust for an invalid purpose attached to it, and a trust for the balance for a valid purpose, and not merely directions given to the testator's executors or trustees to act in a certain manner, the Court will not deprive the donee of the amount set apart for the trust, which he need not perform, but will let it fall into the balance which is applicable to the valid purpose. This view, I know, is dissented from by Malins, V. C., in *In re Williams* (6). In *Dawson* v. *Small* (1) and in *In re Williams* (6) it was the executors who were to carry out the wishes of the testator, and the Court held that the

(1) L.R. 18 Eq. 114. (2) 9 Ch. D. 576. (3) L.R. 1 Eq. 585.
(4) L.R. 4 Eq. 521. (5) L.R. 14 Eq. 45. (6) 5 Ch. D. 735.
(7) 33 Ch. D. 187.

whole of the income should be applied to the valid trusts. In *Hoare* v. *Osborne* (1) and *Vaughan* v. *Thomas* (2) the Court, on the contrary, held that the value of the invalid trusts went into the residue, adopting in each case a different **[355]** method of ascertaining what was to be apportioned to the valid and the invalid trusts respectively.

Thus, of the cases which seem to me to be nearly on all fours with the present, there are two deciding one way and two the other, and three others the principle of the decision in which can, I think, be distinguished from these four. In the present case, however, the directions are much more vague than in any of the foregoing seven cases, and I should have held that the whole gift to "*dhurm*" and "*sadavarat*" was invalid if it had not been for the modern tendency to uphold as much as possible where charity is concerned. I shall, therefore, follow the case of *Hoare* v. *Osborne* (1), and hold that the gift of the rent of the two houses and the income of money in ready cash is good to the extent of one-half in favour of the "*sadavarat*," and there must be an inquiry as to where the "*sadavarat*" is to be established, and a scheme framed for its administration; and there should also be a report as to whether the "*sadavarat*" to be established out of the income of the house in Dariasthan should be entirely separate from this one, or whether the income of the other property, when it falls in, should be added to this. The other half of these two properties and of ready cash will thus be undisposed of, and will go to the first defendant for a widow's estate.

The only question now to be disposed of is that regarding the Rs. 4,000. The gift to "*dhurm*" is clearly bad, and I do not think that a deposit of moneys with a firm at interest would come under the term "money in ready cash," which seems to me a more restricted term than "money" or "ready money." There is no residuary clause in the will, and there are no other words than "money in ready cash" which occur in connection with the bequest of the houses of Mody Bazar, by which it can be held that this Rs. 4,000, in the events which have happened, are subject to the same trusts; consequently I hold that the "*corpus*" of the Rs. 4,000 being undisposed of, it will go to the widow. She was, therefore, entitled to remove it from the place where it had been deposited by the testator.

Declare that the defendant Nenbai is entitled to the possession **[356]** of the house in Dariasthan and to recover the rents and profits thereof, applying them as directed by the will of the testator. Declare that the gift of the rent of the house in Dariasthan, in the plaint mentioned, after the death of the testator's wife is valid, and that the same be and is hereby established. Refer to the Commissioner to report whether the same should be separated from the other "*sadavarat*" hereinafter referred to, and if necessary to inquire and report where the same should be established, and to prepare a scheme for the administration thereof. Declare that the trusts declared as to the income of the two houses in Mody Bazar, and of the interest which may be realized in respect of the testator's moneys in ready cash, is invalid so far as regards "*dhurm*," but valid to the extent of one-half of such income and interest in favour of the "*sadavarat*." Refer to the Commissioner to enquire and report where the same should be established, and to prepare a scheme for the administration thereof. Declare that the directions to expend the sum of Rs. 4,000, in the will mentioned, by "*dhurm*," are invalid, and that the said

(1) L.R. 1 Eq. 585.

(2) 33 Ch. D. 187.

1892
NOV. 25.
ORIGINAL CIVIL.
17 B. 351.

sum is undisposed of by the said will, and belongs to the defendant Nenbai as widow of the testator. Refer to the Commissioner to take an account of the property of the testator received or taken possession of by the executors, or any and which of them, and of their application thereof, &c. Fourth defendant to pay his own costs. Costs of all other parties, as between attorney and client, to be paid out of the estate.

Attorneys for the plaintiff: Messrs. *Little*, *Smith*, *Nicholson*, and *Bowen*.

Attorneys for the defendants: Messrs. *Payne*, *Gilbert*, and *Sayani*.

---

17 B. 357.

[357] APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Birdwood.

NANDRAM DALURAM (*Original Defendant*) *Appellant*, *v.* NEMCHAND JADAVCHAND (*Original Plaintiff*), *Respondent.**

[19th April, 1892.]

Arbitration—Award—Decree in terms of award—Appeal—Award by three out of four arbitrators—Illegal award.

Where a decree has been passed in terms of an award, an appeal lies only where the question is whether the award was illegal, being void *ab initio*.

[**F.**, 24 C. 469 (471); **Appl.**, 2 N.L.R. 81 (83); **R.**, 18 A. 422 (426, 427) (**F.B.**)=16 A.W.N. 137; 29 B. 285=6 Bom. L.R. 1132 (1134); 18 M. 423 (430) (**F.B.**); 9 Ind. Cas. 173=21 M.L.J. 263=9 M.L.T. 251=(1911) 1 M.W.N. 151 (164); 5 O. C. 13 (14); 74 P.R. 1894 (**F.B.**); 112 P.L.R. 1901 (**F.B.**); 6 S.L.R. 169.]

SECOND appeal from the decision of Rao Bahadur Chunilal Maneklal, First Class Subordinate Judge of Ahmedabad with Appellate Powers.

Suit (No. 348 of 1886) and cross suit (No. 389 of 1886) for account. On the application of the parties both suits were referred to the arbitration of four arbitrators. In January, 1888, one of the arbitrators resigned, and another was by consent appointed in his place.

In April, 1888, the last mentioned arbitrator ceased to take part in the proceedings, and on the 12th July, 1888, the other three arbitrators gave their decision: two of them publishing one award, and the third, differing from his colleagues, publishing a separate award.

The plaintiff, Nandram, objected to both the awards, and contended (*inter alia*) that they were illegal, not being the award of the four arbitrators who had been appointed.

The Subordinate Judge held that the award of the two arbitrators, being that of the majority, should be filed, and he made a decree in terms of that award.

Against that decree Nandram (plaintiff in suit No. 348 of 1886) appealed, and the appellate Court confirmed the order, observing: "On a consideration of the authorities cited on either side, the tendency appears to allow an appeal only in a case in which there is no award either in fact or in law, but not to allow an appeal in any other case, and the determination of the question raised on behalf of the respondent **[358]** depends upon the question whether the disputed award is a mere nullity, and this latter question must be answered in the negative. The

---

* Second Appeal No. 635 of 1890.

award is assailed on the grounds that the arbitrators, who decided against the plaintiff (Nandram), accepted bribes from the other side; that the parties had appointed four arbitrators, but the fourth arbitrator has not made an award and has been absent at Rutlam; that Chunilal was appointed, not an arbitrator, but an umpire; that the two arbitrators who have decided against the plaintiff had once submitted their award which the Court remitted for amendment, and those arbitrators fraudulently destroyed that award and made a new award; that the arbitrators have allowed time-barred items; that the amount due is illegal and faulty; that the Court had no jurisdiction, as the amount on the credit and debit sides of the accounts exceeded Rs. 5,000.

"Such are the grounds urged by the appellant against the award, but they are neither singly, nor as a whole, sufficient to make the award a nullity. For the purpose of the preliminary objection raised on behalf of the respondent, the distinction between void and voidable awards should be borne in mind, and although the grounds urged by the appellant might be sufficient to hold that the award is voidable, still they cannot possibly be held as making the award void *ab initio*. I therefore hold that no appeal lies against the decree of the Court below."

Nandram appealed to the High Court.

Rao Saheb *Vasudeo Jagannath Kirtikar* (Government Pleader), for the appellant:—Where a decree is based upon an award, and the legality of the award is impugned, an appeal lies against the decree. An award in which all the arbitrators have not joined is not legal. The lower Courts were wrong in holding that the objections raised against the award do not render it illegal, and therefore void *ab initio*. The Full Bench ruling of the Allahabad High Court in *Lachman Das* v. *Brijpal* (1) is in point. See also *Muhammad Abid* v. *Muhammad Asghar* (2); *Dagdusa Tilakchand* v. *Bhukan Govind Shet* (3); *Debendra Nath Shaw* v. *Aubhoy Churn* **[359]** *Bagchi* (4); *Samal Nathu* v. *Jaishankar Dalsukram* (5); *Suppu* v. *Govindacharyar* (6); *Sashti Charan Chatterjee* v. *Tarak Chandra Chatterjee, &c.* (7).

L. M. Wadia (with *Gangaram B. Rele*), for the respondent:—The lower Court has, no doubt, not found directly that the award is good in law, but it is clear from the judgment that the Court was of opinion that the award is legal. The award being legal, no appeal can lie against a decree based upon it. We rely upon *Vishnu Bhau Joshi* v. *Ravji Bhau Joshi* (8), *Naurang Singh* v. *Sadapal Singh* (9); *Bhagirath* v. *Ram Ghulam* (10); *Ramonoogra Chobey* v. *Mussamut Putmoorta Chobayan* (11); *Sreenath Ghose* v. *Raj Chunder Paul* (12); *Shaikh Elahee Buksh* v. *Shaik Hajoo* (13); *Lalla Ishuree Pershad* v. *Hur Bhunjun Tewaree*, and *Sustee Churn Chuckerbutty* v. *Taruk Chunder Chatterjee* (14); *Sreenath Chatterjee* v. *Kylash Chunder Chatterjee* (15); *Maharajah Jeymungul Singh Bahadoor* v. *Mohun Ram Marwaree* (16); *Protap Chunder Roodro* v. *Huro Monee Dossia* (17).

JUDGMENT.

SARGENT, C. J.:—In this case, the matters in dispute between the parties in two suits Nos. 389 of 1886 and 348 of 1886 were referred to

(1) 6 A. 174. (2) 8 A. 64. (3) 9 B. 82.
(4) 9 C. 905. (5) 9 B. 254. (6) 11 M. 85.
(7) 8 B. L. R. 315. (8) 3 B. 18. (9) 10 A. 8.
(10) 4 A. 283. (11) 7 W. R. C. R. 205. (12) 8 W. R. C. R. 171.
(13) 14 W. R. C. R. 33. (14) 15 W. R. 9 (F.B.). (15) 21 W.R. C. R. 248.
(16) 23 W.R. C.R. 429. (17) 24 W.R. C. R. 188.

1892
APRIL 19.
APPELLATE CIVIL.
17 B. 357.

arbitration. On the application to file the award numerous objections were taken, which were, however, disallowed by the Court, and a decree was finally passed in the terms of the award. The plaintiff in Suit No. 348 of 1886 then appealed against the decree; and the Court below has dismissed the appeal on the ground that no appeal lay against the decree. The reasons for this decision are to be found in the judgment of the Lower Appeal Court in the Appeal (No. 68 of 1889) from the decision in Suit No. 348 of 1886, where the Subordinate Judge with appellate powers after referring to the authorities held that an appeal would lie where the award was a nullity, not where it was only voidable.

[360] The earlier cases turn upon s. 325 of the Civil Procedure Code of 1859, which says that when judgment shall be given according to the award, the judgment shall be final. In *Sashti Charan Chatterjee* v. *Tarak Chandra Chatterjee* and *Lala Iswari Prasad* v. *Bir Bhajan Tewari* (1), the Calcutta Full Bench (*dissentiente* Paul, J.) answered the question "When an award has been ordered to be filed, and judgment has been given in accordance with it under s. 327, Act VIII of 1859, is such judgment open to appeal?" by saying that "it was open to an appellant to show that the paper which has been filed is not an award." In *Maharajah Joymungul Singh Bahadoor* v. *Mohun Ram Marwaree* (2), where the question came before the Privy Council, there had been an arbitration in the course of a suit under the same Act, and the decree passed in the terms of the award had been set aside on appeal by the High Court on the ground that the award had not been signed by the arbitrators separately, and that ten days had not been allowed for objections; and the case was remanded (with remarks on the objections generally as a guide to the Court below) to have these defects remedied, and the several objections heard. On remand the award was properly signed, and the objections were duly heard after proper notice and adjudicated on;—one of which was that the arbitrators had been guilty of misconduct in conducting the arbitration "so as to vitiate the award." The High Court, on appeal to it, held that no appeal would lie from the decree in the terms of that award, and the Privy Council, on appeal from that decision, held that the High Court was right —1st, in reversing the first decree and remanding the case, and, 2ndly, in holding that there was no appeal from the decree passed on remand.

In *Debendra Nath Shaw* v. *Aubhoy Churn Bagchi* (3) Sir Richard Garth, Chief Justice, after expressing some doubt, concluded, on the authority of the Full Bench decision in *Sashti Charan Chatterjee* v. *Tarak Chandra Chatterjee*, *Lala Iswari Prasad* v. *Bir Bhanjan Tewari* (1), that an appeal would lie where the question is whether there is a legal award, which he held was raised **[361]** in that case by the objection that the award had been signed only by three of the arbitrators. In *Lachman Das* v. *Brijpal* (4), where the question arose under s. 522 of Act X of 1877, the Court, after referring to the decision of the Privy Council in *Maharajah Joymungul Singh Bahadoor* v. *Mohun Ram Marwaree* (2), held that an appeal would lie where "there was in fact or in law no award." It is not clear from the judgments delivered in this case whether by the expression "in law no award" the Court meant not only an award which has no legal effect *ab initio*, but also one which is voidable under s. 522. The Madras Court in *Suppu* v. *Govindacharyar* (5), would appear to place the larger meaning on the term

(1) 8 B.L.R. 315. (2) 23 W. R. C. R. 429. (3) 9 C. 905.
(4) 6 A. 174. (5) 11 M. 85.

in law no award." In *Debendra Nath Shaw* v. *Aubhoy Churn Bagchi* (1), it is to be observed that the objection taken to the award was that the three arbitrators who signed it could not, under the circumstances, make an award; in other words, that there was no award made, having legal effect *ab initio*; and it appears to us that the judgment of the Privy Council in *Maharajah Joymungul Singh Bahadoor* v. *Mohun Ram Marwaree* (2) is irreconcileable with any other view than that it is only where the award is not a legal award in the above sense that the appeal will lie.

In the present case, one of the objections taken by the appellant is that the decision by three of the arbitrators, when four were appointed, is illegal; and, if established, it would render the award illegal *ab initio*. We must, therefore, remand the case for a decision on that issue.

Case remanded.

---

17 B. 362.

[362] APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Birdwood.

CHANDRA NAIK (*Applicant*) *v.* BAHINABAI AND ANOTHER (*Opponents*).* [22nd April, 1892.]

Watandars Act (*Bombay Act III of* 1874), *s.* 10 †—*Certificate issued by Collector more than twelve years after death of last holder—Court bound to act on certificate—Limitation—Limitation Act* (*XV of* 1877), *art.* 178.

In execution of a decree against Nijaling Naik his lands were sold in February, 1876, and Hanmantbhatt purchased them and took possession on 10th August 1876. Nijaling Naik died in July 1877, and in February 1888, his son and heir, alleging that the lands were *watan*, applied to the Collector for a certificate under s. 10 of the Watandars Act (Bombay Act, III of 1874). The Collector referred the matter to his subordinates for inquiry, and the certificate was not, issued until the 13th March 1890,—that is more than twelve years after the death of the last holder, Nijaling Naik.

Held, that, although more than twelve years had elapsed, the Court could not refuse to act on the certificate of the Collector, as provided by s. 10 of the Watandars Act.

THIS was a reference made by Rao Saheb Raghavendrarao Ramchandra Gangoli, Subordinate Judge of Bagalkot, under s. 617 of the Civil Procedure Code (Act XIV of 1882).

---

* Civil Reference No. 10 of 1891.

† Section 10 of the Watandars Act (Bombay Act III of 1874):—When it shall appear to the Collector that by virtue of, or in execution of, a decree or order of any British Court any watan or any part thereof, or any profits thereof, recorded as such in the revenue-records or registered under this Act, and assigned under s. 23 of this Act as remuneration of an officiator, has or have after the date of this Act coming into force, passed or may pass without the sanction of Government into the ownership or beneficial possession of any person other than the officiator for the time being; or that any such watan or any part thereof, or any of the profits thereof, not so assigned has or have passed or may pass into the ownership or beneficial possession of any person not a watandar of the same watan, the Court shall, on receipt of a certificate under the hand and seal of the Collector, stating that the property to which the decree or order relates is a watan or part of a watan, or that such property constitutes the profits or part of the profits of a watan, or is assigned as the remuneration of an officiator, and is, therefore, inalienable, remove any attachment or other process then pending against the said watan or any part thereof, or any of the profits thereof, and set aside any sale or order of the sale or transfer thereof, and shall cancel the decree or order complained of so far as it concerns the said watan or any part thereof, or any of the profits thereof.

(1) 9 C. 905.

(2) 23 W.R.C.R. 429.

1892

APRIL 22.

APPELLATE CIVIL.

17 B. 362.

[363] On the 18th February, 1876, certain lands were sold in execution of a decree dated the 29th August, 1874, passed by the Subordinate Judge of Bagalkot against one Nijaling Naik in Suit No. 797 of 1874. At the Court sale the lands were purchased by Hanmantbhatt *bin* Bhimabhatt, who took possession of them on the 10th August, 1876.

Nijaling Naik died on the 4th July, 1877, leaving behind him his son and heir, Chandra Naik. On the 19th February, 1884, Chandra Naik applied to the Collector of Bijapur for a certificate under s. 10 of the Hereditary Offices Act, otherwise called the Watan Act (Bombay Act III of 1874). The Collector having referred the matter to his subordinates for inquiry and report, issued the certificate on the 13th March, 1890,—that is, more than twelve years after the death of the last holder, Nijaling Naik.

While the above proceedings were going on, Hanmantbhatt, the auction-purchaser, died, and his widow, Bahinabai, and a minor son having refused to part with the lands, and the Collector to whom the certificate was returned by the Subordinate Judge for reconsideration, having declined to cancel it, the Subordinate Judge referred the following question to the High Court:—

Whether he was bound to set aside the sale as desired by the Collector in the certificate issued, as it was, after twelve years from the death of the last holder?

The opinion of the Subordinate Judge was that the Collector's certificate was null and void.

Shivram Vithal Bhandarkar (*amicus curiae*), for the applicant Chandra Naik:—The certificate is void, and cannot be acted upon, as it does not state the particulars required by s. 10—*Ramangowda* v. *Shivapa* (1). Further, the Collector cannot now take any action in the matter owing to the provisions of the Limitation Act (XV of 1877). He ought to have taken steps to set aside the sale within three years from its date—art. 178, sch. II of the Limitation Act (XV of 1877).

[SARGENT, C.J.—The provisions of the Limitation Act refer to applications. There is no application in the present case.]

[364] The Collector is not a party to this reference; the parties are the representatives of the purchaser at the auction-sale and the original judgment-debtor. Even if it be supposed that the Collector has of his own motion taken action in the matter, still the judgment-debtor or his representative cannot claim the benefit of sixty years' limitation under art. 149, sch. II of the Limitation Act, which applies, strictly to Government. If he is acting on behalf of the *watandar* (judgment-debtor), he can claim only such limitation as the *watandar* himself could have claimed—*Gunga Gobind* v. *The Collector of the Twenty-four Pergunnahs* (2). Section 10 of the Watan Act must be read in connection with the provisions of the Limitation Act.

The right to get the sale set aside accrued when the auction-purchaser took possession on the 10th August 1876. Ever since that time, that is for more than twelve yerars, the auction-purchaser and his representatives have been in possession without any objection on the part either of the Collector or the *watandar*, who himself was the judgment-debtor. The auction-purchaser's title therefore is good by reason of his adverse

(1) P. J. (1890), p. 263.

(2) 11 M.I.A. 345.

1892
APRIL 22.
APPELLATE CIVIL.
17 B. 362.

possession. The property has been in the possession of the auction-purchaser and his representatives for more than twelve years; it has therefore lost its *watan* character—*Radhabai* v. *Anantrao Bhagvant* (1).

Rao Saheb *Vasudeo Jagannath Kirtikar* (Government Pleader), for Government.—Article 178, sch. II of the Limitation Act (XV of 1877), is not applicable to the present case, as no application has been made to set aside the sale. The Collector having held certain inquiry came to a judicial decision that the property was service *watan*, and that decision he communicated to the Subordinate Judge. It is not correct to say that the auction-purchaser's title has become complete by twelve years' adverse possession. It is true that the Collector granted the certificate after the expiration of that period; but the judgment-debtor's son began to move in the matter in the year 1884, that is, about eight years after the auction sale. His right, title, and interest cannot therefore be allowed to be prejudiced simply because the period of twelve years expired while inquiries were being made by the Collector.

[365] As against the Collector no one can acquire a title by adverse possession till the expiration of the period of sixty years under art. 149, sch. II of the Limitation Act. The provisions of the Watandars Act are similar to the provisions of the Bhagdari Act (Bombay Act V of 1862), and there are rulings to show that under the Bhagdari Act there was no period of limitation prescribed for making an application, and, therefore, such applications were not governed by any particular period under the Limitation Act—*The Collector of Broach* v. *Rajaram Laldas* (2); *The Collector of Thana* v. *Bhaskar Mahadev* (3).

JUDGMENT.

SARGENT, C.J.—The sending the certificate by the Collector as contemplated by s. 10 of the Watandars Act is not an application to the Civil Court, but only a proceeding in the nature of a notification which, the Watandars Act itself provides, shall be acted upon by the Civil Court in a certain manner. Clause 178 of the Limitation Act has, therefore, no application to it. We think that the Subordinate Judge cannot refuse to act on the certificate of the Collector, as expressly required by s. 10 of Bombay Act III of 1874. If the purchaser has, since his purchase, acquired a title by adverse possession, it will be for him to take the proper measures to assert it as against the Collector or any other party, as the case may be.

Order accordingly.

(1) 9 B. 198 (232). (2) 7 B. 542. (3) 8 B. 264.

1892

JUNE 20.

APPELLATE CIVIL.

17 B. 365.

17 B. 365.

APPELLATE CIVIL.

Before Mr. Justice Bayley, Acting Chief Justice, and Mr. Justice Candy.

CHIMNAJI (*Original Plaintiff*), *Appellant* *v.* SAKHARAM AND OTHERS (*Original Defendants*), *Respondents.** [20th June, 1892.]

Mortgage—Redemption—Suit for redemption by purchaser of equity of redemption—Evidence given by defendants of a mortgage other than the mortgage in respect of which suit brought—Right of plaintiff to have the question of latter mortgage determined—Practice—Procedure.

The plaintiff as purchaser of the equity of redemption sued for redemption. He alleged a mortgage, dated A.D. 1849, for Rs. 175. The defendants admitted a mortgage, but alleged that it was executed at a different time and for a larger [366] sum. After the evidence was given, but before the judgment was delivered, the plaintiff applied to amend the plaint and to set up the mortgage admitted by the defendants. His application was refused, and the Court dismissed the suit on the ground that he had failed to prove the particular mortgage alleged in the plaint. The District Judge confirmed the decree, but observed that there probably was a mortgage for the larger sum as alleged by the defendants. On second appeal,

Held, reversing the decree and remanding the case, that the plaintiff was entitled to have the question of the mortgage for the larger sum inquired into.

[Diss., 18 A. 403 (409) ; 3 O.C. 173 (174).]

SECOND appeal from the decision of T. Hart-Davies, Acting Assistant Judge of Poona.

Suit to redeem a mortgaged house.

The plaintiff alleged that on the 1st February 1887 he had purchased the equity of redemption under a mortgage for Rs. 175, dated A.D. 1849, executed by one Rakhmaji to one Shiduji. He now sued to redeem the mortgage.

The first defendant (Sakharam) was a son of the deceased mortgagee Shiduji. He denied the mortgage alleged by the plaintiff, but admitted another mortgage of a different date and for a different amount, *viz.*, for Rs. 256. He further stated that a moiety of the house belonged to him as his share.

Defendant No. 2 (Babaji) was the second son of Shiduji. He denied the mortgage altogether, and claimed the house as his. He also alleged that his brother Sakharam (defendant No. 1) was in collusion with the plaintiff. He also pleaded limitation.

After the evidence was given, but before the judgment, the plaintiff applied to amend the plaint by alleging a mortgage for Rs. 256. The Court refused the application, but allowed the valuation of the claim to be increased to Rs. 256. It then dismissed the suit, holding that the particular mortgage alleged by the plaintiff was not proved. He was of opinion, however, that the evidence showed that the house had been mortgaged. On appeal the District Judge confirmed the decree, remarking that there probably had been a mortgage executed by the mortgagors to the mortgagee at some date prior to 1855 A.D. for Rs. 256, but as that was a different transaction from the one sued on, the plaintiff was not entitled to succeed.

[367] The plaintiff preferred a second appeal.

---

* Second Appeal No. 255 of 1891.

1892
JUNE 20.
APPELLATE CIVIL.
17 B. 365.

Mahadeo Chimnaji Apte, for the appellant.—The Courts should not have dismissed the suit, both being of opinion that there was a mortgage by the plaintiff's assignors to the defendants' family. The evidence given by plaintiff was *prima facie* sufficient, and it lay on the defendants to displace it—*Hiru* v. *Bhikaji* (1); *Chinto* v. *Suga* (2); *Ganesh* v. *Vinayak* (3); *Raghunath Annaji* v. *Babaji* (4).

The plaintiff ought to have been allowed to amend his plaint, as the nature of the suit would not have been materially affected thereby—*Lakshman* v. *Hari* (5).

Gangaram B. Rele, for the respondent, (defendant No. 2).—The Subordinate Judge was right in not allowing the plaint to be amended. The application was made too late, *viz.*, about a year after the defendant No. 1 filed his written statement alleging the mortgage of Rs. 256, and five days before the judgment. The plaintiff failed to prove the mortgage he alleged in his plaint. He cannot be allowed now to prove another mortgage. When a particular instrument is sued upon, the plaintiff must establish his case on that particular cause of action and not on one similar to it—*Vithaldas* v. *Yedu* (6); *Narsapa* v. *Bhimangavda* (7); *Moro* v. *Dada* (8); *Lakshman Trimbak* v. *Bhagirathibai* (9); *Govindrao* v. *Ragho* (10).

JUDGMENT.

CANDY, J.—The plaintiff sues as purchaser of the equity of redemption from certain Telis to redeem a mortgage which in his deed of assignment is recited as having been executed in *Shake* 1761 (A.D. 1839) for Rs. 175 to one Shiduji Mali. The first defendant, the elder son of the deceased Shiduji, pleaded that the mortgage was for Rs. 256, and not in *Shake* 1761; the second defendant, the second son of Shiduji, denied the mortgage altogether; and the third defendant, the sub-mortgagee under defendant No. 1, did not resist the claim.

[368] The Subordinate Judge included in the first issue framed by him the question whether the principal mortgage money was Rs. 175 or Rs. 256, and allowed the valuation of the claim to be increased to Rs. 256, but he rejected the claim (quoting the case at I.L.R., 8 Bom., 543), on the ground that the particular mortgage recited by plaintiff had not been proved.

The District Judge confirmed this decision, though he thought it probable that there was a mortgage for Rs. 256.

We are of opinion that both the lower Courts have erred. In the case of *Govindrav* v. *Ragho* (10) (on which the Subordinate Judge relied), the defendant pleaded that the lands were his ancestral property, and denied that there had at any time been any mortgage. Plaintiffs resorted to dishonest artifices to procure evidence of their case, and it was held that as a specific mortgage was sued on, and not proved, the Court was not authorized to give a decree on some indefinite, supposed mortgage, which by the hypothesis the plaintiff could not have sued on. That case is easily distinguished from such cases as those to be found at I.L.R., 4 Bom.. 584; P. J. for 1888, p. 131; P. J. for 1890, p. 297. In *Lakshman* v. *Hari* (5) defendant admitted that the relations between the plaintiff and himself were those of mortgagor and mortgagee, but pleaded the bar of

(1) P. J. 1883, p. 131. (2) P. J. 1886, p. 247. (3) P. J. 1889, p. 370.
(4) P. J. 1890, p. 297. (5) 4 B. 584. (6) P. J. 1876, p. 270.
(7) P. J. 1877, p. 190. (8) P. J. 1889, p. 159. (9) P. J. 1892, p. 192.
(10) 8 B. 543.

1892
JUNE 20.
APPEL-
LATE
CIVIL.
17 B. 365.

limitation; it was held that when the question of limitation was decided in plaintiff's favour, then the amount of the mortgage-debt was to be decided. The case of *Hiru* v. *Bhikaji* (1) is very similar to the present case, the defendants admitting that there was a mortgage, but pleading that it was for a different sum and of an earlier date. But the case of *Moro* v. *Dada* (2) was very different, for there the defendant referred to a mortgage only to show that it had been paid off, not to admit any liability upon it.

We think therefore in the present case that the plaintiff was entitled to have the question of the mortgage for Rs. 256 inquired into, and we reverse the decrees of the lower Courts and remand the case for a decision on the merits. All costs hitherto incurred to abide the result.

Decree reversed and case remanded.

---

17 B. 369.

[369] APPELLATE CRIMINAL.

Before Mr. Justice Jardine and Mr. Justice Telang.

QUEEN-EMPRESS *v.* KHODA UMA AND OTHERS.* [27th June, 1892.]

*Criminal Procedure Code (Act X of 1882), ss. 227 and 237—Charge—Alteration of charge—Conviction for an offence different from that with which accused is charged—Extradition—*Lex fori.

The accused were subjects of His Highness the Gaekwar of Baroda. They were extradited for committing dacoity in British India. The Magistrate, who held a preliminary inquiry into the matter, committed the accused to the Sessions Court on a charge under s. 398 of the Indian Penal Code (XLV of 1860). The Sessions Judge amended the charge to one under s. 395, on the ground that, as the accused had been extradited on a charge under s. 395, they could be tried and convicted only under that section, and no other. At the end of the trial, the Sessions Judge finding that the accused were guilty of theft, but not of dacoity, acquitted them.

Held, reversing the order of acquittal, that it was competent to the Sessions Judge to alter the charge under s. 227 of the Code of Criminal Procedure (Act X of 1882) and under s. 238 to convict the accused of the minor offence, which the evidence established.

Held, also, that the Code of Criminal Procedure was applicable as *lex fori*.

[R., Rat. Unr. Cr. Cas. 773 (774).]

APPEAL by the Local Government against an order of acquittal passed by the Sessions Judge of Ahmedabad.

The accused were subjects of His Highness the Gaekwar of Baroda. They were charged with committing dacoity in a village in the Ahmedabad District. Their extradition was obtained on the representation of the District Magistrate of Ahmedabad that there was evidence to prove a *prima facie* case of dacoity against them.

The Magistrate, who held a preliminary inquiry into the matter, committed the accused for trial to the Court of Session on a charge of attempting to commit dacoity when armed with deadly weapons, an offence punishable under s. 398 of the Indian Penal Code.

The Sessions Judge was of opinion that, as the accused had been extradited for dacoity under s. 395 of the Penal Code, they could be tried

---

* Criminal Appeal No. 84 of 1892.

(1) P. J. (1888) p. 131.

(2) P. J. (1889) p. 159.

only for that offence, and for no other. He, **[370]** therefore, amended the charge to one under s. 395 of the Code.

At the conclusion of the trial, the Sessions Judge, agreeing with one of the assessors, acquitted the accused for the following reasons :—

"The facts established against the accused are that they went to the complainant's field to steal grass. While so engaged they were disturbed. They abandoned the booty, and, in order to cover their retreat, they caused hurt to their pursuers, and also threatened them. Following the ruling of the Madras High Court in 1865 cited by both Mayne and Starling in their annotations of the Indian Penal Code, and *Reg.* v. *Kalio* (1), I am of opinion that the accused cannot be convicted of dacoity, and as they were extradited for trial on that charge, they cannot be tried and convicted of any other."

Against this order of acquittal the Government of Bombay appealed to the High Court.

Lang (Acting Advocate-General), with Rao Saheb *Vasudev Jagannath Kirtikar*, for the Crown.—Section 395 of the Indian Penal Code applies, as the evidence shows that the prisoners, when caught in the act of stealing, caused hurt to the complainant and his men. They were, therefore, guilty of dacoity. But, assuming that they committed theft only, the Sessions Judge had jurisdiction both to try and convict them of this offence. This jurisdiction is not taken away by the mere fact that their extradition was obtained on a charge of some other offence. Extradition is merely a means of bringing the offenders to trial before the proper Court. When they are brought before the proper Court that Court has jurisdiction to try them on any charge. Jurisdiction is independent of extradition. Jurisdiction is local: see Clarke on Extradition (2nd ed.), p. 101. There is no treaty preventing the British Government trying the prisoners on any charge. The treaty with His Highness the Gaekwar (see Aitchison's Treaties, Vol. IV, 230) provides generally for the surrender of all kinds of offenders. It does not specify any **[371]** particular offence for which they are to be surrendered, or tried when so surrendered. The ordinary law, therefore, applies, and the Sessions Judge had jurisdiction to try and convict the accused of dacoity, or of theft. Section 237 of the Criminal Procedure Code (X of 1882) would allow a conviction even under s. 382 of the Indian Penal Code.

There was no appearance for the accused.

JUDGMENT.

JARDINE, J.—The eight accused were committed for trial for attempt to commit dacoity under s. 398 of the Penal Code. The Sessions Judge amended the charge to one of dacoity under s. 395, being of opinion that as they had been handed over by the Gaekwar on a representation that they had committed dacoity they should be tried only under s. 395. Differing from one assessor, and agreeing with the other, he acquitted the prisoners and discharged them. The judgment shows that the Sessions Judge was satisfied that the eight prisoners did commit the alleged theft of grass, but that as they had abandoned the grass before they used violence to the owners, and as the violence was used to cover their retreat rather than secure the grass, the offence of dacoity was not committed. He also remarked that "as they were only extradited for trial on that charge they cannot be tried and convicted of any other." He gives no

(1) B.H.C. Cr. Ruling, 27th June 1872.

1892
JUNE 27.
APPELLATE CRIMINAL.
17 B. 369.

authority in support of this proposition. The Advocate-General has argued on behalf of the appellant, the Governor of Bombay in Council, that the acquittal on the charge of dacoity is wrong, as the evidence is most consistent with the theory that when the prisoners being intercepted by the owners of the grass used violence, they meant by that means to prevent the recovery of the grass. That may possibly have been the fact, and it must have been so held by one of the assessors. But the question of intention is not beyond doubt; and we do not think sufficient reason has been shown for this Court to convict of dacoity. We concur, however, in the contention of the Advocate-General that there is nothing apparent in the circumstances of the extradition to justify the view of the Sessions Judge that the ordinary provisions of the Criminal Procedure Code were not binding on the Sessions Court as its *lex fori* We think that it was competent to that Court to alter the charge under [372] s. 227, and that it was incumbent on it in its expressed views on the facts to convict of theft under s. 238, when acquitting of the more serious charge of dacoity. The offence was committed in the district of Ahmedabad. Therefore the local law applied: "Crimes are in their nature local: and the jurisdiction of crimes is local," per De Grey, C.J., in *Rafael* v. *Verelst* (1); *Keighley* v. *Bell* (2), and other cases mentioned in Forsyth's Constitutional Law, 249. "By the comity of nations, the country in which the criminal has been found has aided the police of the country against which the crime was committed in bringing the criminal to justice," per Heath, J., in *Mure* v. *Kaye*(3). It appears also that the British Government has a special convention with the Gaekwar, made in 1817, whereby the two contracting parties bind themselves in general terms to hand over "offenders." See Aitchison's Treaties, Vol. IV, p. 230. There seems to be no stipulation that the requisition to the Gaekwar shall state the offence in terms of the Penal Code: and the requirement of justice that the conviction shall be based on the facts proved, and the provision of s. 238 of the Procedure Code, which allows conviction for a minor offence not charged, as, *e.g.*, for theft on a charge of robbery or dacoity, do not conflict at all with the principles of comity or involve any breach of public faith. We reverse the order of acquittal of the eight prisoners, and convict them of the offence of theft, punishable under s. 379 of the Indian Penal Code, and we sentence each of them to rigorous imprisonment for three years.

TELANG, J.—The Sessions Judge has, on the evidence, come to the conclusion that the offence of dacoity is not proved against the accused. And although it is possible to arrive at a different conclusion on the question, whether, when they were obstructed, they had abandoned their booty, still I do not think the evidence is such as to justify us in adopting that conclusion against the opinion of the Sessions Judge. And if the opinion of the Sessions Judge on the question of fact is accepted, the Madras case quoted by him is an authority for holding that the terms of s. 390 are not satisfied. The Sessions Judge was, [373] therefore, right in his decision that the accused in this case could not be properly convicted of dacoity. He has, however, further decided that the accused cannot be tried or convicted on any other charge. He lays it down broadly that when the extradition of an accused person has been obtained on a representation charging him with a particular offence, the Court can try him only for that offence. According to the Sessions Judge's view, it is apparently not competent to the Court to try or

(1) 2 W. Blackstone, p. 1058. (2) 4 Fost. & Fin. 790. (3) 4 Taunt, 43.

convict the accused of any other offence, even though it is of a character cognate to the one mentioned or referred to in the extradition proceedings, and even though it is proved by substantially the same facts as those alleged for obtaining the extradition. The Sessions Judge has not quoted any authority for the proposition he has laid down; and it is certainly not one which can be said to be self-evident. *Prima facie*, indeed, it would appear to be erroneous. For if it is once conceded that the Court before which the accused are put upon their trial has jurisdiction to try them, such jurisdiction must, ordinarily speaking, extend to all offences committed within the jurisdiction of the trying Court, and not lying outside its legal power of investigation. Extradition is only a means of bringing the accused before the tribunals having jurisdiction. It is not even like the sanction for prosecution, for instance, which under s. 167 of the old Criminal Procedure Code was held to be indispensable to confer jurisdiction on the Court—*Reg.* v. *Vinayak Divakar* (1). Now in the case before us there is, no doubt, that quite independently of the extradition the Sessions Judge had full jurisdiction to try the accused. Although they are stated to be subjects of His Highness the Gaekwar, the facts on which the prosecution is based are stated to have occurred within British territory. And as Lord Chancellor Halsbury said in *Macleod* v. *The Attorney-General for New South Wales* (2) "all crime is local; the jurisdiction over the crime belongs to the country where the crime is committed." See also Kent's Commentaries quoted in Clarke on Extradition, (2nd Ed.), p. 10. If, then, the jurisdiction of the Court cannot be disputed, what is there to justify the Court in **[374]** applying at the trial other rules and principles than those which in ordinary cases it is bound to apply under the Code of Criminal Procedure? I confess I can perceive nothing. It is true that in the very recent case of *In re Bellencontre* (3), which was a case of a *habeas corpus* arising on a warrant which described Bellencontre as having been guilty of frauds as a bailee and of frauds as an agent, Cave, J., having come to the conclusion that the *prima facie* case required by the Extradition Statutes of 1870-73 was made out only as regards 4 out of the 19 offences charged against the accused by the French Government, went on to say that "the only object of specifying those cases is in order to give the prisoner the right, if he wishes to make use of it, to object to being tried in France for those other offences—for the other 15—on the ground that those are not in themselves crimes for which he could have been extradited." That, however, was a case which arose on the Extradition Acts and the treaty between France and England. And the remark of Cave, J., above set out does not say what would have been the result if such an objection as he there indicated had been taken before an English Court. See Clarke on Extradition (2nd Ed.), pp. 98 *et seq.* But in any case it only applies in terms where the objection can be taken that the offence was one for which the prisoner could not properly have been extradited at all. No such objection is shown to be sustainable here. On the contrary, the treaty (see Aitchison's Treaties, Vol. IV, 230) between the British and Gaekwar Governments relates generally to all offenders. See, as to this point, Clarke on Extradition (2nd Ed.), p. 14. And therefore in this case the extradition without any restriction whatever would be perfectly regular; and the jurisdiction independent of it would stand unaffected. Further,

(1) 8 B. H C. R. (Cr. Ca.), 32.
(2) L. R. (1891) A. C. 458. (See also 8 B. H. C. R. (Cr. Ca). 74-9.)
(3) L. R. (1891), 2 Q. B. 122.

1892

JUNE 27.

APPELLATE CRIMINAL.

17 B. 369.

assuming that the extradition proceedings could in some way limit the jurisdiction of the Sessions Court, it is plain that there is nothing here on the face of those proceedings to warrant the conclusion that any such limitation has been in fact imposed. The mere circumstance that the offence of dacoity alone is mentioned when extradition is demanded does not necessarily lead to the conclusion that the extradition is allowed for the purpose of a trial only on that [375] charge, and on no other charge whatever. And in any event it could not exclude a trial and conviction on any charge which the facts disclosed in the extradition proceedings would suffice to sustain. On the whole, therefore, it appears to me that, whether, in law, the jurisdiction of our Courts can or cannot be restricted by the condition on which extradition is allowed, no such restriction has, in fact, been imposed in this particular case, and, therefore, it was open to the Court below, and consequently it was its duty, to have tried the accused in this case under the same rules as apply to ordinary trials under the Code of Criminal Procedure. And the Sessions Judge ought to have convicted the prisoners in this case of the minor offence which the facts proved in evidence showed the prisoners had committed.

Order of acquittal reversed.

---

17 B. 375.

APPELLATE CIVIL.

Before Mr. Justice Jardine and Mr. Justice Telang.

DAGDU (*Original Defendant*), *Appellant v.* PANCHAMSING GANGARAM (*Original Plaintiff*), *Respondent.**

[3rd July, 1892.]

Execution sale—Decree—Purchasers at successive execution sales—Title obtained by first purchaser—Certificate of sale obtained by second purchaser before certificate obtained by first purchaser—Priority—Civil Procedure Code (Act XIV of 1882), s. 316—What is the title which vests under the section—Limitation in application of provisions of section—Confirmation of sale—Certificate of sale.

On 27th February, 1886, the plaintiff purchased certain land at a Court sale held in execution of a decree. On the 10th March, 1886, the same property was put up for sale in execution of another decree, and purchased by the defendant. The sale to the defendant was confirmed on 3rd July, 1886, and the sale to the plaintiff not until the 21st July, 1886. Certificates of sale were issued to both plaintiff and defendant on the same day, *viz.*, on the 22nd September, 1886, and on the 14th February, 1887, the defendant was put in possession. In 1889, the plaintiff brought this suit to recover possession.

The defendant relied on s. 316 of the Civil Procedure Code (Act XIV of 1882). He contended that as under that section the title of a purchaser at a Court sale vests at the date of the confirmation of the sale to him, his (the defendant's) right was superior to that of the plaintiff, inasmuch as the sale to him was confirmed on the 3rd July, 1886, while the sale to the plaintiff was not confirmed until afterwards, *viz.*, on the 21st July.

[376] *Held* that the plaintiff was entitled to recover. By his prior purchase he had acquired an equitable or inchoate title to the property which was subsequently perfected by the certificate of sale. Nothing therefore passed to the defendant under his second sale.

The words "the title to the property sold" in s. 316 of the Code of Civil Procedure (Act XIV of 1882) mean the full perfected title arising on the sale becoming absolute. It is that title which under the section does not vest in the purchaser until confirmation. That provision, however, need not necessarily be construed

---

* Second Appeal No. 228 of 1891.

as destroying any lesser interest which arises by reason of general equitable principles.

Quære.—Whether the provision in s. 316 as to the date at which the title of the purchaser is to vest does not apply only as between the parties to the suit and persons claiming through or under them.

Per JARDINE, J.—The reference to parties and persons claiming under them would be surplusage if the Legislature had intended the addition to apply to third parties.

[F., 2 C.W.N. 589 (591) ; **Appr.**, 19 A. 188 (190) ; **R.**, 33 A. 45 (47)=7 A.L.J. 893=7 Ind. Cas. 409 ; 7 C.L.J. 1 (8) ; 11 C.W.N. 495 (496) ; 2 Ind. Cas. 81 (82) ; 9 P.R. 1903=36 P.L.R. 1903 ; 11 P.R. 1906=4 P.L.R. 1906 ; 21 T.L.R. 152 (155) ; **D.**, 22 A. 168 (174) ; 26 C. 176 (179).]

SECOND appeal from the decision of Khan Bahadur N.N. Nanavati, First Class Subordinate Judge at Dhulia with appellate powers, in appeal No. 81 of 1889 of the District File.

The plaintiff, Panchamsing sued to recover possession of four fields (Survey Nos. 6, 21, 22 and 23) and for mesne profits for the years 1887 and 1888.

The fields in question belonged originally to three brothers—Supdu, Sampat, and Mahipat—jointly.

On 27th February 1886 the fields were sold to the plaintiff in execution of a decree against Supdu and his brothers.

On 10th March 1886 the same fields were put up to sale in execution of another decree against Supdu alone, and purchased by the defendant.

The sale to the defendant was confirmed on 3rd July 1886.

The sale to the plaintiff was not confirmed until the 21st July 1886.

The sale certificates were issued to both plaintiff and defendant on the same day, *i.e.*, 22nd September 1886.

The defendant's certificate of sale was registered on 16th October 1886 and the plaintiff's a month later, *viz.*, on 16th November 1886.

On 14th February 1887 the defendant was put in possession.

[377] The principal question at issue between the parties was—who was entitled to priority, plaintiff or defendant, with respect to the lands in suit ?

The Court of first instance decided this issue in the defendant's favour, on the ground that his certificate of sale was registered prior to plaintiff's certificate, and also that he had obtained possession. The suit was, therefore, dismissed with costs.

On appeal the Subordinate Judge with appellate powers held, on the authority of *Prangour* v. *Himanta* (1), that the sale to the plaintiff, not having been set aside at the time of the second sale, was a good and effectual sale to pass the property, so that there was nothing left to pass to the defendant under the second sale.

He, therefore, reversed the decree of the first Court and awarded the plaintiff's claim.

Against this decision the defendant appealed to the High Court.

Mahadev V. Bhat, for appellant.—This is a case between two competing purchasers at Court sales. Under s. 316 of the Code of Civil Procedure (Act XIV of 1882) the title to the property sold vests in the purchaser from the date of the certificate of sale, and not before, and the date of the certificate must be the date of the confirmation of sale. In this case the sale to the defendant was confirmed before the confirmation of the sale to the plaintiff ; therefore, under the section the property

(1) 12 C. 597.

1892
JULY 3.
APPELLATE CIVIL.
17 B. 375.

became vested in him. How could it be divested by the subsequent confirmation of the sale to the plaintiff? The defendant's purchase was, moreover, accompanied with possession. The defendant has, therefore, a better title—*Prem Chand Pal* v. *Purnima Dasi* (1); *Nanjundepa* v. *Hemapa* (2); *Lachminarayan* v. *Indrabhan* (3).

Mahadev C. Apte, for respondent.—By the sale to the plaintiff on the 27th February, 1886, all the right, title, and interest of the judgment-debtor passed to the plaintiff. There was then nothing left to pass to the defendant by the subsequent sale on the 10th March, 1886. The sale to the plaintiff stands good until it is set aside. It gave an equitable or inchoate title to the [378] plaintiff as purchaser. And that title became absolute when the sale was confirmed, and he obtained the formal certificate of sale.

His title, which was inchoate before, was perfected by the issue of the sale certificate. Nothing therefore passed to the defendant under the second sale—*Yeshvant* v. *Govind* (4); *Prangour* v. *Himanta* (5). Section 316, cl. 2 of the Code of Civil Procedure does not apply to auction-purchasers. It refers to the parties to the suit and persons claiming through them, and not to strangers.

JUDGMENT.

TELANG, J.—The question raised in this case is one upon which, apparently, there has not been yet any authoritative decision in this Court. On 27th February 1886 the property in dispute was sold at an execution sale and knocked down to the plaintiff. On 10th March 1886 the property was sold again, also in execution of a decree, and knocked down to the defendant. The latter sale was confirmed on 3rd July 1886, and the former subsequently on 21st July 1886. Certificates of sale were issued both to the plaintiff and defendant on 22nd September 1886, and on 14th February 1887 the defendant was put in possession. On the findings of the Court below, it is quite clear that the sale to the defendant was a sale only of the share of Supdu, while the sale to the plaintiff was a sale of the shares of Supdu and all his brothers. The plaintiff therefore is, in any event, entitled to the relief he claims as regards the shares and interests of Supdu's brothers. And the question is simply, as regards the share of Supdu, whether, in the events which have happened, it now belongs to the plaintiff or the defendant.

It will conduce to a clear understanding of the case, I think, if we ascertain the respective rights of the parties at the various dates which have been above mentioned. On the 27th February 1886 the sale to the plaintiff took place. At that time the defendant had admittedly no right to the property—present, future, vested, or contingent. And, according to the decisions of our Courts, the plaintiff then by virtue of such sale obtained an equitable interest in the property, which has been sometimes described as "inchoate," sometimes as "contingent." In *Kanapa* [379] v. *Janardan* (6) Sir M. R. Westropp spoke of the purchaser in such a case obtaining, as from the date of the sale, "a contingent right to the land, *i.e.*, contingent on subsequent confirmation." In the case of *Rajah Hossein Buksh Khan* v. *Baboo Roy Dhunput Sing Bahadoor* (7), payments made by a purchaser before confirmation of sale were allowed to such purchaser on the sale being subsequently set aside, Sir R. Couch

(1) 15 C. 546.
(2) 9 B. 10.
(3) P. J. 1883, 254.
(4) 10 B. 453.
(5) 12 C. 597.
(6) 11 B. H. C. R. 193 (194).
(7) 18 W. R. 289 (290).

saying: "The plaintiff by his purchase at the auction sale had acquired an inchoate right to the property. If the sale had been confirmed, he would have become the absolute purchaser." These cases, it is true, were decided under the old Civil Procedure Code, but the doctrine laid down in them was not based on the provisions of that Code, but on general equitable principles (1).

The question, then, is whether there is anything in the provisions of the present Code (XIV of 1882) which should be held to prevent such equitable interests arising. The words of the Code, s. 316, at first sight certainly seem to bear some such signification. "The title to the property," that section says, "vests in the purchaser upon the confirmation and not before." But I am, on the whole, of opinion, that these words are not necessarily inconsistent with the equitable interest accruing from the sale. What is the meaning of "the title to the property"? That phrase, according to its ordinary meaning, must, I apprehend, be held to apply only to a full perfected title, not to that "contingent" or "inchoate" title which Sir M. R. Westropp and Sir R. Couch spoke of in the cases above cited. Such a perfected title, doubtless, does not vest in the purchaser before confirmation. But is a provision, which enacts that, to be necessarily construed as destroying any lesser interest which arises by reason of general equitable principles? I am not satisfied that that is the necessary result of putting its ordinary grammatical sense on the language used by the Legislature. And, if that is not necessarily the ordinary grammatical sense, I can see some very weighty reasons for holding that we should not attribute that sense to the words. Suppose, for instance, the delay in **[380]** obtaining confirmation of the first execution sale is due to a vexatious or fraudulent attempt on the part of the judgment-debtor to set aside the sale—an attempt perhaps even based on collusion between the judgment-debtor and another creditor. Such an attempt may, of course, result in protracted litigation, and while such litigation is pending, the other creditor of the same judgment-debtor may get the property sold and the sale confirmed. Is the first purchaser to lose the benefit of his purchase under such circumstances for no fault of his own, and possibly even by the fraud and collusion of the judgment-debtor and the subsequent execution-creditor? Unless the words of the Legislature reasonably construed, are incapable of bearing any other interpretation, I should be unwilling to sanction this. Again, if the later purchase prevails, either the previous purchaser loses his money most inequitably; or if he is allowed a refund of it on the ground of there having been a total failure of consideration—though it is difficult to see precisely how this is to be practically done—the first execution-creditor is put to an inequitable loss, for which he may, conceivably, be quite unable to reimburse himself. On the other hand, if it is held that the previous sale prevails, there is no injustice to the later purchaser, who avowedly is a speculative purchaser, or at all events is not entitled to the privileges of a *bona fide* purchaser for valuable consideration (2). These considerations appear to me to lead to the conclusion that we ought not to adopt the construction contended for on behalf of the appellants, unless the words used by the Legislature cannot reasonably be made to yield any other meaning.

To come back, then, to the words of the section itself. I have already pointed out that the words "the title to the property shall not vest

(1) Cf. also *Nanjundepa* v. *Hemapa*, 9 B. 10; and *Yeshvant* v. *Govind*, 10 B. 453.
(2) Compare *Sobhagchand* v. *Bhaihand*, per Melvill, J., 6 B. 193 (207).

1892
JULY 3.
APPEL-
LATE
CIVIL.
17 B. 375.

before the certificate" are not necessarily inconsistent with the subsistence of an equitable interest short of the full perfected title in the purchaser even before the certificate issues. And the facts that the transaction which takes place at the time of the auction is called a sale, that a cancellation of it is called the setting aside of a sale, that a subsequent auction [381] after the failure of the first is called a re-sale—all these things show that in the contemplation of the legislature the transaction even before confirmation and issue of certificate is a sale—though a sale liable to be set aside. It is something more, therefore, in its legal aspect, than a mere contract for sale, and must be treated as lying outside the scope of those differences of opinion which were referred to by Sir M. R. Westropp in *Waman* v. *Dhondiba* (1), and, therefore, rendering it unnecessary to inquire with any minuteness whether any real interest in the property itself resulted from the transaction or not.

There is in the same section, however, another phrase which requires notice:—"So far as regards parties to the suit and those claiming through or under them." The High Court of Calcutta (Norris and Beverley, JJ.) (2) has construed that phrase; and that Court has held that, if the title "as regards the parties to the suit" does not vest till after a particular date, it cannot, as regards third parties, date from any earlier period. It is impossible not to feel the force of this view. On the other hand, however, it ought not to be forgotten, that on this construction the whole of the clause above set out becomes mere surplusage. If the "vesting" takes effect at the same time "as regards parties to the suit" and as regards third parties, there is no obvious object in expressly specifying the former. It may, doubtless, be said that there is an object in specifying it, because the vesting may possibly take effect later as regards third parties. But it is not easy to imagine the case for which such a provision would be needed. I am myself, therefore, rather inclined to think, that the whole of the clause relating to the time when the vesting is to take effect was put in to give legislative form to the law as already laid down by the Courts under the Act of 1859, and in giving it such a form, it was thought desirable to insert the parenthetical clause above referred to in view of the similar words which occur in s. 312, touching the confirmation of the sale, and which were most probably inserted merely *ex abundanti cautela*. If this is so, it [382] is not improbable that there was no intention on the part of the Legislature to disturb the equitable rights flowing from the completion of the auction sale, but only to regulate such matters as arose, for instance, in *Basapa* v. *Marya* (3) or *Harkisandas* v. *Bai Ichha* (4). I think it would not be contrary to the rules laid down in the case of *Bank of England* v. *Vagliano Brothers* (5) and it would be in accordance with one of the rules in *Heydon's case* (6) to look to the old law and the decisions under it, so far as is necessary to arrive at such an interpretation of s. 316.

On the whole, therefore, it appears to me that we cannot decide the present case in favour of the defendant, without holding that an execution sale by the Court, before it is confirmed, creates not only no title to the property, but no right *in re* whatever, not even any equitable interest in the property. Apart from the Civil Procedure Code, it would, I think, be impossible to hold this. And in the words of the Code I can find no adequate support for the view that the Legislature intended that such

(1) 4 B. 126. (2) *Prem Chand Pal* v. *Purnima Dasi*, 15 C. 546.
(3) 3 B. 433. (4) 4 B. 155. (5) L. R. (1891), A. C. 107.
(6) 3 Rep. 7*b*; and compare *Pelton* v. *Harison*, L.R. (1891), 2 Q.B. 422; *Connor* v. *Kent*, *Ibid*, 545; and *In re Leon*, L. R. (1892), 1 Ch. 348.

equitable interests, which had been constantly given effect to by the Courts, as a matter of substantive law, should now cease to be recognized. I am therefore of opinion that the decree of the Court below is right, and should be affirmed with costs.

JARDINE, J.—I am of the same opinion and concur in the proposed decree. I agree with my learned colleague in the reasons he has given. I think the reference to the parties and persons claiming under them in the addition made to s. 316 in Act XII of 1879, re-enacted in the Code, Act XIV of 1882, would be surplusage if the Legislature had intended the addition to apply to third parties. The addition requires the certificate to bear the date of the confirmation of the sale; and s. 314 declares that no sale of immoveable property shall become absolute until it has been confirmed; the new words in s. 316 as to the date when "the title to the property sold shall vest" seem to me technical, and to point to the complete title arising on the **[383]** sale becoming absolute, such as might be requisite to enable the purchaser to bring a suit in ejectment, but distinguishable from the inchoate title which suffices for a suit of an equitable nature. The distinction is illustrated by Westropp, C.J., in *Krishnaji* v. *Ganesh* (1).

There are many reported cases in which the right in equity of a third party to bring suit on the imperfected title has been declared before 1879: I take the Full Bench case of *Bhyrub Chunder* v. *Soudamini Dabee* (2) to be one of them; and it is not to be supposed that the Legislature in 1879 and 1882 was not aware of the settled doctrine which was applied by the High Court up to the time when this addition to s. 316 was made, as appears from *Yeshwant* v. *Govind* (3) and *Prem Chand Pal* v. *Purnima Dasi* (4). With reference to the remarks of Norris, J., in that case I would observe that it appears difficult to hold that the words of the new part of s. 316, which omit mention of strangers to the suit, can be construed to include them by inference, as that construction would abolish rights protected by a firmly established application of equity. Had this been the intention of the Legislature, express words would have been used. With regard to Beverley, J.'s concluding remark in that same case, I would also observe that the reasoning in *Prangour* v. *Himanta* (5) commends itself to me as a correct interpretation of s. 316 as amended.

Decree confirmed.

(1) 6 B. 139.
(2) 2 C. 141.
(3) 10 B. 453.
(4) 15 C. 546.
(5) 12 C. 597.

1892
DEC. 17.

ORIGINAL CIVIL.

17 B. 384.

17 B. 384.

[384] ORIGINAL CIVIL.

Before Mr. Justice Starling.

ANANDRAO VITHAL VARADI (*Plaintiff*) *v.* BUDRA MALLA, PURKHA DHOLLA, AND HARIBA TUKARAM VARADI (*Defendants*).*

[17th December, 1892].

Practice—Inspection—Production — Discovery — Co defendants — Inspection granted to defendant against co-defendant—Civ. Pro. Code (Act XIV of 1882), ss. 129 and 131.

A defendant may obtain discovery or inspection as against a co-defendant if the latter can be regarded as an opposite party.

The plaintiff sued to set aside a mortgage made by the third defendant (his uncle) to defendants Nos. 1 and 2, alleging that shortly after he (the plaintiff) had attained his majority he had been induced to join in the mortgage by the undue influence and threats of the third defendant, who represented that the money to be raised by the mortgage was required to pay off the debts of the plaintiff's father. The plaintiff further alleging that he had received none of the money and that no money had been paid by defendants Nos. 1 and 2 to the third defendant in his presence. Defendants Nos. 1 and 2 took out a summons against the third defendant for inspection of certain account books and documents. It was objected that no question was raised in the suit between the third defendant and defendants Nos. 1 and 2, and that consequently, under s. 131 of the Civil Procedure Code (Act XIV of 1882), the latter were not entitled to inspection.

Held, that inspection must be given. It was possible that not being able to set aside the mortgage as regarded himself, the third defendant was colluding with the plaintiff. Under the circumstances he might be considered a "party opposite" to the first two defendants, although eventually the Court might not be able to make any order between him and them.

IN chambers. Summons for inspection.

The first two defendants were Marwaris trading in partnership under the name of Dholla Cutchra. The third defendant was the uncle of the plaintiff, being his deceased father's brother.

The plaint alleged that his father, Vithal Tukaram Varadi, died intestate in July, 1887, and left a widow and the plaintiff, his only son, who was then a minor, his heirs according to Hindu law.

The third defendant, Hariba, obtained letters of administration, *durante minoritate*, to the estate of the said Vithal. He and **[385]** Vithal had been jointly the administrators of the estate of their father, Tukaram Varadi (the plaintiff's grandfather), and Hariba, after Vithal's death, continued to administer that estate in which the plaintiff claimed his father's share.

The plaintiff attained his majority in November, 1888. He complained that Hariba (defendant No. 3) had not made over to him his father's estate, or his share of his grandfather's estate, or accounted for the same, and he alleged that on the 11th February, 1890, Hariba (defendant No. 3) by undue influence and threats had induced him to execute a mortgage of certain properties to defendants Nos. 1 and 2 for Rs. 42,000, falsely and fraudulently stating that the money was required to pay off certain debts of his father's. He alleged that he had received no money from the first and second defendants, nor had any money been paid by them to Hariba in his (plaintiff's) presence. He prayed that the said mortgage might be set aside, and that inquiry might be made as to whether any debts were due by his father Vithal, &c., &c.

---

* Suit No. 236 of 1892.

1892
DEC. 17.

ORIGINAL CIVIL.

17 B. 384.

The suit was filed on the 22nd April, 1892. Hariba (defendant No. 3) filed a written statement denying in a very guarded manner the plaintiff's allegations.

On the 6th November, 1892, a summons was taken out by the first and second defendants, calling on the third defendant Hariba to show cause why he should not allow them inspection of certain account books and documents.

Payne (for defendant No. 3) showed cause.—The applicants are not entitled to inspection as against their co-defendant. There are no questions raised between them—Civil Procedure Code (XIV of 1882), ss. 129 and 131 (1); Peile on Discovery, **[386]** p. 10; *Brown* v. *Watkins* (2). Further, the affidavits do not show that the documents are in our possession.

Lang (Acting Advocate-General), for defendants Nos. 1 and 2 in support of the rule.—The defendants are entitled to inspection. The plaintiff sues to set aside a mortgage made to them by himself and third defendant. The third defendant ought really to be a plaintiff in this suit.

JUDGMENT.

STARLING, J.—This is a summons by two defendants for inspection of documents in the possession of the third defendant.

Mr. Payne showed cause against the summons, and argued that although under s. 131 of the Civil Procedure Code (XIV of 1882), any party to the suit may call upon any other party to the suit to produce for his inspection any specified document, yet that "any other party" must mean "opposite party," and, further, that "opposite party" in respect of a defendant can only mean the plaintiff and not a co-defendant. In this contention he is supported by the judgment in the case of *Brown* v. *Watkins* (2), as the Court came to the conclusion that the rule under discussion there which corresponds to s. 131 of the Civil Procedure Code (Act XIV of 1882), did not authorize granting discovery as between co-defendants. This case has, however, been discussed in the Court of appeal in the case of *Shaw* v. *Smith* (3), and the Court held that "opposite party" did not refer only to the defendant as contrasted with the plaintiff, or *vice versa*, but to any two parties, whether plaintiff or defendants, co-plaintiffs or co-defendants, between whom it was necessary to adjust rights. Agreeing, as I do, with this view of the section, I am of opinion that there is no objection to one defendant seeking discovery or inspection as against a co-defendant, provided that co-defendant can be regarded as an opposite party.

---

(1) Section 129 :—

The Court may, at any time during the pendency therein of any suit, order any party to the suit to declare by affidavit all the documents which are or have been in his possession or power relating to any matter in question in the suit, and any party to the suit may, at any time before the first hearing, apply to the Court for a like order.

Section 131 :—

Any party to a suit may, at any time before or at the hearing thereof, give notice through the Court to any other party to produce any specified document, for the inspection of the party giving such notice or of his pleader, and to permit such party or pleader to take copies thereof.

No party failing to comply with such notice shall afterwards be at liberty to put any such document in evidence on his behalf in such suit, unless he satisfies the Court that such document relates only to his own title, or that he had some other and sufficient cause for not complying with such notice.

(2) 16 Q.B.D. 125. (3) 18 Q.B.D., 193.

1892
DEC. 17.
ORIGINAL
CIVIL.
17 B. 384.

[387] The question I have, therefore, to decide is whether the third defendant, against whom inspection is sought, is a party opposite to the first two defendants.

It appears that one Vithal Tukaram, the father of the plaintiff, died in 1887, leaving the plaintiff a minor. On his death the third defendant obtained letters of administration to Vithal's estate *durante minoritate* of the plaintiff. Shortly after the plaintiff attained his majority, he and the third defendant executed a mortgage of Vithal's estate, the consideration for which was alleged to be certain debts due by Vithal on promissory notes, advances made to the third defendant for the purposes of the administration, and a sum paid in cash on the execution of the mortgage-deed. The plaintiff now seeks to have the mortgage set aside and an account taken of what is really due in respect of the alleged consideration, alleging fraud and misrepresentation and undue influence on the part of the third defendant as to the debts of Vithal and the amount borrowed by him, and denying that the amount which ought to have been paid in cash was so paid.

Now, if the mortgage transaction was honest, and the suit not brought by the plaintiff in collusion with the third defendant, I should have expected to find, in the written statement of this defendant, not merely a general denial of fraud, &c., but a distinct assertion of what the consideration was, and a positive statement that the moneys were due or had been paid. Instead of this I find only general denials of fraud, &c., but no assertion that the promissory notes were existing at the time of the execution of the mortgage-deed, or that anything was done in respect of them. The defendant further does not assert that he actually borrowed any money for the purposes of the administration, nor does he say that the money which the mortgage-deed showed he had received in cash was so received. Further, he assents to an account being taken. The only account, however, asked for in the plaint is subject to the mortgage being set aside, and assumes that the circumstances which will be proved will be such as will induce the Court to say that the mortgage cannot be held to be good for anything more than can be proved on an account being taken of the various items which make up the **[388]** consideration. Consequently, it seems to me to be very possible that, not being able to set aside the mortgage as regards himself, he is colluding with the plaintiff to enable him to save what he can from the fire. Under these circumstances I consider him to be a "party opposite" to the first two defendants, although eventually the Court may not be able to make any order between him and them.

I therefore allow the first two defendants inspection of the documents set forth in part 1 of the first schedule to the third defendant's affidavit of documents affirmed on the 11th day of October, 1892, and filed on the 19th day of November, 1892.

With regard to the other documents of which inspection is sought, the third defendant distinctly swears that they are not in his possession, power, or control; and however much I may suspect the entire truth of that statement, there is nothing on the face of his affidavit which would enable me at the present stage to make further enquiries.

Attorneys for the plaintiff: Messrs. *Chalk*, *Walker*, and *Smetham*.

Attorneys for the first and second defendants: Messrs. *Janardan* and *Ardeshir*.

Attorneys for the third defendant: Messrs. *Payne*, *Gilbert*, and *Sayane*.

17 B. 388.

TESTAMENTARY JURISDICTION.

Before Mr. Justice Starling.

YESHWANT BHAGWANT PHATARPAKAR (*Plaintiff*) *v.* SHANKAR RAMCHANDRA PHATARPAKAR (*Defendant*).* [19th December, 1892.]

1892
DEC. 19.
TESTAMENTARY JURISDICTION.
17 B. 388.

Practice—Receiver—Receiver in testamentary suit—Succession Act (X of 1865), *s.* 239.

The High Court has power to appoint a receiver in a testamentary suit.

[R. 18 B. 237 (240).]

TESTAMENTARY suit. In this suit a consent order was made on the 26th November, 1892, whereby it was ordered that the plaintiff should produce all the ornaments in his possession, **[389]** belonging to the estate of Bhagu Naikin Phatarpakar, deceased, before the attorneys of both parties, and that an inventory thereof and of all furniture and other moveables belonging to the estate should be made by the attorneys, and that the ornaments should be deposited in the Bank of Bombay in the name of the attorneys, &c. By the same order Mr. L. A. Watkins was appointed receiver to receive the rents of the immoveable property belonging to the estate.

Disputes immediately arose as to the amount of the property, and on the 3rd December, 1892, a *rule nisi* was obtained by the defendant calling on the plaintiff to show cause why Mr. L. A. Watkins, the receiver appointed in the suit, should not be ordered to take possession of all the estate of Bhagu Naikin not produced before the attorneys in accordance with the order made on the 26th November, 1892.

Jardine, for the plaintiff, showed cause.

Inverarity, *contra*, in support of the rule.

JUDGMENT.

STARLING, J.—In this matter Mr. Inverarity on the 26th November applied for an order that the Administrator-General should take possession of the estate and effects of Bhagu Naikin under s. 18 of the Administrator-General's Act (II of 1874). This was opposed by the Advocate-General on behalf of one Yeshwant, who alleges that he is the executor of the will of the said Bhagu and has applied for probate thereof, to which Mr. Inverarity's client, Raghunath Narayan, has entered a caveat. Eventually, by consent of both counsel, it was ordered that all the ornaments of Bhagu should be produced to the solicitors of both parties, a list made of them, and that they should then be deposited in the Bank of Bombay, that all the other moveable property of Bhagu should be produced, and a list made of it, after which it was to remain in the possession of Yeshwant, he undertaking not to dispose of it, and Mr. Watkins was appointed receiver to collect the amount of the immoveable property.

On the 3rd December it was alleged that Yeshwant had not obeyed that order, in that he had not produced all the ornaments or household property of Bhagu, and that he had not produced the cash belonging to her estate, which was in his hands, and the **[390]** Court was asked to make an order that the receiver should take possession of all the moveable property of Bhagu not heretofore produced by Yeshwant. A rule was granted by me calling upon Yeshwant to show cause why this order

* Testamentary Suit No. 23 of 1892.

1892
DEC. 19.

TESTAMENTARY JURISDICTION.

17 B. 388.

should not be made. On the 19th December Mr. Jardine appeared to show cause against the rule. As this motion is opposed, I must consider whether this Court in a testamentary suit can appoint a receiver.

In England, the Court of Chancery, in cases of disputed representation in the Ecclesiastical Court, was in the habit, on a proper case being made, of appointing, *pendente lite*, a receiver of property the representation of the former owner of which was in dispute : see *Watkins* v. *Brent* (1) ; *Rendall* v. *Rendall* (2) ; and since the Court of Probate Act, 1857, came into force, the Court of Chancery has exercised the same power—*Parkin* v. *Seddons* (3). But these were orders of a Civil Court made in suits filed for the specific purpose of obtaining a receiver. The Court of Probate Act, 1857, however, gave authority to the Testamentary Court to appoint an administrator provisionally to take charge of the personal estate of a deceased person pending any suit touching the validity of his will, and to appoint such administrator or any other person receiver to collect the rent of and to manage his real estate. These provisions have been consolidated and transferred into the Indian Succession Act (X of 1865), s. 239, which empowers the Court to appoint an officer to take and keep possession of the property of a deceased person until probate or letters of administration are granted. This section, however, is not repeated in the Probate and Administration Act, V of 1881. I should have no hesitation in acting under this section if the will was one to which the Indian Succession Act applied, but as the will in the present case would apparently be governed by the Probate and Administration Act, 1881, it is necessary to look more closely into the question.

The section by which this will would be excluded from the Indian Succession Act is s. 331, but that only excludes **[391]** from the operation of that Act intestate or testamentary succession of Hindus, and does not forbid the procedure provided thereby (in the course of granting probates, &c.) to be applied to Hindu or other excepted wills. See the case of *Kokya Dine* (4), which was with reference to a Buddhist will. Why, then, was this useful provision not inserted in the Probate and Administration Act, 1881 ? My own impression is that the framers of that Act having provided in s. 55 that proceedings in relation to the granting of probate and letters of administration should be regulated by the Civil Procedure Code, and knowing the provisions of that Code as to receivers, and seeking to avoid the repetition, in the Probate Act, of any provision which was in the Civil Procedure Code, have left the appointment of a receiver to be regulated by the provisions of that Code. For these reasons I should, without difficulty, have come to the conclusion that this Court in its testamentary jurisdiction had power to appoint a receiver.

Mr. Jardine has, however, referred me to a motion in Testamentary Suit No. 11 of 1891, in which Farran, J., on the 13th August, 1891, refused to appoint a receiver. There is no written judgment, and consequently I cannot ascertain whether the refusal was on the merits or on a point of law. It was, however, argued that the property of the deceased was not the subject of a suit. Possibly not directly, but the present suit is to determine who is to have the possession and management of the property of the deceased,—in fact, who is to be the person in whom all the rights of the deceased are to vest, and thus become the legal owner. If a suit were brought on the civil side to determine who had the right to

---

(1) Myl. and Cr. 102.
(2) 1 Hare 152.
(3) L.R. 16 Eq. 34.
(4) 2 B.L.R.A.C. J. 79.

1892
DEC. 19.
TESTAMENTARY JURISDICTION.
17 B. 388.

the possession and management of property, the provisions of the Specific Relief Act, I of 1877, would ordinarily require a prayer to be inserted for possession of the property, but I cannot see the substantial difference, as regards *interim* remedies, between a suit in this form and a suit on the testamentary side, the result of which will be to declare that, by virtue of the provisions of a will, a certain person has the right to stand in the shoes of a deceased owner, and thus be entitled to have the possession and management of all his property.

[392] It seems to me that the property is the subject of the suit, in the one case, directly, because possession is sought, and in the other, because the decree will determine who is to have authority over, and to be entitled to get possession of, certain property which is set out in a schedule to the petition for probate or letters of administration. Consequently I see nothing in the law relating to procedure which would prevent me appointing a receiver in this case without regard to any consent on the part of the plaintiff.

It is true that the Administrator-General's Act empowers the Court to authorize and require the Administrator-General to take charge of property of deceased persons which is in danger, yet I doubt whether this provision deprives the Court of any other powers it may possess; and although in many cases the Administrator-General might most conveniently be appointed, a receiver might be better in others. In the present case, a receiver has by consent been appointed for certain purposes, and I, therefore, consider that, if the Court is to take any action, it will be better to enlarge the present receiver's powers than to enjoin the Administrator-General to take possession of the assets of the estate.

Has any ground, then, been made on the facts of the case for such an appointment? In the first place, when the consent order was made, it was certainly a distinct understanding that every portion of the moveable property of the deceased was to be produced and entered in an inventory, and by what passed in Court must the parties have alone been guided, as the order was not drawn up till some days after it was carried out, so far as it has been obeyed. The plaintiff did not, however, produce the cash in his hands, and it was not until after enquiries from the defendant's solicitors that the plaintiff mentioned the amount thereof. As to the ornaments admitted by the defendant to belong to the estate, those produced and inventoried appear in two lists, one in the handwriting of the plaintiff, which he says has always been with him, and the other partly in the handwriting of the plaintiff and partly in that of the defendant, which has been in the possession of the defendant, and as far as these ornaments are concerned these two agree. In the same lists [393] and mixed up with the foregoing ornaments, are others which, the plaintiff asserts, belong to his wife, but there is nothing in these lists to indicate that fact, or to distinguish them from those which he admits belonged to Bhagu, and it is difficult to understand why, if they did belong to plaintiff's wife, they should have been inserted in a list which was given to the defendant at the time the safe was locked up and sealed.

It is also a suspicious fact that, in the absence of the defendants, the plaintiff broke the defendants' seal which had been put on the safe, and took out the ornaments now in dispute. It looks very much as if some portion at least of these ornaments belonged to the deceased Bhagu. I, however, do not decide that question at the present time, but I think under all the circumstances of this cases I am justified in

1892
DEC. 19.
TESTAMENTARY JURISDICTION.
17 B. 388.

extending the power of Mr. Watkins, by appointing him receiver without security to recover and take possession of all the cash and moveable property belonging to the deceased which has not been produced by the plaintiff to the solicitors of the two parties and entered into the inventory made by them. Costs must be costs in the cause.

Attorneys for the plaintiff: Messrs. *Mansukhlal*, *Damodar*, and *Jamsetji*.

Attorneys for the defendants: Messrs. *Chitnis*, *Motilal*, and *Malvi*.

---

17 B. 394 = Chitty's S. C. C. R. 363.

[394] ORIGINAL CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Bayley.

GOVARDHANDAS GOCULDAS TEJPAL (*Plaintiff*) *v.* THE MUNICIPAL COMMISSIONER (*Defendant*).* [27th January, 1893.]

Municipal Act (Bombay) III of 1888, *s.* 158—*Tax—Drawback—General conditions prescribed by Standing Committee limiting right to drawback under s.* 158—Ultra vires.

Under s. 158 of the City of Bombay Municipal Act (Bombay Act III of 1888), the following general conditions were prescribed by the Standing Committee with reference to claims for drawback of the general property tax leviable in Bombay:—

"(1) Except with the special sanction of the Commissioner, no claim for drawback shall be entertained unless submitted to the Commissioner not less than 30 days before the commencement of the half-year to which such claim relates.

(2) Drawback of the one-fifth part of the general tax shall be sanctioned by the Commissioner in cases failing within either of the following classes and in no others:

(*a*) Chawls or buildings let out for hire in single rooms either as lodging or godowns for the storage of goods.

(*b*) Properties which, in the opinion of the Commissioner, are usually or frequently vacant either wholly or partially.

(3) No sanction for drawback shall extend or apply to any floor on which trade or manufacture is carried on, or any goods are sold."

The Commissioner having refused to sanction a drawback of the tax liable on certain properties of the plaintiff on the ground that they did not fall within the terms of the above conditions, the plaintiff filed this suit. It was contended in this behalf that the second and third of the above conditions were bad, and that the Standing Committee could not by so-called general conditions limit or curtail the right given to tax-payers by s. 158.

Held, that the conditions prescribed by the Standing Committee were not *ultra vires* and that the Commissioner was justified in refusing the drawback.

CASE stated for the decision of the High Court under s. 2 of Act XII of 1888 by C. W. Chitty, Chief Judge of the Court of Small Causes:—

"1. This is an appeal against the decision of the Municipal Commissioner refusing to sanction a drawback of one-fifth part of the general tax leviable in respect of certain immoveable properties belonging to the appellant.

[395] "2. There is no dispute as to the facts of the case. It is admitted that all the properties named in the petition of appeal consists of buildings which are let out in flats; in two cases the ground floor is occupied by shops. With this exception all the premises are used as lodging for tenants, but are not let out entirely in single rooms. The said

---

* Appeal No. $\frac{M}{45}$ of 1892.

buildings are let to two or more persons holding in severalty, and the Municipal Commissioner has, for the purpose of assessing such buildings to the property tax, treated the whole of each of such buildings as one property.

"3. The Municipal Commissioner refused to sanction a drawback in respect of the said properties, on the ground that they did not fall within the terms of the general conditions prescribed by the Standing Committee. It should be mentioned that no exception was taken to the first of such general conditions.

"4. On behalf of the appellant it was argued that the second and third general conditions were bad; that, inasmuch as it has been held by the High Court that 'may' in s. 158 is to be read as 'shall,' s. 158 is positive and compulsory, that the Standing Committee cannot by so-called general conditions limit or curtail the right given to tax-payers by s. 158, and that the second and third conditions are inconsistent, one with the other.

"For the respondent it was contended that the drawback was properly refused; that the Act itself limits the right of tax-payers by making the sanction of drawback subject to the general conditions prescribed; and that the general conditions are reasonable, if the Standing Committee have the right to say that the drawback is not to be granted in every case which comes within the terms of s. 158.

"5. The conditions and circumstances under which drawback was allowed when the former Act was in force were prescribed by the Act itself (see Bombay Municipal Act, 1872, s. 76), and it will be seen that the conditions now prescribed are slightly more favourable to the tax-payer, and there can be little doubt that they are not in themselves unreasonable. I had some doubt whether in this case it was open to this Court to go behind such [396] general conditions duly prescribed by the Standing Committee; but assuming that the Court has that power, two questions arise: (1) whether the general conditions of the 10th March 1892 limit the rights of tax-payers under s. 158, and (2) whether the Standing Committee have power to make such conditions.

"6. In expressing my opinion on the above points I may say, with regard to the first question, that, in my opinion, it should be answered in the affirmative. There is nothing in s. 158 itself, except the words 'subject to any general conditions, &c.,' which in any way restrict or limit the right of the tax-payers to the allowance of drawbacks in all cases falling within the terms of the section, whereas the conditions confine the allowance to certain classes of property. As to whether the Standing Committee have power to make such conditions, it would appear from comparison of the former and present Acts that the Legislature intended to vest in the Standing Committee the power of restricting such allowances, which power was formerly exercised by the Legislature itself (s. 76). It would, however, be expected that, if it were so intended, the word 'limitation' or 'restriction' would be used with or in place of the word 'condition,' which applies rather to the method of sanctioning allowances. At the same time I think that the words 'general conditions' are wide enough to include limitations or restrictions, and that therefore the Standing Committee have the power to make such conditions as those in question. There can be little doubt that if the contrary be held, it would have the effect of rendering compulsory the allowance of drawback in many cases where it was never intended, and would be unreasonable."

1893
JAN. 27.
ORIGINAL CIVIL.
17 B. 394 = Chitty's S. C. C. R. 363.

Section 158 of the City of Bombay Municipal Act (III of 1888), is as follows :—

(1) When any building or land is let to two or more persons holding in severalty, the Commissioner may, for the purpose of assessing such building or land to the property taxes, either treat the whole thereof as one property, or with the written consent of the owner of such building or land treat each several holding therein or any two or more of such several holdings together or each floor or flat as a separate property.

(2) When the Commissioner has determined to treat all the several holdings comprised within any one building or land under this section as one property, he may, subject to any general conditions which may from time to time be [397] prescribed by the Standing Committee in this behalf, at any time, not later than seven days before the first day of any half-year for which an instalment of general tax will be leviable in respect of the said property, sanction a drawback of the one-fifth part of the general tax so leviable.

In pursuance of the above section the following notice was issued by the Municipal Commissioner :—

It is hereby notified that the Standing Committee of the Corporation has, under the provisions of s. 158 (2) of the City of Bombay Municipal Act, 1888, prescribed the following general conditions in supersession of those hitherto in force to be observed in granting allowances of one-fifth drawback of the general tax in respect of properties which are let to two or more persons in separate occupancies :

(1) Except with the special sanction of the Commissioner no claim for drawback shall be entertained unless submitted to the Commissioner not less than 30 days before the commencement of the half year to which such claim relates.

(2) Drawback of one-fifth part of the general tax shall be sanctioned by the Commissioner in cases falling within either of the following classes and in no others, *viz* :—

(*a*) Chawls or buildings let out for hire in single rooms either as lodging or godowns for the storage of goods.

(*b*) Properties which, in the opinion of the Commissioner, are usually or frequently vacant either wholly or partially.

(3) No sanction for drawback shall extend or apply to any floor on which any trade or manufacture is carried on, or any goods are sold.

Applicants for drawback should see the Assessment Department Ward Superintendents, at their respective Ward Offices, with reference to the second condition prescribed by the Standing Committee.

Macpherson, for plaintiff.

for defendant.

JUDGMENT.

SARGENT, C. J.—We agree with the Judge of the Small Cause Court that the second and third of the conditions prescribed by the Standing Committee under the provisions of s. 158, clause (2), are not *ultra vires*, and justify the Commissioner in refusal of the drawback. The practical effect of them is doubtless to confine the right to drawback to buildings let on a particular class of holding ; but, if the Legislature had intended to exclude conditions in any way restrictive of that right,—and by prescribing conditions nothing more was meant, as was suggested, than to lay down rules as to the time and manner of [398] claiming the right to drawback,—we should have expected different language.

1893
JAN. 27.

ORIGINAL CIVIL.

17 B. 394 = Chitty's S. C. C. R. 363.

Moreover, the position of the sentence in the section, coming as it does immediately after the mention of the particluar description of buildings, points to the conclusion that by the term "conditions" was contemplated a possible qualification or restriction affecting the nature or extent of the holdings already referred to. The Standing Committee, which is a select portion of the Councillors, might well be expected to exercise a sound discretion in deciding upon the necessary conditions. We may remark that the several buildings in question, although deprived of the right to drawback by the conditions, will still be entitled to a refund when the entries are such as to fall under the provision of s. 175.

Costs of this reference to be costs in the municipal appeal, and to be taxed by the Taxing Officer of the High Court as on the original side of the High Court.

Attorneys for plaintiff :—Messrs. *Little, Smith, Nicholson*, and *Bowen*.

Attorneys for the defendant :—Messrs. *Crawford, Burder, Buckland* and *Bayley*.

---

17 B. 398.

APPELLATE CIVIL.

Before Mr. Justice Jardine and Mr. Justice Telang.

MANILAL (*Original Defendant*), *Appellant v.* BAI TARA (*Original Plaintiff*), *Respondent.** [22nd February, 1892.]

Hindu law—Widow—Widow's right of residence in her husband's house after his death—House mortgaged by plaintiff's husband in his lifetime and sold in execution—Auction-purchaser—Notice of widow's claim to reside.

In execution of a decree upon a mortgage effected by the plaintiff's husband in his lifetime, the house in dispute was put up to auction, and purchased by the defendant. The defendant was aware that the plaintiff (the mortgagor's widow) was residing in the house at the time of the Court sale. In a suit brought by the plaintiff to establish her right to reside in the house in question,

Held, that in the absence of any allegation that the mortgage effected by the plaintiff's husband was not for the benefit of the family, or was in any way in [399] fraud of the plaintiff's rights, the defendant as auction-purchaser took the house free from the plaintiff's right of residence as a Hindu widow, notwithstanding the fact that he had notice of her claim.

[R., 36 P.R. 1907=11 P.L.R. 1908=118 P.W.R. 1907; Cons., 27 M. 45=12 M.L.J. 270 (275).]

SECOND appeal from the decision of J. B. Alcock, District Judge of Surat, in appeal No. 64 of 1891 of the District File.

The plaintiff, Bai Tara, was the widow of one Nandlal Baharilal. In execution of a decree upon a mortgage effected by Nandlal and his son the house in dispute was put up to auction and purchased by the defendant.

The plaintiff thereupon sued for a declaration of her right of residence, as a Hindu widow, in the house in dispute, and for an injunction restraining the auction-purchaser from ousting her.

The Court of first instance rejected the plaintiff's claim.

On appeal, the District Judge found that the auction-purchaser had notice of the fact that the plaintiff was residing, and had a right to reside, in the house in dispute, and that the plaintiff could not be provided with a

* Second Appeal No. 790 of 1891.

1892
FEB. 22.

APPEL-
LATE
CIVIL.

17 B. 398.

residence in any other family property. He, therefore, awarded the plaintiff's claim, on the authority of *Dalsukhram* v. *Lallubhai* (1).

Against this decision the defendant appealed to the High Court.

Manekshah Jahangirshah, for appellant.

Nagindas Tulsidas, for respondent.

The following authorities were referred to in argument:—*Nana Jivan* v. *Rama* (2); *Ramanadan* v. *Rangammal* (3); *Lakshman* v. *Satyabhamabai* (4); *Gauri* v. *Chandramani* (5); *Talemand Singh* v. *Rukmina* (6); *Srimati Bhagabati* v. *Kanailal* (7); *Dalsukhram* v. *Lallubhai* (1).

JUDGMENT.

JARDINE, J.—It is found below that the defendant, who represents the purchaser at the Court sale held under the decree obtained on the mortgage by the mortgagee against the plaintiff's husband, had notice of the plaintiff's claim to reside in the house then sold and in which she was then residing. But, in the absence **[400]** of any allegation that the mortgage effected by the plaintiff's husband was not for the family advantage, or was in any way in fraud of her rights; we are of opinion that the purchaser at the Court sale took the house free from her right of residence as a Hindu widow. This appears to have been decided by this Court in *Nana Jivan* v. *Rama* (2) and at Madras in *Ramanadan* v. *Rangammal* (3). The subject is also discussed in *Lakshman* v. *Satyabhamabai* (4) and in *Dalsukhram* v. *Lallubhai* (1).

For these reasons we reverse the decree of the District Judge and restore that of the Subordinate Judge. Plaintiff to pay costs of both appeals.

Decree reversed.

---

17 B. 400.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Birdwood.

BAI UGRI AND OTHERS (*Original Defendants*), *Appellants v.* PETAL PURSHOTAM BHUDAR (*Original Plaintiff*), *Respondent.**

[10th March, 1892.]

Husband and wife—Marriage—Restitution of conjugal rights—Conditional marriage—Kudwa Kunbi caste—Custom—Public policy.

The plaintiff, a member of the Kudwa Kunbi caste, sued in 1890 for restitution of conjugal rights, alleging that he had been married to the first defendant in 1927. The defendants alleged that at the date of the marriage the parties were only a month old; that the marriage was a *sata* (exchange) marriage, and that by the contract the plaintiff's father was bound, as a condition of his obtaining the second defendant's daughter for his son, to provide a girl to be married to the second defendant's son. They alleged that such conditional marriages were a custom of the caste, and they denied that the condition had been performed by the plaintiff's father. They further alleged that in 1936 the plaintiff's father, finding that he could not perform the condition, had passed a release (the plaintiff himself then being a minor) to defendant No. 2 (the father of defendant No. 1), giving up all claims to defendant No. 1; that a dispute having subsequently arisen after the plaintiff had attained his majority the matter was referred to the members of the caste, who decided that within a certain fixed time the plaintiff should provide a girl for the son of defendant No. 2, and that

---

* Second Appeal No. 514 of 1890.

(1) 7 B. 282. (2) P.J. (1886) p. 252. (3) 12 M. 260.
(4) 2 B. 494 (511, 514, 520). (5) 1 A. 262. (6) 3 A. 353.
(7) 8 B.L.R. 225.

on the plaintiff failing to do so the marriage was dissolved. The Court found that by the custom of the caste the marriage in 1927 between the plaintiff and defendant No. 1 was only a conditional marriage; that the release of 1936 operated to cancel the marriage, and that in any case the plaintiff's failure to find a girl for the second defendant's son, in accordance with the decision of the caste, dissolved the marriage.

[401] *Held*, that the plaintiff had not established his right to the restitution of defendant No. 1 as his wife. The alleged custom was not contrary to public policy. According to the custom relied on, there was no complete and binding marriage within the intention of the parents of the parties although the ordinary religious ceremonies were performed. Such a transaction could not be regarded as immoral from any point of view.

The Hindu law leaves it entirely to the parents to marry their daughters, and although, according to strict Brahmanical law, a marriage is complete when the religious ceremony has been performed, there would seem to be no sufficient reason for refusing to recognise a custom, at any rate among the lower castes, by which such transactions, rendered necessary by the paucity of women in the caste, although performed with religious ceremonies, are still regarded by the parents on both sides as incomplete and conditional marriages.

THIS was a second appeal from the decision of Rao Bahadur Chunilal Maneklal, First Class Subordinate Judge of Ahmedabad with appellate powers.

Suit for restitution of conjugal rights. Defendant No. 1 was the daughter of the second defendant, and the plaintiff alleged that he was married to defendant No. 1 in 1927 (1871-72) by a *sata* (exchange) contract of marriage. By this contract he received defendant No. 1 in marriage from her father (defendant No. 2) and in return his (the plaintiff's) father was to provide a girl to be given in marriage to the son of defendant No. 2. The plaintiff further stated that in accordance with this twofold contract the son of defendant No. 2 was married to a girl provided by the plaintiff's father, and the plaintiff was married to defendant No. 1.

The girl married to the son of defendant No. 2 died soon after the marriage, and thereupon defendant No. 2 refused to send his daughter, (defendant No. 1), to the house of her husband (the plaintiff) unless another girl was provided by his (plaintiff's) father for the defendant's son. The dispute was referred to the members of the caste in *Samvat* 1942 (A. D. 1886-87), and they decided that the plaintiff within a certain time should offer another girl to defendant No. 2 for his son, and that when the offer was made defendant No. 2 should pay Rs. 125 to the plaintiff, and should send defendant No. 1 to his house. The plaintiff complained that, as required, he had offered a girl to defendant No. 2, who had, however, refused to accept her, and had also refused to pay the Rs. 125 and to send defendant No. 1 to his house. The plaintiff accordingly filed this suit. The first defendant had been **[402]** given in marriage by her father (defendant No. 2), to the third defendant.

For the defence it was alleged that the plaintiff and the first defendant were married in *Samvat* 1927, when they were only a month old; that the contract of marriage was twofold; that no girl had ever been offered by the plaintiff's father to the second defendant for marriage to his son; that as the plaintiff's father had not performed, and could not perform, his part of the contract, he, in *Samvat* 1936 (1880-81 A. D.), had given a release (the plaintiff then being a minor) to the second defendant, stating, therein that he had no longer any claim on the first defendant; that the plaintiff, however, when he came of age, claimed possession of the first defendant; that the matter was therefore referred to arbitrators in *Samvat* 1942 (A.D. 1886-87), who decided that the plaintiff

1892

MARCH 10.

APPELLATE CIVIL.

17 B. 400

should offer a girl within a certain time to the second defendant and then take away the first defendant to his house; but that in case the plaintiff should fail to do this within the time, the second defendant should be at liberty to give the first defendant in marriage to any other person. The defendants alleged that the plaintiff had failed to perform his part under this award, and that thereupon the first defendant had been given in marriage to the third defendant.

The Subordinate Judge rejected the plaintiff's claim. In his judgment he said: "It appears that *bekhla*, *tekhla*, and *chockhla* (*i.e.*, double, treble, and quadruple contracts) are common among Kunbis in the district, and those of moderate means seem to indulge most in such contracts. This may perhaps be due to the scarcity of girls. And as marriages take place every nine, ten or twelve years, child marriages are very common, but the married girls are sent to their husbands' houses only when they become of marriageable age, and several circumstances sometimes take place before the girl reaches her marriageable age to be sent to her husband's house, which bring about annulment of the marriage contract. . . . . The defendant No. 1 has never gone or has never been sent to the plaintiff's house. They have hitherto never lived as husband and wife. Since her marriage with defendant No. 3, the defendant No. 1 has been living in his house as his wife. Under such circumstances I think that the plaintiff is not entitled to recover possession of the defendant No. 1 to live with him as his wife.

[403] "It seems to me that until the girls reach their marriageable age among Kunbis, child marriages in them are more like betrothal and less like *pakka* marriages, especially when such marriages are effected according to the double, treble and quadruple contract arrangement."

In appeal, the Court reversed the decree. The defendants thereupon preferred a second appeal.

Govardhanram M. Tripathi, for the appellants:—The plaintiff is not entitled to a decree for restitution of conjugal rights. His marriage was a conditional one, and as the conditions were not fulfilled, the marriage was never completed. These conditional marriages are a custom among the Kudwa Kunbi caste to which the parties belong. The custom is not immoral or opposed to public policy—*In the matter of Chamia* (1). Such a marriage is called Asura, and is only an inchoate one.

Ganpat Sadashiv Rao, for the respondent:—The marriage in this case does not fall within the class of marriages called Asura. A marriage is complete as soon as the requisite ceremonies are performed, and it cannot then be set aside. Where a marriage is made subject to a condition a Court should uphold the marriage and set aside the condition—*Seetaram, alias Kerra Heera* v. *Mussamut Aheeree Heeranee* (2). The essential condition of the marriage in the Asura form is the payment of money. But the validity of a marriage is not affected by failure of a contract to pay money—Steele's Hindu Law and Custom, p. 166. The Hindu law regards marriage as an indissoluble tie—West and Buhler, (3rd Ed.), p. 90, a custom dissolving marriage is immoral and should not be given effect to—*Mathura Naikin* v. *Esu Naikin* (3). The custom of providing a wife for the son of a man whose daughter is married, cannot be supported on the ground of public policy.

At this stage of the case the Court recorded the following interlocutory judgment:—

(1) 7 C. L. R. 354. (2) 20 W. R. 49. (3) 4 B. 545.

1892
MARCH 10.
APPELLATE CIVIL.
17 B. 400.

[404] *1891, September 28.* SARGENT, C. J. :—The judgment of the lower Court of appeal shows that the Subordinate Judge, A. P. assumes that the plaintiff was validly married to defendant No. 1, and upon that assumption he holds that a custom of the caste "for the father to divorce his son's wife, although the son was a minor, was immoral and contrary to public policy." But it appears to us that a doubt necessarily arises as to the effect of a *Sata* (exchange) marriage, as contracted according to the custom of the caste; for it is needless to say that such a contract of marriage is not known to the strict Hindu law. In other words, it has to be determined whether, according to the custom of the caste, what took place in *Samvat* 1927 constituted a complete valid marriage between the plaintiff and defendant No. 1, or whether the marriage remained inchoate or conditional upon the performance by the plaintiff's father of his part of the bargain, *viz.*, "to offer a girl to defendant No. 2 for marriage with his son."

Before disposing of the case on considerations arising out of public policy we think it is advisable that issues should be raised for determining the above question, and also whether by the custom of the caste the father could cancel what had been done in *Samvat* 1927 so as to bind the plaintiff. We must therefore send back the case for a finding on the following issues :—

1. Whether by the custom of the caste what took place in 1927 constituted a complete and unconditional marriage between plaintiff and the first defendant?

2. Whether the plaintiff's father by the custom of the caste could cancel what took place in 1927 so as to bind him?

The finding on the issues to be sent to this Court within three months. Parties to be allowed to give fresh evidence.

The findings of the Subordinate Judge on both the issues were in the affirmative. In his reasons for the findings, however, he stated that the marriage was complete, in the sense that all the necessary ceremonies were gone through, but that the custom of conditional marriage relied on by the appellant was proved.

The case then came again before the High Court.

[405] [SARGENT, C.J. :—Now the only question before us is whether we can recognize the custom.]

Ganpat Sadashiv Rao, for the respondent (plaintiff) :—We rely upon the rulings in *Uji* v. *Hathi Lalu* (1), *Reg.* v. *Karsan Goja*; *Reg* v. *Bai Rupa* (2) and *Reg.* v. *Sambhu Raghu* (3). The custom alleged is opposed to public morals and is also repugnant to the spirit of the Hindu law. The utmost that the caste could do was to inflict a fine upon the defaulting party for his failure to perform his part of the contract.

Govardhanram M. Tripathi, for the appellants :—According to the custom in dispute, a marriage is not allowed to be consummated, though all the necessary religious ceremonies are performed, till the husband has performed his part of the contract. It is not, therefore, complete. The performance of the ceremonies amounts to nothing more than betrothal. Therefore the custom cannot be treated as immoral or opposed to public policy, and, therefore, it should be recognized—*Boolchand Kollta* v. *Janokee* (4).

---

(1) 7 B.H.C.R. A.C.J. 133.
(2) 2 B.H.C.R. 117.
(3) 1 B. 347.
(4) 25 W.R. 386.

1892

MARCH 10.

APPELLATE CIVIL.

17 B. 400.

JUDGMENT.

SARGENT, C.J.—The findings on the issues sent down by this Court on 28th September 1891, are, when read together, to the effect that although the usual religious ceremonies were performed on the occasion, what took place in *Samvat* 1927 constituted, by the custom of the caste, only a conditional marriage between plaintiff and defendant No. 1; that the *farkhat*, passed by the father in *Samvat* 1936, and which was signed by the plaintiff, operated to cancel the marriage, but that, in any case, a dispute having arisen out of the said *farkhat*, the decision of the Panch that plaintiff should find a girl to be married to a male member of the family of defendant No. 2 was binding on him, and that the plaintiff's default in doing so dissolved the marriage.

It has, however, been contended that the Court ought not to recognize such a custom as being contrary to public policy. The cases which have been referred to, *viz.*, *Reg.* v. *Karsan Goja*; *Reg.* v. *Bai Rupa* (1) *Uji* v. *Hathi Lalu* (2) and *Reg.* v. *Sambhu Raghu* (3), all turn upon caste customs by which a woman is **[406]** enabled to leave her husband and marry another man of her own free will, or with the consent of the caste, and which the Court held to be invalid on the ground that they were immoral as "legalizing adultery." The question here is of an entirely different nature; as, according to the custom relied on, there is no complete and binding marriage within the intention of the parents of the parties, although the ordinary religious ceremonies (presumably those usual amongst Sudras) are performed. Such a transaction as took place in *Samvat* 1927 cannot, in our opinion, be regarded as immoral from any point of view. The parties are in all cases, according to the practice of the caste, of very tender years when such marriages are contracted. The Hindu law leaves it entirely to the parents to marry their daughters, and although, according to strict Brahmanical law, a marriage is complete when the religious ceremony has been performed, there would seem to be no sufficient reason for refusing to recognize a custom, at any rate amongst the lower castes, by which such transactions, rendered necessary by the paucity of women in the caste, although performed with religious ceremonies, are still regarded by the parents on both sides as incomplete and conditional marriages. In the case of *Boolchand Kollta* v. *Janokee* (4), which was a suit like the present for restitution of conjugal rights, the Calcutta High Court gave effect to a caste custom by which the usual ceremony of marriage was not regarded as binding unless a second ceremony was performed prior to the woman coming to maturity and cohabiting with her husband, and by which, in default of such ceremony, the woman might, after puberty, as the defendant in that case had done, marry another man.

Upon the whole, we are of opinion that there is no reason for not recognizing the custom, as proved in this case, and therefore, whether upon the ground of the *farkhat* passed by the plaintiff's father, or of the plaintiff's default in performing the condition imposed on him by the Panch, we must hold that the plaintiff has not established his right to the restitution of the defendant No. 1 as his wife, and must therefore reverse the decree of the Court below and dismiss the plaint, with costs throughout on plaintiff.

Decree reversed.

(1) 2 B.H.C. 117.
(2) 7 B.H.C A.C.J. 133.
(3) 1 B. 347.
(4) 25 W. R. 386.

17 B. 407.

1892
APRIL 19.

APPELLATE CIVIL.

17 B. 407.

[407] APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Birdwood.

THE SECRETARY OF STATE FOR INDIA (*Original Defendant*), *Appellant* *v.* SHETH JESHINGBHAI HATHISANG AND OTHERS (*Original Plaintiffs*), *Respondents.** [19th April, 1892].

Land revenue—Bombay Summary Settlement Act VII of 1863—*Settlement under that Act is an agreement and subject to the law of contracts—Settlement made and sanad issued under a mistake—Quit-rent paid by inamdars to Government under such settlement—Refund—Void agreement—Contract Act* (*IX of* 1872), *ss.* 20 *and* 65—*Sanad—Meaning and effect of.*

Under the Bombay Summary Settlement Act VII of 1863, a settlement in respect of the village of Mankol was effected, in 1864, between the Government and the plaintiffs, who were the *inamdars*, and a *sanad* was granted to the plaintiffs, under the terms of which a certain yearly quit-rent was payable by them to Government in respect of the said village. At the time of the settlement the plaintiffs believed that they were the superior holders of all the lands in the village, including certain *wanta* lands. It subsequently appeared, however, that the *wanta* lands were the property of certain *girassias*, who were in possession as owners, and that the plaintiffs were not the holders of these lands within the meaning of s. 32 of Act VII of 1863. The Government, however, required the plaintiffs to pay the entire quit-rent of the village for the *Samvat* years 1939-1940, as fixed by the *sanad*. The plaintiffs paid under protest and brought this suit to recover the amount (Rs. 400-12-6) paid in respect of the *wanta* lands.

Held, that the plaintiffs were entitled to a refund of the quit-rent paid in respect of the *wanta* lands.

A settlement under Act VII of 1863 (Bombay) is an agreement effected by proposal and acceptance (see s. 2), and is subject to the ordinary rules applicable to contracts. Here both parties entered into the settlement in the belief that the plaintiffs were the superior holders of all the lands in the village. There was, therefore, a common mistake as to a matter of fact which both parties must have regarded at the time as essential to the agreement, it being made so by the Act itself under which they assumed to contract. Such a mistake under s. 20 of the Contract Act (IX of 1872) renders the agreement void. The settlement as to the *wanta* lands might be treated as distinct from that which applied to the remaining lands of the village, the former being void, and the plaintiffs being, therefore, entitled to a refund of the quit-rent paid in respect of such lands under s. 65 of the Contract Act.

A *sanad* issued under Act VII of 1863 merely declares what by s. 6 of the Act is stated to be the effect of the settlement to which both the Government [408] and the holders of the land have consented; but it is by virtue of the settlement itself, as provided by the Act, that Government are entitled to demand payment of such rent.

[R., 25 B. 714 (750)=3 Bom. L.R. 603; 15 Ind. Cas. 836 (837)=5 S.L.R. 267.]

SUIT to recover quit-rent paid under protest by the plaintiffs to Government in respect of certain *wanta* lands for the *Samvat* years 1939 and 1940, and for a declaration, &c., that the defendant was not entitled to levy a quit-rent on the *wanta*.

The said lands were situate in the village of Mankol, of which the plaintiffs were the *inamdars*. The plaintiffs alleged that under the Bombay Summary Settlement Act, VII of 1863, a settlement was effected in 1864 between them and the Government in respect of all the lands in the village, including the *wanta* lands; that at the time of this settlement they *bona fide* believed that they were the superior holders of the *wanta* lands as well as of the rest; and both parties being under that impression

* Appeal No. 95 of 1890.

1892
APRIL 19.
APPELLATE CIVIL.
17 B. 407.

the amount of quit-rent was then fixed and a *sanad* was granted to them by Government. Certain *girassias* being in possession of the *wanta* lands, the plaintiffs subsequently brought a suit against them to compel them to contribute to the quit-rent leviable on the village under the settlement. In that suit, however, the plaintiffs failed, the Court holding that, at the time of the settlement, the *girassias* were the owners of the lands and that they were not liable, not having been parties to the settlement of 1864.

The plaintiffs were subsequently required by Government to pay the quit-rent for the entire village, including the *wanta* lands, for the years 1939 and 1940 as fixed by the settlement of 1864. They paid it under protest, and now brought this suit to recover the amount (Rs. 400-12-6) paid in respect of the *wanta* lands, and for a declaration that they were not liable to pay in respect of the said *wanta* lands.

The defendant contended that the plaintiffs were liable to the whole rent until the *sanad* of 1864 was cancelled. It was stated that the Government was willing to issue a fresh *sanad* on the joint application of the plaintiffs and the *girassias*, or on the plaintiffs obtaining a decree showing their exact share of the village.

[409] The District Judge rejected the claim, holding that it was not cognizable by the Court under s. 28 (1) of the Bombay Summary Settlement Act VII of 1863.

On appeal to the High Court the case was remanded to be disposed of on the merits (see Printed Judgments for 1889, p. 82).

On remand the District Court passed a decree for the plaintiffs, awarding the claim in full, and making the declaration prayed for.

The defendant appealed to the High Court.

Rao Saheb *Vasudeo J. Kirtikar*, (Government Pleader), for appellant (defendant) :—On the plaintiffs' (respondents') representation of the facts, *viz.*, that they were the registered holders of all the lands in the village, the Government granted them a *sanad*, which has been acted on for more than fifteen years. They are, therefore, now estopped from objecting to it, and the mistake cannot be relieved against—Story on Equity, para. 151. The *girassias* ought to have been joined in this suit. They hold a third share of the village.

The Government has been willing to grant a fresh *sanad*, but this could only be done with the assistance of the plaintiffs, who are the *inamdars*, and they would not join except on conditions which Government could not admit. Until the dispute between the plaintiffs (respondents) and the *girassias* is settled, the Government can do nothing—*Dolsang* v. *The Collector of Kaira* (2). The plaintiffs are in the position of trustees for the *girassias*. They, therefore, cannot seek to set aside the *sanad* without the consent of the *girassias*.

Govardhandas M. Tripathi, for respondents (plaintiffs) :—The plaintiffs are willing to take a separate *sanad*, and have offered **[410]** to do so, but Government require them to apply jointly with the *girassias*.

---

(1) Section 28 of Bombay Act VII of 1863 :—When any settlement of a claim or claims to total or partial exemption from land revenue has been made by the Governor in Council, or any duly authorized officer of Govenment under this Act, any appeal from or against the proceedings, orders or acts of the officers of Government engaged in making any such settlement shall be made to the Governor in Council or to such officer or officers as may be appointed by the Governor in Council to take cognizance of such appeals, and shall not be cognizable by any other authority.

(2) 4 B. 367.

Under the Bombay Summary Settlement Act, VII of 1863, Government cannot grant a *sanad* without the holder's consent. The term "holder" is defined by s. 32, cl. (*f*) (1). The plaintiffs are not the holders of the land in the possession of the *girassias*, and the plaintiffs' *sanad*, which related to that land, is *ultra vires*.

At the time of granting the *sanad* both the Government and the plaintiffs believed that the plaintiffs were the holders of the *wanta* lands. This was a mistake. The *sanad* is, therefore, void—s. 20 of the Indian Contract Act (IX of 1872). See also ss. 65 and 70; Pollock on Contracts (5th Ed.), p. 418. The *sanad* being void, the question of estoppel cannot arise—*Bingham* v. *Bingham* (2).

[SARGENT, C. J., referred to *Jones* v. *Clifford* (3).]

Rao Saheb *Vasudeo J. Kirtikar* in reply:—There was no mistake on the part of Government. The plaintiffs represented the facts to Government, and the *sanad* was granted. The mistake of one party does not make a contract void.

JUDGMENT.

SARGENT, C. J.—The plaintiffs seek to recover from Government the quit-rent paid to Government (under protest) for the *Samvat* years 1939 and 1940 in respect of certain *wanta* lands in the village of Mankol, of which the plaintiffs are *inamdars*, and which lands are admittedly in the occupation of the *girassias*, and also for a declaration that the defendant is not entitled to levy a quit-rent on the *wanta*.

The lands in question were included in a settlement effected between the plaintiffs and Government in 1864, in respect of all the lands in the village, under the Bombay Summary Settlement Act, VII of 1863. The case for the plaintiffs is that the **[411]** settlement was effected on the assumption that they were the holders of all the lands in the village, whereas the *girassias* were then and are now in possession of the *wanta* lands as owners, as subsequently determined by this Court in *Jesingbhai* v. *Hataji* (4). The judgment of this Court in the suit brought by the plaintiffs against the *girassias* to compel them to contribute to the quit-rent leviable on the village lands under the settlement is doubtless conclusive as between the plaintiffs and the *girassias*, that the *wanta* lands in the village were the property of the latter at the time of the settlement; and no attempt has been made in this suit by Government to dispute the correctness of that decision. We must, therefore, in this state of the evidence, regard it as settled that, neither at the time of the settlement, nor when the payments to Government in question were made, were the plaintiffs the "holders" of those lands within the meaning of s. 32 (*f*) of the Summary Settlement Act, VII of 1863, or indeed of the *sanad* itself, which was the result of that settlement.

The plaintiffs' case is that, at the time of the settlement, they *bona fide* believed themselves to be the superior holders of the *wanta* lands, and entered into settlement under that belief. The question is whether, having under that impression settled with Government for the payment of a

---

(1) Section 32, clause (*f*):—For the purposes of this Act the word "holder" shall be taken to signify the person who by himself, his tenants, sub-tenants or agents is in possession of the land held wholly or partially exempt from land revenue assessment, and shall include a mortgagee in possession as aforesaid. The committee, manager or trustee of any temple, who may be in possession of such lands, shall be considered the holder thereof.

(2) 1 Ves. Sen. 126. (3) 3 Ch. D. 779. (4) 4 B. 79.

1892
APRIL 19.

APPELLATE CIVIL.

17 B. 407.

certain quit-rent in respect of all the lands in the village, they are now entitled to any and what relief. It appears that, on the discovery by the plaintiffs that they were not the superior holders of the *wanta* lands, they applied to Government to have the *sanad*, which relates to all the lands in the village, amended; and this the Government assented to, provided the plaintiffs and *girassias* joined in their application, or on plaintiffs' obtaining a decree as to their exact share in the village; and such is the answer which they now, by their written statement, make to the present plaint, contending at the same time that, until such amendment is made, the plaintiffs are liable for the entire quit-rent. With respect to this latter objection to the plaint, it is to be remarked that the *sanad* merely declares what, by s. 6 of the Act, is stated to be the effect of the settlement, to which both the **[412]** Government and the holders of the land have consented. But it is by virtue of the settlement itself, as provided by the Act, that the Government are entitled to demand payment of the quit-rent; and the present question, therefore, as to the right of Government, under the circumstances of the case, to insist upon the entire quit-rent as settled in respect of all the lands in the village, is one to be determined quite independently of the *sanad*; and we agree, therefore, with the Joint Judge, that this suit will lie although the *sanad* may not have been amended.

We may here remark that the provision in s. 28 of the Act VII of 1863, which precludes a Civil Court from questioning a settlement made under the Act, so far as regards the right of the Government to levy from the holder for the time being of the lands the annual quit-rent fixed by s. 6, is repealed by Act X of 1876; and the present suit is not included in the suits over which the jurisdiction of the Civil Court is taken away by s. 4 of that Act.

Now, it is to be remarked that what is termed a settlement in the Act, as made by Government with the holder of land, arises from the acceptance by the holder, as stated in s. 2, of the terms and conditions offered by Government, as set out in s. 6. In other words, it is an agreement effected by proposal and acceptance and subject to the ordinary rules applicable to contracts. In the present case we see no reason to doubt that both parties entered into the settlement in the belief that the plaintiffs were the superior holders of all the lands in the village. They were the registered holders in the Government books, and the subsequent conduct of the plaintiffs and more specially the suit they brought against the *girassias*, shows that they regarded themselves as being entitled as such holders. Both parties, therefore, engaged in the settlement under a common mistake as to a matter of fact which they must both have regarded at the time as essential to the agreement, it being made so by the Act itself under which they assumed to contract. For there is not a particle of evidence to show that they intended to contract on any other basis. Such a mistake by s. 20 of the Contract Act (IX of 1872) renders the **[413]** agreement void. Here, doubtless, it affects only a portion of the subject-matter of the contract, *viz.*, the *wanta* lands; but, looking at the nature of the contract, the object of which was to settle in a summary manner claims to exemption from payment of assessment on lands on payment of a quit-rent, assessed on the lands at a uniform rate, as provided by s. 6, the settlement as regards the *wanta* lands may be treated as distinct from that which applies to the remaining lands in the village; and we arrive at the conclusion that the plaintiffs were entitled to contend that the settlement was void

as regards the *wanta* lands, and that, as provided by s. 65 of the Contract Act, they were entitled to a refund of the quit-rent paid in respect of such lands. It is plain, however, that the amount of the refund must depend on the extent of the *wanta* lands, which cannot be ascertained, so as to bind the Government, in the absence of the *girassias*. The third and fifth issues could not, therefore, be determined in this suit without making the *girassias* parties.

We must, therefore, reverse the decree and send back the case for a fresh decision with due regard to the above remarks, after making the *girassias* parties and recording fresh findings on issues third and fifth. The parties to pay their own costs of this appeal.

Decree reversed and case sent back.

---

17 B. 413.

APPELLATE CIVIL.

Before Mr. Justice Bayley, Acting Chief Justice, and Mr. Justice Candy.

KASTURCHAND BAHIRAVDAS AND OTHERS (*Original Defendants*), *Appellants v.* SAGARMAL SHRIRAM AND ANOTHER (*Original Plaintiffs*), *Respondents.** [4th July, 1892.]

Parties—Partnership—Non-joinder—Suit in name of a firm by its manager—Addition of name of other partner as co-plaintiff—Misdescription of plaintiff—Civil Procedure Code (Act XIV of 1882), *s.* 27—*Amendment of plaint—Limitation—Limitation Act (XV of* 1877). *s.* 22—*Practice—Procedure.*

In this suit, which was brought to recover a debt due to the firm of Kondanmal Sagarmal, the plaintiff was described as "the firm of K.S. by its manager S.S." The defendants objected that one Malamchand was a partner in the firm and should **[414]** be a party to the suit. He was accordingly joined as a co-plaintiff on the 27th January 1888. The defendants then contended that the suit was time-barred under s. 22 of the Limitation Act, XV of 1877.

Held, that the case was one of misdescription and not of non-joinder, for the action was brought in the name of the firm by its manager. The order of the words in the vernacular plaint showed that Sagarmal, the manager, did not sue in his own name. The defendants were entitled to have the name of the other partner disclosed, but it being found as a fact that Sagarmal was entitled to sue for the firm, the addition of Malamchand's name on the record came within the provisions of s. 27 of the Civil Procedure Code, Act XIV of 1882.

[F., 27 B. 157 (161) ; **R.**, 20 B. 767 (775) ; 18 M. 33 (37) ; 7 C.W.N. 817 (821) ; 3 O.C. 347 (349) ; 127 P.R. 1906 = 58 P.L.R. 1907 = 10 P.W.R. 1907 ; 149 P.R. 1907 ; 1 S.L.R. 191 (193, 195) ; **D.**, 21 B. 580 (584).**]**

SECOND appeal from the decision of M. H. Scott, District Judge of Satara.

This was an action brought to recover a debt due to the firm of Kondanmal Sagarmal. The suit was filed on the 21st November 1884, upon a document dated 1st December 1881. In the plaint the plaintiff was described as "the firm of Kandanmal Sagarmal by its manager Sagarmal Shriram."

The defendants objected (*inter alia*) that the plaint did not disclose the names of all the partners in the firm of Kondanmal Sagarmal.

The Subordinate Judge found that one Malamchand was a partner with Sagarmal in the firm of Kondanmal Sagarmal, and that he should

---

* Second Appeal No. 759 of 1890.

1892
JULY 4

APPELLATE CIVIL.

17 B. 413.

have been a party to the suit. On this ground he dismissed the suit under s. 32 of the Civil Procedure Code (Act XIV of 1882) without going into the merits of the case.

On appeal the District Judge (C. G. W. Macpherson) reversed the decree, and remanded the case for decision on the merits, being of opinion —(*a*) "That the question whether Sagarmal was entitled to sue for the firm must be determined on the evidence. (*b*) "That, if Sagarmal was not entitled to sue for the firm, Malamchand should be brought on the record, so that the suit be disposed of on the merits."

The order of the District Judge was confirmed by the High Court in appeal No. 58 of 1887.

In accordance with the above order, Malamchand was joined as a co-plaintiff on the 27th January 1888. The defendants contended that the suit was then time-barred.

[415] The Subordinate Judge found that the plaintiff Sagarmal could sue in his own name for the partners of the firm, and that the suit was not time-barred, and allowed the claim.

In appeal, the District Judge confirmed the decree.

From that decision defendants preferred this second appeal.

Phirozshah M. Mehta (with *Mahadeo Chimnaji Apte*), for the appellants (defendants).—The suit was instituted by Sagarmal alone on the 21st November, 1884, on a document dated 1st December, 1881. Malamchand, who was a necessary party, was not joined till the 27th January, 1888. The suit was then barred by limitation—*Kalidas Kevaldas* v. *Nathu Bhagvan* (1); *Balkrishna Moreshwar Kunte* v. *The Municipality of Mahad* (2); *Hari Gopal* v. *Gokaldas Kushabashet* (3). A defendant may insist that every person interested in the subject-matter of the suit should be joined, and, if such person be not joined in time, the suit ought to be dismissed—*Ramdoyal* v. *Junmejoy* (4).

The plaint as it was originally drawn did not comply with the provisions of s. 50 of the Civil Procedure Code (Act XIV of 1882). We took the objection as to want of parties in our written statement before the first hearing. The respondent then took no steps to join Malamchand, and when he did so he was too late. Section 35 of the Civil Procedure Code provides for special cases. In all other cases the names of all persons interested as plaintiffs must be on the record. A firm cannot sue in its own name without specifically mentioning the names of all the partners.

Gajdar (with *Mahadeo Bhaskar Chavbal*), for the respondents.—The only question involved in the case is whether the joinder of Malamchand was too late under the Limitation Act (XV of 1877). The suit was not brought by Sagarmal on his own behalf, or in his individual capacity, as manager; it was instituted in the name of the firm, and, therefore, there was no necessity to disclose the names of all the partners. It is nowhere laid down that a suit shall not be brought in the name of a firm. There is nothing in the Civil Procedure Code to prevent such a suit being filed. The suit being in the name of the firm, Malamchand was **[416]** impliedly a party to it, and it was not necessary to mention his name—Lindley on Partnership (5th Ed.), p. 265. The firm itself being the plaintiff, a partner in the firm cannot be called a co-plaintiff. He was joined in the suit as a co-manager. The cases cited were suits filed by managers in their individual capacity and not by the firm itself, as in the

(1) 7 B. 217. (2) 10 B. 32. (3) 12. B. 158. (4) 14 C. 791.

present case. *Manni Kasaundhan* v. *Crooke* (1); *Pragilal* v. *Maxwell* (2). The addition of Malamchand to the suit does not come within the provisions of s. 22 of the Limitation Act—*Subodini Debi* v. *Cumar Ganoda Kant* (3). Assuming that the frame of the suit was not in accordance with the provisions of s. 50 the Civil Procedure Code (Act XIV of 1882), the Court can amend the plaint. This is a case merely of misdescription. One partner may bring a suit in the name of a firm—*Whitehead* v. *Hughes* (4).

Phirozshah M. Mehta in reply:—Malamchand was not joined as a co-manager. The plaint shows that he was joined as co-plaintiff. *Subodini Debi* v. *Cumar Ganoda Kant Roy* (3) does not apply, because the real principals in that case were disclosed and the suit was brought by the authorized agent of those principals. The above ruling is at direct variance with the provisions of s. 22 of the Limitation Act—Starling on Limitation, p. 84; *Hari Gopal* v. *Gokuldas Kushabashet* (5). A suit may be brought by the partners in the name of a firm, but a firm alone cannot bring a suit without disclosing the partners.

JUDGMENT.

CANDY, J.—The only argument urged in the present appeal is that the suit was barred by s. 22 of the Limitation Act (XV of 1877). We think, however, that this case must be distinguished from the numerous cases quoted at the Bar which establish the principle as to non-joinder of plaintiffs in actions of contract. The present was a case of misdescription, not of non-joinder. For the action was brought in the name of the firm by its manager: the manager did not sue in his own name; the order of the words in the vernacular plaint shows this. When then the defendants objected, as they were entitled to do, that **[417]** the name of the other partner in the firm should be disclosed, the Subordinate Judge was not justified in rejecting the suit under s. 32. This was the view taken by the District Judge (Mr. Macpherson), which was confirmed on appeal. The case having been remanded, and the name of Malamchand having been brought on the record, the Subordinate Judge found as a fact that Sagarmal was entitled to sue for the firm, and that the addition of Malamchand's name came under the provisions of s. 27, not of s. 32. The District Judge (Mr. Scott) came to the same conclusion, and we think that he was right, and confirm the decree with costs.

Decree confirmed.

(1) 2 A. 296. (2) 7 A. 284. (3) 14 C. 400.
(4) 2 Cr. & M. 318. (5) 12 B. 158.

1892
JULY 7.

APPEL-
LATE
CIVIL.

17 B. 417.

17 B. 417.

APPELLATE CIVIL.

Before Mr. Justice Bayley, Acting Chief Justice, and Mr. Justice Candy.

TIPPANNA (*Plaintiff*) *v.* THE SOUTHERN MARATHA RAILWAY COMPANY (*Defendants.*)* [7th July, 1892.]

Railway Company—Exemption from liability—Special contract—Risk note—Railways Act (*IX of* 1890), *s.* 54, *cl.* (1), *s.* 72, *cls.* (*a*), (*b*), *sub-cls.* (2) *and* (3)—*Carriers' Act*, 1865.

The plaintiff sued the defendants (a Railway Company) for damages for short delivery of goods consigned to him. The defendants pleaded a special contract signed by the consignor, which, in consideration of their carrying the goods at a special reduced rate instead of the ordinary tariff rate, exempted them from liability for loss or damage to the goods from any cause whatever before, during, and after transit over their railway or other railways working in connection therewith.

Held, that under the contract the defendants were not liable to the plaintiff.

[**Appr.**, 30 C. 257 (261); **R.**, 17 C.W.N. 529 (531)=18 Ind. Cas. 216; 4 Ind. Cas. 907 =113 P.R. 1908=15 P.L R. 1909; 5 O.C. 153 (154); 14 M.L.J. 396 (399); 2 N.L.R. 125 (128).]

THIS was a reference from Rao Saheb Vinayak Vithal Tilak, Subordinate Judge of Bagalkot, in his Small Cause jurisdiction, under s. 617 of the Civil Procedure Code (Act XIV of 1882).

The reference was as follows:—

"3. On the 21st April, 1891, a certain man at Salem, (a station on the Madras Railway), consigned 230 bags of cocoanuts (each bag containing 100 nuts) for delivery to plaintiff at Bagalkot **[418]** (a station on the Southern Maratha Railway). The two railways work in connection with each other. The defendants having delivered only 229 bags to the plaintiff, the latter has sued to recover damages (Rs. 4) for the short delivery.

"4. Under s. 76 (1) of the Railways Act (IX of 1890) it is not necessary for the plaintiff to prove how the loss of one bag was caused. Nor has the defendants produced any evidence on the point.

"5. The defendants rely on s. 72 (2) of the Railway Act and on * *

---

* Civil Reference No. 3 of 1892.

(1) Section 76 of the Indian Railways Act (IX of 1890):—

In any suit against a railway administration for compensation for loss, destruction or deterioration of animals or goods delivered to a railway administration for carriage by railway, it shall not be necessary for the plaintiffs to prove how the loss, destruction or deterioration was caused.

(2) Section 72 of the Indian Railways Act (IX of 1890):—

(1) The responsibility of a railway administration for the loss, destruction or deterioration of animals or goods delivered to the administration to be carried by railway shall, subject to the other provisions of this Act, be that of a bailee under ss. 151, 152 and 161 of the Indian Contract Act, 1872.

(2) An agreement purporting to limit that responsibility shall, in so far as it purports to effect such limitation, be void, unless it—

(*a*) is in writing signed by or on behalf of the person sending or delivering to the railway administration the animals or goods, and

(*b*) is otherwise in a form approved by the Governor-General in Council.

(3) Nothing in the Common Law of England or in the Carriers' Act, 1865, regarding the responsibility of the common carriers with respect to the carriage of animals or goods, shall affect the responsibility as in this section defined of a railway administration.

the risk note (1) (Ex. 7), which is [419] signed by the consignor and attested by witnesses. They contend that the special contract contained in the risk note exonerated them from all liability to damages.

"6. It is admitted that the risk note is in the form approved by the Governor in Council."

The Subordinate Judge referred the following question :—

"Can the defendant claim exemption from liability by reason of the special contract contained in the risk note ?"

The opinion of the Subordinate Judge was in the negative, though he considered that the decision of the Calcutta High Court in *Moheswar Das* v. *Carter* (2) supported the defendants' contention.

Daji Abaji Khare (*amicus curiæ*), for the plaintiff, relied on *Chogemul* v. *The Commissioners for the Improvement of the Port of Calcutta* (3).

Mahadeo Bhaskar Chavbal (*amicus curiæ*), for the defendants, relied on *Moheshwar Das* v. *Carter* (2).

JUDGMENT.

Per Curiam.—In this case the Subordinate Judge of Bagalkot has referred the following question :—Can the defendants claim exemption from liability by reason of the special contract contained in the risk note which the plaintiff has signed ? His opinion was in the negative. The risk note, as the Subordinate Judge states in para. 6 of his reference, is admittedly in the form approved of by the Governor-General in Council.

This case comes within the Railways Act (IX of 1890). By s. 54 (4), cl. (1) of that Act, subject to the control of the Governor-General in Council, a railway administration may impose conditions not inconsistent with the Act, or with any [420] general rule thereunder, with respect to the receiving, forwarding or delivering of any animals or goods. By s. 72, sub-cl. (2), an agreement purporting to limit the responsibility of a railway administration for the loss of goods delivered to be carried by railway shall, in so far as it purports to effect such limitation, be void unless it (*a*) is in writing signed by or on behalf of the person sending or delivering to the railway administration the goods, and (*b*) is otherwise in a form approved by the Governor-General in Council. There is a further sub-cl. (3) which is as follows :—" Nothing in

(1) *Risk Note.*

(To be used when the sender elects to despatch at a "special reduced" or "owner's risk" rate articles for which an alternative "ordinary" or "railway risk," rate is quoted in the tariff.

Station, 21st April 1891.

Whereas the consignment of.....tendered by me as per forwarding order No. of this date, for despatch by the Madras Railway to station and for which I have received railway receipt No. of the same date, is charged at a special reduced rate instead of at ordinary tariff rate chargeable for... ..... I, the undersigned, do in consideration of such lower charge agree and undertake to hold the said railway harmless and free from all responsibility for any loss, destruction or deterioration or damage to the said consignment from any cause whatever before, during, and after transit over the said railway or other railway lines working in connection therewith.

(2) 10 C. 210.

(3) 18 C. 427.

(4) Section 54 of the Indian Railways Act (IX of 1890) :—

(1) Subject to the control of the Governor-General in Council, a railway administration may impose conditions, not inconsistent with this Act, or with any general rule thereunder, with respect to the receiving, forwarding or delivering of any animals or goods.

(2) The railway administration shall keep at each station on its railway a copy of the conditions for the time being in force under sub-s. (1) at the station, and shall allow any person to inspect it free of charge at all reasonable times.

1892
JULY 7.
APPELLATE CIVIL.
17 B. 417.

the Common Law of England or in the Carriers' Act, 1865, regarding the responsibility of common carriers with respect to the carriage of animals or goods shall affect the responsibility, as in this section defined, of a railway administration."

Mr. Khare, who argued this case for the plaintiff, contended that there is something in the Common Law of India which will enable him to recover damages notwithstanding the terms of the risk note. In our opinion as there is a risk note in this case signed by the plaintiff, which is in a form approved by the Governor-General in Council, his contention must fail. This risk note says: "To be used when the sender elects to despatch at a 'special reduced' or 'owner's risk' rate articles for which an alternative 'ordinary' or 'railway risk' rate is quoted in the tariff." The risk note states that, whereas the consignment is charged at a special reduced rate instead of at ordinary tariff rate charged for the goods (230 bags of cocoanuts), the plaintiff does, in consideration of such lower charge, agree and undertake to hold the said railway harmless and free from all responsibility for any loss, destruction or deterioration or damage to the said consignment from any cause whatever before, during, or after transit over the said railway or other railway lines working in connection therewith. As pointed out by Garth, C. J. (Prinsep and Wilson, JJ., concurring) and by O'Kinealy, J., in *Moheswar Das* v. *Carter* (1), similar contracts have frequently been construed by English Courts and full effect has been given to their provisions. We cannot understand the doubts of the Subordinate **[421]** Judge, when, moreover, he had a ruling of the Calcutta High Court to guide him.

The recent decision of the Calcutta High Court in *Chogemul* v. *The Commissioners for the Improvement of the Port of Calcutta* (2), so strongly relied upon by Mr. Khare, has no application in the present case, as there was no special contract signed by or on behalf of the consignor of the goods. The present case turns upon the provisions of the risk note, which, in our opinion, shows that the defendants have a complete defence to this action.

Mr. Khare further argued that, apart from the measure of the general responsibility of railways as defined by cl. (1) of s. 72, and the non-applicability thereto of the Common Law of England or of the Carriers' Act, 1865, there was a Common Law of India untouched by the section, and that under that law defendants could not claim exemption by reason of the risk note. We are unaware of such a law. The Common Law, which came to govern the duties and liabilities of common carriers throughout India, was the Common Law of England (see remarks of Privy Council in *The Irrawaddy Flotilla Company* v. *Bugwandas* (3)). The effect of that law as regards railways is restricted by s. 72 of Act IX, 1890.

In answer, therefore, to the question referred by the Subordinate Judge we are of opinion that the defendants can claim exemption from liability by reason of the special contract contained in the risk note.

Order accordingly.

(1) 10 C. 210 (213). (1) 18 C. 427. (3) 18 C. 620.

17 B. 422

[422] APPELLATE CIVIL.

Before Mr. Justice Jardine and Mr. Justice Telang.

1892
JULY 20.

APPELLATE CIVIL.

17 B. 422.

THE SECRETARY OF STATE FOR INDIA (*Original Defendant*), *Appellant v.* BALVANT RAMCHANDRA NATU (*Original Plaintiff*), *Respondent.** [20th July, 1892.]

Local Funds Act (Bombay), III of 1869, *s.* 8—*Local Fund cess*—Inamdar—*Superior holder*—*Liability of* inamdar *to pay the cess.*

An *inamdar* is a "superior holder" within the definitions of Reg. XVII of 1827 and Bombay Acts I of 1865 and V of 1879. He is, therefore, the person primarily liable to pay the Local Fund cess under s. 8 of Bombay Act III of 1869.

There is no provision of law entitling an *inamdar* to charge for his expenses in collecting the cess.

[R., 26 B. 504 (516); 28 B. 74 (80).]

APPEAL from the decree of W. H. Crowe, District Judge of Poona, in suit No. 12 of 1889

The plaintiff was the *inamdar* of the village of Kudus. He sued to recover back the sum of Rs. 10-8-0 paid by him to the Collector under protest as the remuneration of the village officers for collecting the Local Fund cess in his *inam* village.

The defendant pleaded *(inter alia)* that the plaintiff as *inamdar* was liable to pay the cost of collecting the cess.

The District Judge held that the plaintiff was a superior holder, and as such was not liable, under Bombay Acts III of 1869 and V of 1879, to pay any remuneration to the village officers for collecting the cess. He, therefore, awarded the plaintiff's claim.

Against this decision the defendant appealed to the High Court.

Rao Saheb *Vasudev J. Kirtikar*, Government Pleader, for appellant :—The provisions of ss. 6, 7 and 8 of Bombay Act III of 1869 show that the Local Fund cess falls, in the first place, on the *inamdar*, who is a superior holder. He is, therefore, liable to pay the cost of collecting the cess. Under s. 136 of the Bombay Land Revenue Code, the superior holder is primarily responsible for the land revenue, and he is entitled, under s. 86 **[423]** of the code, to receive assistance from the revenue authorities in recovering the revenue from the inferior holders. When he is entitled to this benefit, it is but fair that he should pay all reasonable charges incidental to the collection of the revenue. Refers to *Ranga* v. *Suba Hegde* (1) ; *Ram Tukoji* v. *Gopal* (2).

Phirozeshah M. Mehta (with him *Mahadev C. Apte*), for respondent :—The *inamdar* is not liable to pay the cess at all. The last clause of s. 8 of Bombay Act III of 1869 shows that the tenants are liable for the cess. If they do not pay it, the landlord is entitled to the assistance of the village officers in recovering the cess from them : see ss. 85 and 86 of the Bombay Land Revenue Code (Act V of 1879). Section 136 of the Code no doubt makes superior holders primarily responsible for the land revenue. But, as the *inamdar* pays no revenue, he cannot be called a superior holder. He is a mere intermediary of the Government, and as such is entitled to deduct the cost of collecting the cess from the total cess

* Appeal No. 91 of 1890.

(1) 4 B. 473.

(2) 17 B. 54.

1892
JULY 20.
APPELLATE CIVIL.
17 B. 422.

collected. Moreover, the village officers are bound to give assistance to the *inamdar*. They are agents of Government, and cannot claim any remuneration for the assistance they render.

JUDGMENT.

JARDINE, J.—In this case the plaintiff, who is the *inamdar* of a wholly alienated village, claims from the Government a sum of money which he paid to the village officers as remuneration for their collecting from the plaintiff's tenants the amount of the cess levied under Bombay Act III of 1869, s. 8, last clause.

It is argued by Mr. Mehta, who appears for the plaintiff, that this cess does not fall upon the *inamdar* at all. But, in our opinion, ss. 6 and 7 of the Act impose it, in the first instance, as a charge on the aggregate village assessment and thus upon the land. Section 8 requires that the cess be levied in the same manner and under the same provisions of law as the ordinary land revenue. The *inamdar* is a "superior holder" within the definitions of Reg. XVII of 1827, s. 3, Bombay Act I of 1865, s. 2, cl. (*k*), and Bombay Act V of 1879, s. 3, cl. 13, and was under Reg. XVII of 1827, s. 30, and is under Bombay Act V of 1879, s. 136, **[424]** the person primarily responsible for the payment of land revenue. We think, therefore, s. 8 of the Act of 1869 justifies the levy of the cess from him, and we may refer to *Ranga* v. *Suba Hegde* (1) and *Ram Tukoji* v. *Gopal* (2) as showing that this view has been accepted by this Court.

It is also contended, that the plaintiff as a mere intermediary of the Government is entitled to charge for his expenses in collecting the cess. There is no provision of law so entitling him: and as he is primarily liable to pay the cess, we are not aware of any reason, equitable or otherwise, which would impose on the Government the burden of paying him any expenses which he may incur under the legislative permission to him to recover the amount of the cess for his own benefit from his tenants.

In support of the first contention Mr. Mehta argued that the last clause of s. 8 of the Act of 1869, where the words "recovery of this cess" appear, shows that the Legislature intended the cess to fall in its first incidence on the tenants, and that the first clause of s. 8 applied to the levy of the cess from them. But it is clear that this first clause refers to the cess described in ss. 6 and 7; and this is not a cess leviable from under-tenants, but one leviable on the aggregate village assessment, and, therefore, from the *inamdar*, the superior holder. In the last clause of s. 8 the words "recovery of this cess" really mean "recovery of the *amount* of the cess described in ss. 6 and 7." The Act does not deal with two sorts of cesses: what the landlord recovers from the tenant is not, in strict language, a cess.

Another argument used for the plaintiff is that the *inamdar* has a right to the unpaid services of the village officers in the collection of the cess from the tenants by virtue of s. 8 of the Act of 1869 and the requirement of s. 85 of the Revenue Code of 1879 that the payments of the tenants shall be made through the village officers and not otherwise. It is unnecessary for us to determine this question of law. If the plaintiff's contention is right, he might have refused the demand of the village **[425]** officers. They are not parties to this suit; and no order of the

(1) 4 B. 473.

(2) 17 B. 54.

Collector has been shown us, nor any evidence from which we can infer that the payment to the village officers was made under compulsion used by the Collector.

For these reasons we reverse the decree of the District Court, and reject the plaintiff's claim with costs throughout.

Decree reversed.

1892
JULY 20.

APPELLATE CIVIL.

17 B. 422.

---

17 B. 425.

APPELLATE CIVIL.

Before Mr. Justice Bayley, Chief Justice (Acting), and Mr. Justice Candy.

MAHADAJI (*Original Defendant*), *Appellant v.* JOTI (*Original Plaintiff*), *Respondent.** [25th July, 1892.]

Mortgage—Simple mortgage usufructuary—Right to have the property sold—Distinct covenant to pay the principal—Possession in lieu of interest—Sale to recover principal only—Construction.

A merely usufructuary mortgage will confer no right to have the mortgaged property sold. But where there is a distinct covenant to pay the principal, and the land is security for the same, the intention of the parties is that the property should be sold. Such a transaction is a simple mortgage usufructuary, and carries with it the right to have the property sold in default of payment of the principal.

A mortgagee, who is entitled to possession in lieu of interest and who does not take possession, loses his right to interest, and cannot ask that the property be sold for default in payment of interest, the property being security for the principal only.

[**F.**, 34 B. 128=11 Bom. L.R 1315 (1320)=4 Ind. Cas. 595 ; 34 B. 462=12 Bom. L.R. 491=7 Ind. Cas. 446 ; **R.**, 17 Ind. Cas. 329=16 O. C. 56 (66) ; 9 O. C. 144 (145) ; **D.**, 22 B. 440 (446) ; 10 O. C. 29 (31) ; 11 O.C. 323 (325).]

THIS was a second appeal from the decision of M. H. Scott, District Judge of Satara.

The plaintiff sought to recover from the defendant personally, and on his default from the mortgaged property, Rs. 1,000 (Rs. 500 principal and Rs. 500 interest), due upon a mortgage-bond dated the 27th March, 1873, which ran as follows :—

Bond for debt, the 14th of *Falgun Vadya*, *Shak* 1794—the cyclical year, name thereof being *Angira*—corresponding with the English year 1873. On this day the bond is given in writing to the creditor named Rajashri Joti bin Raju Patil Yadav, by caste Maratha, occupation agriculture * * inhabitant of mauje Yeravle, taluka Karad, as follows :—I have received from you this day principal Rs. 500 (five hundred) of the *gadi* Surat currency. As for the interest of the said amount, I have given (the produce of) my own land which is in my **[426]** own enjoyment situate at mauje Yeravle * * called Sarkari Dale Vihiriche, Survey No. 22 (measuring), acres 1-31 and assessed at Rs. 9. The four boundaries thereof are * * * (The produce of) the land as comprised within the above four boundaries I have given in liquidation of the interest on the said amount. Therefore, you are to receive interest on the said amount from the produce of the said land. You are to do all (that is), bestow labour on the said land and

* Second Appeal No. 7 of 1891.

1892
JULY 25.
APPELLATE CIVIL.
17 B. 425.

to receive all the produce. You are to pay the Government assessment on the said land and to receive the interest. The period (fixed) for the (payment of the) amount is five years from the date of the bond, within which time I will pay the principal amount of Rupees five hundred and redeem the land. There is a well in the said land. You are to take my share of water from the well and to raise garden crops in the said land. Should the amount remain unpaid after that date, I will continue the land with you until I pay the amount. I will not plead any objection, &c. You are to keep the embankments and boundary marks of the said land in repair according to law. Unless I pay the money I will not disturb (your) possession of the land. This bond I have duly given in writing. The date aforesaid, I, the debtor have duly received the said amount of Rs. 500 (five hundred) of the Surat currency which you have this day paid to me, and have duly given this acknowledgment in writing. The date aforesaid. The handwriting of Antaji Balkrishna Vategavkar, inhabitant of Yeravle, the 27th March, 1873. My own handwriting.

The defendant admitted the execution of the bond, but pleaded want of consideration and limitation.

The Subordinate Judge found that the payment of consideration was not proved, and rejected the claim.

On appeal the District Judge held that the consideration was paid; he, therefore, reversed the decree and allowed the plaintiff's claim.

The defendant preferred a second appeal.

Lang (Advocate-General) with *Vishnu Krishna Bhatavdekar*, for the appellant (defendant) :—The mortgage-bond stipulates that the plaintiff should take and retain possession of the property for five years and appropriate the income in lieu of interest. But as he failed to take possession, the Judge has passed a personal decree against the defendant. The plaintiff's cause of action against the defendant personally is clearly time-barred, the suit not being brought until 1888. Further, the lower Court was wrong in allowing interest. Under the terms of the deed, the plaintiff was to take possession, and appropriate income in lieu of interest. If he failed to take possession, he must suffer for his own negligence. Lastly, the Judge was wrong in passing **[427]** a decree for the sale of the property. The transaction in dispute is a usufructuary mortgage, which does not carry with it the right of sale—*Shaik Idrus* v. *Abdul Rahiman* (1).

[CANDY, J.—How do you reconcile the ruling of the Full Bench in *Motiram* v. *Vithai* (2) with the one quoted ?]

The mortgage in that case was a simple mortgage usufructuary. The intention with respect to the sale of the property must be gathered from the instrument itself. If it contains no claim of sale, then there can be no sale. Section 67 of the Transfer of Property Act (IV of 1882) is to the same effect. The words in the bond sued upon are "unless I pay the money I will not disturb your possession." There is nothing in the bond to show that the right of sale was given to the mortgagee.

Phirozeshah M. Mehta (with *Ganesh Krishna Deshmukh*), for the the respondent (plaintiff) :—The instrument in dispute is an ordinary mortgage-bond. The interest was not secured upon the produce of the land. The produce was to be taken merely in liquidation of interest. The ruling in *Shaik Idrus* v. *Abdul Rahiman* (1) is not applicable to the present case, because in that case there was no stipulation that

(1) 16 B. 303.

(2) 13 B. 90.

the mortgagor should pay the amount; the amount was to be recovered from the mortgaged property. The bond in the present case contains a covenant that the defendant would pay the money after the expiration of five years—*Ramayya* v. *Guruva* (1). There being an undertaking in the mortgage-bond to pay, that gives the mortgagee a right to sue for sale. When there is a covenant in the usufructuary mortgage, to pay, as in the present case, it ceases to be a pure usufructuary mortgage, and carries with it the right of sale if the money be not paid within the stipulated time—Macpherson on Mortgage, page 11. Owing to the plaintiff's failure to take possession of the land, the defendant has not only appropriated the produce thereof, but has, in addition, enjoyed the benefit of the loan of Rs. 500. We are, therefore, entitled to recover interest.

JUDGMENT.

[428] CANDY, J.—Admittedly the decree against the defendant personally was bad and must be reversed.

It is further contended that under the bond the mortgagee had no right to ask that in default the land should be sold. But this is not so. It was not merely a usufructuary mortgage, which would confer no right to have the property sold. There was a distinct covenant to pay the principal, and the land was security for the same; so we cannot infer that the intention of the parties was that the property should not be sold. It was a "simple mortgage usufructuary," carrying the right to have the property sold in dofault of payment of the principal sum of Rs. 500.

Plaintiff's pleader also asks that the property may be sold in default of payment of interest. That claim is bad. For the plaintiff was entitled to possession in lieu of interest, and, if he never took the trouble to obtain possession, he lost his right to interest. The land was security for the principal. The decree must be amended, and judgment passed for Rs. 500, to be paid within three months; in default the land to be sold. Costs in proportion throughout.

Decree amended.

---

17 B. 428.

APPELLATE CIVIL.

Before Mr. Justice Jardine and Mr. Justice Telang.

BHAGVAN (*Original Plaintiff*), *Appellant* v. KESUR KUVERJI (*Original Dependant*), *Respondent.** [1st August, 1892.]

Civil Procedure Code (*Act XIV of* 1882), s. 574—*Judgment of Appellate Court—Reasons for the decision to be stated.*

Section 574 of the Code of Civil Procedure (Act XIV of 1882) is imperative, and under it the appellate Court is bound to state the reasons for its decision.

A Court of appeal framed certain issues under s. 566 of the Code of Civil Procedure (Act XIV of 1882), and remanded them for findings by the original Court. On the return of those findings, as neither party filed any objections, the **[429]** appellate Court accepted these findings, without giving any reasons for so doing, or even stating in its judgment whether it concurred in them or not, and confirmed the decree of the original Court.

---

* Second Appeal No. 298 of 1891.

(1) 14 M. 232.

1892

AUG. 1.

APPELLATE CIVIL.

17 B. 428.

Held, that the judgment of the appellate Court was not a judgment according to law.

[F., 7 M.L.J. 236 (237); R., 19 B. 551; 23 B. 334 (339); 20 M. 496; 31 M. 469 (471) (F.B.)=18 M.L.J. 34=3 M.L.T. 71; 17 M.L.J. 62-N; 8 O.C. 290 (292).]

SECOND appeal from the decision of T. Hamilton, Acting District Judge of Surat, in appeal No. 22 of 1889 of the District File.

The plaintiffs sued to recover one-fifth share of a certain field, alleging that they had purchased this share of the field from one Kalyan Jogi, who had inherited it from Bhula Lalbhai.

The Subordinate Judge rejected the plaintiff's claim.

On appeal the District Judge raised the following issues:—

(1) Had Bhula Lalbhai one-fifth share in the field in question?

(2) Did Kalyan Jogi obtain this one-fifth share from Bhula by inheritance or gift?

The District Judge, being of opinion that the plaintiffs should have been allowed to examine certain witnesses they had already named in their *darkhast*, remanded the case, in order that, after examining those witnesses, the lower Court might record findings on the above issues.

The Subordinate Judge recorded his findings on both the issues in the negative.

On the return of these findings the hearing of the appeal was resumed.

No objections to the findings having been filed on either side, the District Judge confirmed the lower Court's decree, without, however, giving any reason for his decision.

The plaintiffs thereupon preferred a second appeal to the High Court.

Govardhanram M. Tripathi, for appellants:—The District Judge's judgment is not a judgment according to law. He does not give any reasons for the decision. Under s. 574 of the Code of Civil Procedure he is bound to state the reasons for his **[430]** decision—*Umed Ali* v. *Salim Bibi* (1); *Mumtaz Begam* v. *Fateh Husain* (2).

Motilal M. Munshi, for respondent:—Neither party took any objections to the findings of the Court of first instance. The lower appellate Court was, therefore, right in accepting those findings and confirming the decree.

JUDGMENT.

JARDINE, J.—The District Judge under s. 566 of the Code of Civil Procedure framed issues of fact, and remanded them for findings by the original Court. On return of the findings, the District Judge overruled a contention of the present appellants that the Subordinate Judge had wrongly refused to take the evidence of certain witnesses. It does not appear, however, that any memorandum of objection was filed under s. 567, or that any objection was taken orally at the hearing to the findings as not justified by the evidence on record. The District Judge silently accepted these findings, without giving any reasons for so doing, or even stating in his judgment whether he concurred in them or not.

The only point argued before us in support of the appeal is that s. 574 of the Code of Civil Procedure is imperative and required the District Judge to give his own decision, and the reasons for it, upon the issues remanded, to the original Court under s. 566. In support of this contention, *Umed Ali* v. *Salima Bibi* (1) and *Mumtaz Begam* v. *Fateh Husain* (2) are cited. The point does not appear to have been decided by this

(1) 6 A. 383. (2) 6 A. 391.

High Court. But we are of opinion that these cases interpret the Code correctly. Section 567 requires the lower Court of appeal to proceed to determine the appeal. Section 571 requires it to pronounce judgment, and s. 574 is imperative as to what the judgment is to contain.

We, therefore, set aside the decree of the District Court and remand the appeal to that Court, in order that it may record judgment as required by the law, and pass a decree thereupon. Under the circumstances, we direct that the parties pay their own costs in this Court.

Decree reversed and case remanded.

---

17 B. 431 (P.C.) = 20 I.A. 50 = 6 Sar.P.C.J. 52 = 17 Ind. Jur. 109.

[431] PRIVY COUNCIL.

PRESENT :

Lords Hobhouse, Macnaghten, Hannen and Shand and Sir Richard Couch.

[*On appeal from a judgment of the Governor in Council of Bombay as an appellate Court under Regulation XXIX of 1827.*]

SHEKH SULTAN SANI (*Appellant*) *v.* SHEKH AJMODIN (*Respondent*); AND BY REVIVOR SHEKH SULTAN SANI (*Appellant*), AND BEGUMBI KOM AJMODIN AND OTHERS (*Respondents*). [18th, 19th, 24th and 25th June, and 1st July, 1891 and 19th November, 1892.]

Resumption by the Government of estates held on political tenure—Mixed estate of saranjam and inam so held—Non-jurisdiction of Civil Courts.

The engagements entered into by treaty between the British Government and the Raja of Satara in 1819, and the terms fixed separately with the several Satara jaghirdars in 1820, did not impart any greater fixity of tenure than had previously belonged to the latter under Maratha rule; and their jaghirs remained liable to resumption at the will of the Government.

The question to whom a saranjam, or jaghir, shall be granted, upon the death of its holder, is one which belongs exclusively to the Government to be determined upon political consideration; and it is not within the competency of any legal tribunal to review the decision.

Inam villages and lands, with the mokasa, included originally in one saranjam granted under the Maratha rule for the support of troops, remained after 1820, when the rule of the Peshwa had ceased, a personal and military jaghir, forming a mixed estate of saranjam and inam. The tenure remained, under British rule, political; and no distinction could be drawn in this respect between the inam lands and the saranjam. The whole estate passed to the person whom the Government at its discretion, for political reasons, recognized as the grantee, without its being competent to any Court of law to question the decision of the executive authority in the matter.

[R., 34 B. 329 (339) = 12 Bom. L.R. 208 = 5 Ind. Cas. 965; 5 Bom.L.R. 983 (986).]

APPEAL from a judgment (28th April, 1887) of the Governor of Bombay in Council, as an appellate Court under Regulation XXIX of 1827, varying a judgment (8th June, 1886) of the Court of the Agent for Sardars in the Deccan and Khandesh.

The plaintiff (now appellant) alleges himself to be the son of Shekh Khan Mahomed Waikar, deceased on 31st December, 1872, who was a jaghirdar, and sardar of the second class on the list of the Agent for Sardars. The defendant Shekh Ajmodin valad Abdul Rajak was the son of the daughter of the **[432]** brother, named Abdul Kadar, of the abovenamed

1892
Nov. 19.

PRIVY COUNCIL.

17 B. 431 (P.C.)= 20 I.A. 50= 6 Sar. P.C.J. 52=17 Ind. Jur. 100.

sardar. Abdul Kadar died in 1873, after taking his grandson as his "adopted son." The administrators of the estate, Rao Bahadur Gopal Hari Deshmukh and Ganesh Dinkar Joshi, represented Ajmodin in the earlier proceedings, and on his death this appeal was revived against the other respondents abovenamed.

The principal question was whether the saranjam and inams claimed as part of the inheritance and property which had belonged to the deceased Shekh Khan Mahomed were or were not political tenures to which the succession could be dealt with by the Government only, at its discretion, apart from any jurisdiction of the Civil Courts.

In the last century, when the family to which Shekh Khan Mahomed Waikar belonged was represented by Shekh Mira, then in the service of the Raja of Satara, grants of inam, mokasa and saranjam were made to Shekh Mira, comprising villages in Satara, Poona, and Khandesh; and with some of these the estates now claimed were identical. The grants were continued by the Maratha ruler to Shekh Mira's adopted son, who was succeeded by his son Shekh Mira II in 1785. After the hostilities of 1818 had ended, the treaty of 25th September 1819 guaranteed the possession of the latter, and he, besides, was one of the jaghirdars with whom an engagement was separately made by the Government in 1820. He died in 1828, leaving two sons, of whom the abovenamed Shekh Khan Mahomed, who died in 1872, was the elder, and Shekh Abdul Kadar abovenamed, who died in 1873, was the younger. In December, 1836, Sultan Sani, this appellant, was born, and from his birth down to Shekh Khan Mahomed's death in 1872 he was acknowledged by Khan Mahomed to be his legitimate son. However, it was equally a fact that in 1857 an official inquiry was held as to Sultan Sani's birth, and it was decided that he was not the son of the Shekh, or of his wife, but was a child substituted by arrangement when born, as he was, of one of the female servants of the house. This decision was accepted as correct by the Governor in Council and Her Majesty's Government; and it was, in consequence, determined that Khan Mahomed's saranjam **[433]** should be resumed at his death. Shekh Khan Mahomed having died, the Government on the 23rd October, 1873, ordered the Agent for Sardars to investigate judicially, and after notice, whether Shekh Ajmodin was the legitimate successor to the headship of the Waikar family, either by adoption or descent. The Agent reported that no custom of adoption among Mahomedans in the Deccan was proved, but that Abdul Kadar did, before his death in 1873, execute a document with intent that Shekh Ajmodin should be his heir; the Agent referred also to Shekh Mira's having "adopted" a son in 1740. The Government on the 27th March, 1874, declared that there were sufficient reasons for recognizing Shekh Ajmodin as the head of the family, to whom the saranjam should be continued. This was confirmed by the Secretary of State for India on the 18th June, 1874. The inam portion of the family estate remained after Khan Mahomed's death in the hands of the Collector of Satara, who managed it; and as to it, the opinion of the "Alienation Settlement Officer" was called for. This he gave on the 6th October, 1876, to the effect that "the whole estate intact, having been restored under the treaty of the 3rd July, 1820, was continuable as a guaranteed estate to Shekh Ajmodin as the head of the family." The Government on the 6th November, 1876, resolved that this should be carried out. The saranjam and inam estates were then made over to the defendant, to whom the administrators abovenamed made over the private property

of the late Mahomed Khan. This was reported to the Government by the Collector of Satara on the 7th February, 1877.

On the 8th September, 1884, a certificate under the 6th section of the Pensions' Act, XXIII of 1871, was granted by the Government, enabling the plaintiff to take the present proceedings, which he attempted to commence as a pauper on the 1st November, 1884; but on the 5th June, 1885, he paid the Court fees, and the suit came on for hearing before the Agent for Sardars. The suit, valued at Rs. 3,75,870, was for the possession of (1) four parcels of inam land and two parcels of mirasi land in the taluka of Wai in the Satara district; (2) the income of mokasa amals and saranjam in villages in different districts of the Deccan and Khandesh; (3) of inam and mirasi lands in the district of **[434]** Khandesh, the rents of which had been withheld by order of the authorities, from the plaintiff: (4) of devashthan land. The property was described at length in four schedules corresponding to the above. A declaration of right, an injunction and mesne profits were claimed by the plaintiff, as son and heir, and also as devisee under a will of Khan Mahomed executed on 29th September 1860.

The fact of the will was undisputed: but the defence, in brief, was that the plaintiff was not the son of Shekh Khan Mahomed. It was also insisted that the Government Resolution of 27th March, 1874, confirmed on 18th June, 1874, as to the saranjam, and another Resolution of the 6th November, 1876, as to the inam lands, had given the defendant a title of which he could not be deprived by the order of any Civil Court. The issues raised questions indicated by this defence.

The Agent for Sardars found on the evidence that the claimant was the only son of Khan Mahomed, and as such was entitled to share in all his property in respect of which the Court was competent to pass any decree. This he considered it competent to do as to all the property except the saranjams. These he held to be completely at the disposition of the Government. As to the rest of the property, including the inams, he decreed to the plaintiff that share of it to which the Mahomedan law would have entitled him as only son.

Mesne profits were not allowed, on the ground that, the defendant's possession having been given to him by the Government, he was not in wrongful possession. Both parties appealed under Reg. XXIX of 1827, to the Governor in Council constituted by that law an appellate Court from that of the Agent. The Governor in Council was not satisfied that the plaintiff was the legitimate son of Khan Mahomed, and the decision of the Agent was reversed upon this point. The following is the judgment so far as it is material to this report. After a statement of the facts, the Governor in Council continued thus:—

"It follows that Sultan Sani is not entitled to succeed to any property as heir. But Khan Mahomed executed a will in Sultan **[435]** Sani's favour: and as he must be regarded as a stranger, this will, though made without the consent of heirs, is valid to the extent of one-third of any property of which Khan Mahomed, and not the Government, had the disposal.

"The great mass of the property which forms the subject of the suit was held by Khan Mahomed's ancestors under grants of old date, which merged into a re-grant under the agreement concluded with Shekh Mira Waikar, dated 3rd July, 1820, which will be found at p. 377 of the IV Vol. of Aitchison's Treaties (Ed. 1876). By this agreement the 'jaghirs, &c.,' were restored to Shekh Mira, and the 'Inam villages, watans, and

1892
NOV. 19.
——
PRIVY COUNCIL.
——
17 B. 431 (P.C.)
20 I.A. 50 = 6 Sar. P.C.J. 52 = 17 Ind. Jur. 100.

other allowances ' were continued to him. Upon Khan Mahomed's death, the Government, in accordance with the decision already referred to, resumed the jaghir or saranjam, and after a while regranted it to the defendant, Ajmodin. There is no doubt whatever that the Government had a perfect right to do this, and that its action cannot be questioned. It is settled law that the Government may resume jaghirs or saranjams whenever it pleases, and that the Civil Court cannot question such action. Even, therefore, if the resumption of a saranjam were wholly unjustifiable, it would be none the less valid: but certainly no resumption could be more justifiable than one made as a punishment to the saranjamdar for palming off upon Government a spurious son as his heir. This has hardly been disputed; and the argument at the Bar has been mainly directed to the question whether the resumption and regrant to Ajmodin of the inam, as distinguished from the saranjam, can be upheld as an act legally within the competency of Government. Now, it certainly appears from the old sanads that the inams were originally held on a somewhat different tenure from the saranjam. They seem to have been granted for maintenance and as a reward for past service, rather than on condition of future service. The same distinction may perhaps have been intended, though it is not very clear, in the agreement of the 3rd July, 1820. It is also evident that, after it had been determined to resume the saranjam, Government did not for some time contemplate a resumption of the inam, but rather intended that all claims to the inam should be adjudicated on in the usual course by the **[436]** Civil Court. But in 1876 Government finally determined to resume the inam, and regrant it to Ajmodin: and the question is, not whether this determination was consistent with the advice of all its officers, or with its own previous views and opinions, but whether its action was within the powers vested in it by law. Now, looking to the provisions of sch. B, Rule 10 of Act XI of 1852, to s. 1, cl. 2, and s. 16 of Bombay Act II of 1863, and to s. 2, cl. 2 and s. 32 of Bombay Act VII of 1863, it must, in the opinion of the Governor in Council, be held that Government has the power to resume, on political considerations, any property which is held on political tenure: and that it is for Government to determine, in every instance, whether the tenure is political. This being so, the question is whether Government did, in 1876, resume the inams of the Waikar family on the ground that they were held on political tenure. Now, the decision of Government is contained in its Resolution No. 6836 of the 6th November, 1876, which in its preamble sets forth a memorandum of the Alienation Settlement Officer, containing his opinion that 'as Government have sanctioned the adoption' (*i.e.* of Ajmodin) 'the whole estate, intact, saranjam and inam, as restored after the war under the treaty of 3rd July, 1820, is continuable as a guaranteed estate to the adopted son as the head of the family, and should be entered in the accounts accordingly, the same as all other treaty estates of mixed saranjam and inam;' and then the Resolution is passed in the following terms:—'The suggestions of the Alienation Settlement Officer are approved, and should be carried out.' So that Government adopted the view of the Alienation Settlement Officer, and that view clearly was that, under the terms of the treaty of 1820, and other similar treaties, a mixed estate of saranjam and inam is all held on the same political tenure, and ought to pass intact to the person whom Government may recognize as the head of the family. This view may have been right or wrong, (and looking to the terms of the treaty of 3rd July, 1820, the Governor in Council would find it difficult to say that it

1892
NOV. 19.

PRIVY COUNCIL.

17 B. 431 (P.C.) = 20 I.A. 50 = 6 Sar. P.C.J. 52 = 17 Ind. Jur. 100.

was wrong) ; but, at any rate, as it was adopted by Government as the ground of its action, it does not appear open to any Court to dispute it.

[437] "Another ground on which the resumption and regrant of the inam may well be justified is that the agreement of 3rd July, 1820, under which the inam was held, cannot be construed as amounting to more than a grant to Shekh Mira for his own life. It is true that in 1842 the saranjam was by order of the Court of Directors made hereditary ; but nothing was said about the inam. It seems to follow that, if the inam was included in the order, then it was treated as saranjam and was included in the same incidents : while, if it was not included, then it has never been made hereditary, and Government had a perfect right to resume it. In either case Ajmodin's title is unassailable. It follows that all claims made in this and the companion suits to a share in the saranjam and inam estates granted under the agreement of the 3rd July, 1820, must be disallowed."

The Governor in Council then considered the claim to the private property of Khan Mahomed ; holding that, as to a portion of it, limitation barred the present suit. The following relates to what was awarded, the property being considered in two classes, *viz.* (1) that which was in possession of Khan Mahomed, or held in trust for him, at the date of his death, and (2) that to which he was entitled by inheritance on the death of Abdul Kadar. The judgment continued thus :—"There are three schedules marked A, B, and C annexed to the plaint. The property contained in sch. A is in the possession of the defendant, and the plaintiff sues to recover possession. Up to 1876 this property (other than the saranjam) was held under attachment by Government for the benefit of Khan Mahomed's and Abdul Kadar's creditors, and eventually of their heirs. There was no adverse possession until the property was handed over to the defendant in 1876, and the suit is well within twelve years from that date. But the claim to the property mentioned in schs. B and C, appears to be of a different nature, and to come under a different rule of limitation. The property, mentioned in sch. B is stated in the plaint to be not in the possession of the defendant, but of third parties, and what is asked for is an injunction to the defendant not to obstruct the plaintiff in recovering the property from such third parties. The property in sch. **[438]** C is declared in the plaint to be in the possession of the plaintiff himself ; and what is asked for is a declaration that the defendant has no title to such property. The suit then, as regards the properties set forth in schs. B and C, is one simply for an injunction and declaration ; and the Governor in Council can find no sufficient authority for holding that a longer period of limitation than six years is allowed for such a suit. It appears to be a claim for which no other period is provided in sch. II of the Limitation Act (XV of 1877), and therefore to fall within art. 120. In this view, the suit in regard to the properties included in schs. B and C is barred, as against the present defendant, whatever may be the case as regards third parties, who may be in possession of any portion of the property : for it is admitted that the cause of action, so far as the injunction and declaration are asked for, arose in 1876.

"Confining his attention, therefore, to sch. A, the Governor in Council finds that Sultan Sani is entitled under the will to one-third of any private property belonging to Khan Mahomed, while Rahimunissa, as heir, takes the remaining two-thirds."

1892
NOV. 19
PRIVY COUNCIL.
17 B. 431 (P.C.) = 20 I.A. 50 = 6 Sar. P.C.J. 52 = 17 Ind. Jur. 100.

An order as to each portion of the property separately claimed concluded the judgment.

On this appeal, preferred as provided for in the Reg. XXIX of 1827.

Mr. *R. V. Doyne*, for the appellant, argued that the Agent for Sardars, in the first instance, was wrong in dismissing the claim to the saranjam, while his decision had been right as to the inams, and as to the rest of the property which he decreed to the plaintiff. The judgment of the Governor in Council erred both as to the saranjam and the inams, which should have been held to be hereditary in the family of the late Shekh Mahomed Khan, and not liable to resumption on his death. The saranjam, although originally an estate resumable on the death of the holder by the ruling power which granted it, had subsequently been rendered an estate hereditary in the family. The effect of the guarantee of the British Government in the treaty of 1819 and of the agreement, "fixing terms," with the Waikar **[439]** jaghirdar in 1820, had been to confirm the title. The saranjam had not remained subject to its original conditions. It had passed from father to son for three generations. He referred to the Satara Treaty, No. II, of 25th September, 1819, in Vol. VI of Aitchison's "Treaties, Engagements and Sanads," (edition of 1864), guaranteeing in art. 7 the possession of the jaghirdars; also to the terms fixed for Shekh Mira Waikar, as one of the Satara jaghirdars, who was ancestor of Khan Mahomed, in the agreement of 3rd July, 1820, Vol. VI, (Ed. 1864), p. 78. If the words of the treaty had been conclusive that the saranjam was not hereditary, there would have been no ground for the present contention; but they were not, and they were consistent with what had afterwards taken place by way of rendering the estate continuous and hereditary in the family of the jaghirdar. Reference was made to passages in the last chapter of Grant Duff's History of the Mahrattas; and to correspondence in the years 1834—1842, inclusive, between the Bombay Government and the Court of Directors, as to the hereditary character of this tenure. According to this, it appeared to have been ordered, as between the Court and the Government, that the saranjam should be considered hereditary by the latter. However, nevertheless, on the 5th April, 1860, the Government Resolution was that even if Khan Mahomed should leave a legitimate son, the saranjam would not be continued to the latter. It was submitted that even if this had not been founded on mere error in the conclusion that Shekh Sultan Sani was not the son of Khan Mahomed, this Resolution, and all the subsequent proceedings in derogation of that son's right of succession, were beyond the scope of the executive power. The appellant's case was that in 1873 the Government had not retained, and did not possess, authority to alter the right of succession to either the saranjam, or the inam estates, which had then become fixed to descend to the elder son, in consequence of the repeated acts of recognition of the succession in the family of Khan Mahomed. But the appellant's case was stronger, as regarded the inams, which had been resumed, than as to the saranjam; the former was a reward for past services, the latter involved originally, the support of troops for service The agreement of 1820 referred expressly **[440]** to inams *viz.*, to inam villages, watans, and other allowances; and the inams were not, and could not lawfully have been, comprised in the resolution of 5th April, 1860, as they had then become fixed to descend to the *Sardar's heir*, and were subject to his testamentary power, within the rules of law. Nor had the Government the power to effect what the resolution of 27th March 1874, had

been treated as effecting, the recognition of the respondent Ajmodin as the person to whom the saranjam and the inams should be continued; and in taking possession of the latter, as the Collector had done, he had acted without due warrant, these estates being subject to the law of inheritance, and the rights of the appellant subsisting. Reference was made to *Ramchandra Mantri* v. *Venkatrao Mantri* (1); *Gulabdas Jugjivandas* v. *The Collector of Surat* (2); *Premshankar Raghunathji* v. *The Government of Bombay* (3); *Dosibai* v. *Ishvardas Jagjivandas* (4); The Inam Act, XI of 1852; Bombay Acts II and VII of 1863; The Pensions Act, XXIII of 1871, s. 4. Upon the question of the appellant's birth the evidence supported the finding of the first Court that the appellant was the son of Khan Mahomed. The inquiry in 1857 was one in the Revenue Department; and the effect of a judgment could not be attributed to it. Reference was made to ss. 40—44 of the Indian Evidence Act, 1872, relating to prior judgments, when relevant, and to *Naranji Bhikhabhai* v. *Dipa Umed* (5) and *Gujju Lall* v. *Fatteh Lall* (6). Effect was to be given to the presumption of Mahomedan law as to legitimacy of birth, on which point *Ashruf ud Dowla Ahmed Hossein* v. *Hyder Hossein Khan* (7), *Mahammad Azmat Ali Khan* v. *Lalli Begum* (8) were referred to. The judgment of the first Court should be restored, and the appellant should obtain the declaration of legitimacy claimed, and of his title to the saranjam and inams.

Mr. *R. B. Finlay*, Q. C., and Mr. *J. D. Mayne*, for the respondent:—

[441] The principal points in their argument were the following. The appellant's title, both to the saranjam and to the inams, was derived, according to his claim, from grants to his alleged ancestors by the former ruling power, and the recognition by the present one. His title, in short, depended on the effect of the treaty of 1819, and the engagement of 1820, amounting to a grant to him; and this was his title as to both kinds of estate, the saranjam and the inams. Neither the treaty, nor the agreement, on the point as to what quantity of estate they conferred, were subject to the interpretation of the Civil Courts. They were to be construed by the Government, which had not recognized that they conferred anything more than a life tenure in either the saranjams or the inams. Both these estates were of a political character, and the succession to them was at the discretion of the Government to be allowed or not. Although the grantee's son had succeeded at his death, as in the case of Khan Mahomed in 1827, that was not by any legal right of inheritance, but because the Government, on account of his birth, and for political reasons, allowed him to succeed. The Government, after the war, parcelled out the tenures on the understanding that existing rights, with regard to Maratha custom, should be observed, and the raj was disposed of on the same terms. To the Raja of Satara the raj was granted, conditionally on his respecting the titles of the jaghirdars, to whom their titles were guaranteed, but only to the extent of their then prevailing rights. The result was that the saranjams and the inams were afterwards held, as they had been before 1820, by holders, who held them as tenures personal and military, as these tenures had been in their origin. The tenures were for life only. Saranjams by custom were at the disposal of the ruling power, and the particular estate in this case was held on a political tenure, a term used in reference to such

(1) 6 B. 598. (2) 6 I. A. 54=3 B. 186. (3) 8 B.H.C.R. (A.C.J.) 195.
(4) 18 I. A. 22=15 B. 222. (5) 3 B. 3.
(6) 6 C. 171. (7) 11 M. I. A. 94. (8) 9 I. A. 8=8 C. 422.

1892
NOV. 19.
—
PRIVY COUNCIL.
—
17 B. 431 (P.C.) = 20 I.A. 50 = 6 Sar. P.C.J. 52 = 17 Ind. Jur. 100.

estates and appearing in the acts of the legislature, as in 1863. The inams now claimed were, in effect, granted by the Government, on the same principle, and were held for life only. Although the correspondence of 1834—1842 took place, no alteration was made in the tenure of Khan Mahomed, of his saranjam and inam estates. As to the evidence about the claimant's birth, the appellate Court was [442] right in its conclusion that he had not made out his title as son and heir to Khan Mahomed; and was right in permitting his claim to rest only on the will of his alleged father as to the property that could be so disposed of. The right of the Government to deal with the other estates, the inam as well as saranjam, which in this case had been mixed together in the Maratha grants, was recognized by legislation; and the term "political tenure" used by it, was applicable here.

Reference was made to Act XI of 1852, ss. 10 and 11 of sch. B, Bombay Acts II and VII of 1863 and to *Gulabdas Jugjivandas* v. *The Collector of Surat* (1), *Dosibai* v. *Ishvardas Jagjivandas* (2), *Madhavrav Manohar* v. *Atmaram Kesha* (3).

Mr. *R. V. Doyne*, replied:—The defendant-respondent having died before the delivery of judgment, an order was made that the appeal should be revived against the respondents above named.

JUDGMENT.

Their Lordships' judgment was given on the 19th November, 1892, by

LORD HANNEN:—The plaintiff, Sultan Sani, claims to be the son of Shekh Khan Mahomed, who died on the 31st December, 1872, and as such son to be entitled to certain properties alleged to have been held by Khan Mahomed, by a tenure known as saranjam, and certain other properties alleged to have been held by a tenure known as inam. The nature of these tenures will be considered presently. The plaintiff also claimed the property as devised to him under the will of Khan Mahomed.

The suit was one in the Court of the Agent for Sardars, a tribunal created in 1827 (Bombay Regulation XXIX of 1827) for the trial of suits against certain Deccan Sardars, an appeal being given to the Governor in Council of Bombay, and from him to the Queen in Council.

In this suit the plaintiff sought to recover possession from the defendant Ajmodin (the predecessor of the present respondents) of the saranjam and inam lands of which (as the plaintiff [443] alleged) the defendant had been put into wrongful possession by the Bombay Government after the death of Khan Mahomed.

In answer to this suit it was contended by the defendant that the plaintiff was not the son of Khan Mahomed; and, secondly, that the tenure of the lands claimed was such that the Government was entitled, on the death of Khan Mahomed, to resume them and assign them to whom it pleased.

The title of the plaintiff under the will of Khan Mahomed was not disputed as to the property of the testator over which the Government had not such a disposing power.

The Agent for Sardars held (8th June 1886) that the plaintiff is the son of Khan Mahomed, but that the saranjams were completely at the disposal of the Government. As to the other lands, which he distinguished as inam, he held that the plaintiff was entitled under the Mahomedan law to recover as only son of the testator.

---

(1) 6 I. A. 54 = 3 B. 186. (2) 18 I. A. 22 = 15 B. 222. (3) 15 B. 519.

On appeal to the Governor in Council, His Excellency in Council held that the plaintiff was not the son of Khan Mahomed, and that the Government had power not only to resume the saranjam, but also the socalled inam property, and to assign them to whom it pleased.

From this decision the present appeal is brought to Her Majesty in Council.

The Agent for Sardars and the Governor in Council have both held that the saranjam lands were of such a tenure that the Government was entitled to resume them and to re-grant them to whom it pleased. Their Lordships propose to consider this question in the first instance.

" Saranjam " is stated in Wilson's Glossary to be an " assignment of lands or their revenue by the State for the support of troops."

" Mokasa," a word which will be found in several of the documents hereinafter referred to, appears to have a meaning nearly equivalent to that of saranjam. It is defined as " villages [444] or lands, or a share in the rule over them, and revenue arising from them, granted on condition of military service or in inam."

" Inami " is stated by Wilson to mean " grants of land held rent-free, and in hereditary and perpetual occupation."

The history of the property to which this suit relates is as follows :—

In 1708, one Shekh Meeran (or Mira) was in the service of the Raja of Satara. For assistance rendered to the Raja " he received the inam village of Pasarni, a pension of Rs. 1,800 monthly, and was raised to the rank of a commander of 60 horses, for the maintenance of which he held mokasa amals (meaning 'share of revenue') to the amount of Rs. 40,000. The pension ceased with the first Shekh Meeran, and the mokasa has since fallen off to about Rs. 18,000, which, with Pasarni, is still enjoyed for the performance of service to the Raja of Satara with 10 horsemen." This is given on the authority of Lieutenant-Colonel Briggs, formerly resident at Satara. The date does not appear. The property thus granted was situated in the districts of Satara, Poona, and Khandesh.

The earliest document relating to the property is of the date of 1709, A.D. This document is headed, " Body of horse under the control of the State " and it runs thus :—" Body (of horse under) Shekh Mira ; saranjam, total as in last year (as per) mandatory letters ; " and it includes nine mokasa villages and the inam village of Pasarni.

The next document is dated 1715, A.D., and is also headed " Body of horse under the control of the State, Body (of horse) Shekh Mira," and is as follows :—" The letter of command, dated 18th moon Saval (regarding) the village of Pasarni, Samat Haveli, Prant Wai. A deed of inam was formerly given about the grant of this village as inam to the aforenamed person, together with all rights and cesses, the present and future taxes and together with sardeshmukhi. The deed having been burnt, new deeds have been prepared and given."

In 1718, A.D., a document headed, " Saranjam for the body of horse under the control of the State . . . in the charge [445] of Shekh Mira," includes and comprises " village of Pasarni, inam village," also " inam lands in Kasba Wai (called) Katban, the place of residence of the aforenamed person, are granted in inam."

Katban appears to have been granted to Shekh Mira, (date uncertain, qu. 1715), " to him and his son, grandson, &c., from generation to generation."

1892 NOV. 19.

PRIVY COUNCIL.

17 B. 431 (P.C.) = 20 I.A. 50 = 6 Sar. P.C.J. 52 = 17 Ind. Jur. 100.

1892
NOV. 19.

PRIVY COUNCIL.

17 B. 431 (P.C.) = 20 I.A. 50 = 6 Sar. P.C.J. 52 = 17 Ind. Jur. 100.

The grant of Pasarni was confirmed in 1752 by the mother of the then Raja of Satara to Shekh Khan Mahomed I, the son of Shekh Mira, in the same terms.

In a document described as the Peshwa's diary of 1763, A. D., it is recorded that " Mokasa villages, &c., have been continued by the Government from former times to Shekh Khan Mahomed in the service of Government. They are in the same manner confirmed."

Amongst the properties enumerated are " the whole village of Pasarni, Samat Haveli, Prant Wai, together with the deshmukhi and sardeshmuki (rights) being inam."

In 1785, A.D., in the diary of the Peshwa is registered " the sanad for continuing the saranjam to Shekh Mira Waikar," *i.e.*, Mira II, and the saranjam is thus described,—" A saranjam (consisting) of amal (shares of revenue) of mahals and of single villages, as also inam villages and lands, were continued from former times to Shekh Khan Mahomed Walad Shekh Mira for the support of troops. He having died, the saranjam and inam villages and lands have as before been confirmed upon his son Shekh Mira for the support of troops." Then follows an enumeration of the properties, which includes the mokasa lands and inam villages and lands, amongst these latter being the whole village of Pasarni, Samat Haveli, Prant Wai.

It is to be observed that this document clearly includes the inam villages and lands with the mokasa as parts of one saranjam for the support of troops.

When the power of the Peshwa was overthrown, Shekh Mira II was in possession of this saranjam. A portion of the conquered territory was placed under the Government of the [446] Raja of Satara (1), with whom a treaty was entered into on the 25th September, 1819, by which it was provided that the possessions of the jaghirdars within the Raja's territory were to be under the guarantee of the British Government, which engaged to secure the performance of the service due to the Raja according to established custom.

Separate agreements were entered into with several jaghirdars of whom Shekh Mira II was one. The agreement with Shekh Mira II, which was made on the 3rd July, 1820, thus commences (2) :—" These jaghirs, &c., were formerly held by you as a personal and military jaghir ; but having come into the possession of the British Government along with the rest of the country, they are now restored, in consideration of the antiquity and respectability of the family, to be held as formerly in personal and military jaghirs."

The 7th article stipulates that " without orders from Government no extra troops are to be levied, and none assembled for the purpose of making war on any one. In matters of family disputes concerning relationship and such like, no appeal to arms can be permitted, but the case is to be represented to the Agent of the British Government, who will communicate with the Government of His Highness, and whatever decision is given must be reckoned binding. "

This agreement does not specify the jaghirs to which it relates. The 5th article is as follows :—

" Whatever inam villages, watans, and other allowances have hitherto belonged to Shekh Mira Waikar within the territories of the British Government or of His Highness shall be continued, and whatever items

(1) Aitchison, Vol. VI, edition of 1864, No. 2, Articles 1 and 7.
(2) Aitchison, Vol. VI, edition of 1864, p. 78.

of revenue belonging to His Highness's Government may be within the jaghir shall be continued to be paid."

There are no words in this agreement having reference to the descendants of Shekh Mira, and it distinctly states that the jaghirs are to be held "as formerly in personal and military jaghirs." This agreement must be regarded as the root of the title (whatever it may be) which was required by Shekh Mira II.

[447] With regard to the expression contained in some of the sanads previously cited of the grant being to the person named, "his son, grandson, &c., from generation to generation," it has been observed by many writers of authority on this subject that they do not, as might be supposed, impart a fixed hereditary tenure. Colonel Etheridge, in his preface to the narrative of the Bombay Inam Commission, quotes the language of Sir Thomas Munro in a minute of the 15th March, 1822, in which he states that the "terms in such documents (sanads) 'for ever,' 'from generation to generation,' or in Hindu grants, 'while the sun and moon endure,' are mere forms of expression, and were never supposed either by the donor or receiver to convey the durability which they imply, or any beyond the will of the sovereign;" and in a subsequent minute of the 16th January, 1823, Sir Thomas Munro shows that while the seizure of private property by the native princes would have been considered unjust by the country, jaghir grants were not regarded by the people in the light of private property. (Etheridge, p. 14.)

1892
NOV. 19.
PRIVY COUNCIL.
17 B. 431 (P.C.) = 20 I.A. 50 = 6 Sar. P.C.J. 52 = 17 Ind. Jur. 100.

Their Lordships entertain no doubt that the engagements entered into by the English Government with the Raja of Satara and with the several jaghirdars did not impart any greater fixity of tenure than had been previously enjoyed by those jaghirdars under the native rulers, and that their jaghirs were liable to resumption at the will of the Government, although from reasons of political expediency the English authorities would not be disposed to add to the disturbance and confusion attending a conquest, by dispossessing the holders of property to any greater extent than was necessary for safety.

Thus, on the death of Shekh Mira II, in 1827, the saranjam, which he had enjoyed, was continued to his son Shekh Khan Mahomed II, but the character of his tenure was distinctly stated in the document by which possession was given to him: "Your father Shekh Mira Waikar died this year, and the saranjam in his possession was thereupon placed under attachment by Government. A petition having now been submitted by you, it has been decided to continue the saranjam to you as before for service to be rendered by you. The attachment has **[448]** therefore been removed, and . . . this sanad has been issued to you. The amount which is always paid from the Government Treasury on account of the mokasa, which forms part of the saranjam, shall therefore continue to be paid to you. As regards the alienated lands, you should take them back in your possession and enjoy them in accordance with past usage, and in accordance with the agreement passed by you to Government you must continue to honestly and faithfully perform the service." This last clause apparently relates to lands which had been alienated by Shekh Mira II, but which, as the Government pointed out, he had no right to do.

These were the terms on which Shekh Khan Mahomed II acquired the position of jaghirdar under the Raja of Satara. He accepted that position as the gift of the British Government, which had decided to continue the

1892
NOV. 19.
PRIVY COUNCIL.
17 B. 431 (P.C.) = 20 I.A. 50 = 6 Sar. P.C.J. 52 = 17 Ind. Jur. 100.

saranjam to him. In this document there is no reference to the descendants of Khan Mahomed, and the grant is made for service to be rendered by him, and is in its terms personal.

One of the questions to be determined in this case is whether, on the death of Khan Mahomed, the Government had or had not the same power of deciding to whom it would grant this saranjam, which it had exercised on the death of the previous holder in favour of Khan Mahomed. In making that grant the Government was no doubt influenced by the fact that Khan Mahomed was the son of the previous jaghirdar, and that it was politically expedient to continue the possession of the saranjam in the same family, but there is nothing to show that the Government recognized any right of succession in the son; the language of the grants in the cases both of Shekh Mira II and Shekh Khan Mahomed II points in the opposite direction. The practice of regranting jaghirs to the sons of preceding jaghirdars naturally had the effect of leading sons to expect to succeed their fathers, and when this practice was long continued in one family the original character of the holding became obscured. This process has been commented on by many writers on the subject of India. In the Honourable Mountstuart Elphinstone's History of India, it is said (5th ed., p. 82): "Notwithstanding all **[449]** these precautions, the usual consequences of such grants (jaghir) did not fail to appear. The lands had from the first had a tendency to become hereditary, and the control of the Government always grew weaker in proportion to the time that had elapsed from the first assignment. The original principle of the grant, however, was never lost sight of, and the necessity of observing its conditions was never denied." In the present instance there was but the one re-grant to Khan Mahomed since the original grant to Shekh Mira, and in that re-grant the character of the holding as saranjam (or jaghir) derived from the decision of the Government in the applicant's favour was expressly stated.

In 1834 an inquiry arose as to the tenure of certain jaghirs in Khandesh, and as to that of Shekh Mira. Mr. Warden, the Deputy Agent, writing to Mr. Saville Marriott on the 3rd January, 1834, says (Rec., p. 212),—"Shekh Mira Waikar was a Satara feudatory chief, serving the Raja with a few horse, and holding a saranjam for his life in Khandesh. I have referred to his sanad or title-deed, and find that his estate was clearly a life grant, the customary provision for the continuance of it by inheritance to be found in the sanads of all hereditary saranjamdars being omitted, and the usual form of life grants adopted."

What document Mr. Warden refers to does not appear; possibly it was the sanad of 1785.

In the course of the inquiry arising out of Mr. Warden's report, Mr. Elphinstone, who had been engaged in the settlement of the Deccan in 1818-19, was referred to by the Court of Directors for his advice, and he, in the year 1838, recommended that all jaghirs "granted by the Mogul Emperor or the Rajas of Satara should be hereditary in the fullest sense of the word;" and with regard to Shekh Mira he stated that his impression was "that Shekh Mira's ancestor commanded a Mogul fort at the time of the first conquest by the Marathas, and surrendered on terms, one of which was the receipt of a hereditary jaghir. If this be so we can have no right to resume his lands unless we can annul the agreements of former Governments;" and he **[460]** added that a reference to his Secretary's list of jaghirdars, prepared in 1818-19, would settle the question.

Upon reference to this list (transmitted 25th October, 1819), which is headed, "Mr. Elphinstone's list of saranjams," Shekh Mira's name appears. He is there stated to belong to the class of Sardars or great chiefs. It is stated that he made his submission on the 28th March, having left the Peshwa at least a month before; that he is an old jaghirdar of the Shahu Raja, and under the heading "Decision" is written: "To have all his jaghirs except those in the Nizam's country on account of his early submission and ancient family." And under the heading "For what period recommended" is written "Hereditary."

It has been seen, however, that this recommendation was not acted upon at the time, and that the grant, which was in fact made to Shekh Mira, did not contain any language importing that the grant was of an hereditary jaghir.

In consequence of the advice of Mr. Elphinstone the Court of Directors, in a Despatch of the 26th October, 1842, directed that all jaghirs in "Class I of Mr. Mill's list, which bears date anterior to 1751, be, as Mr. Elphinstone recommends, hereditary in the fullest sense of the word, together with those of which the dates are unknown, but which are known to be ancient. The latter class, though small, includes the three resumed jaghirs of Shekh Mira, Sumsher Bahadur, and Eshwant Rao Dabhary. The first of these, already restored to the son of the last holder, but for life only, must be considered hereditary."

It is to be observed with regard to this direction that it recognizes that the jaghirs of Shekh Mira have been restored to the son of the last holder (that is, to Shekh Khan Mahomed II, son of Shekh Mira II), but for life only, and that the time for taking any action with reference to the succession would not arise in the ordinary course of things until the death of Khan Mahomed. No fresh grant was made to Khan Mahomed, and his rights must depend upon that grant, which had in fact been made to him on the death of his father. It remained for the Government, when the necessity should arise, to determine to **[451]** whom it should re-grant, or in whom it should recognize, a right of succession to the jaghirs then possessed by Khan Mahomed.

This was the state of things down to 1857, when one Shaikh Sultan Inamdar presented a petition to the Assistant Inam Commissioner at Satara complaining that, although he and others shared in the inams held by the family of Khan Mahomed, their names were purposely omitted by him (Khan Mahomed) in a genealogical table, which he produced before the Mamlatdar of Wai in a certain inquiry affecting those shares, while a son of one Manik Dewtia was mentioned in it as his (Khan Mahomed's) son.

This petition was forwarded to the Magistrate of Satara, who directed an inquiry into the charge thus made against Khan Mahomed of putting forward the child of another man as his own.

This inquiry was conducted by the First Assistant Magistrate, Lieutenant Sandford (afterwards Sir Herbert Sandford), whom the Governor in Council describes as a Magistrate of great experience and intimate knowledge of the people and politics of Satara. With him was associated, in the inquiry, Gopalrao Hurry, of whom the Governor says that he was an officer held in high estimation, who was afterwards raised to several important judicial posts.

This inquiry appears to have been a preliminary investigation with a view to considering the expediency of instituting criminal proceedings

1892
NOV. 19.

PRIVY COUNCIL.

17 B. 431 (P.C.) = 20 I.A. 50 = 6 Sar. P.C J. 52 = 17 Ind. Jur. 100.

against Khan Mahomed and those supposed to have assisted him in putting forward a supposititious child as his own.

The inquiry was conducted in a judicial manner, the witnesses were examined on oath, and Khan Mahomed was offered the opportunity of cross-examining the witnesses who deposed against him, and he produced many witnesses in his defence.

In the result Lieutenant Sandford and Gopalrao Hurry concurred in reporting that the charge had been established, and that the child put forward by Khan Mahomed as his son, namely, the present plaintiff, was not his child, but the child of Manik.

[452] The report of Lieutenant Sandford and the evidence taken by him were transmitted by the Magistrate of Satara to Mr. Ellis, described as the Acting Revenue Commissioner for Alienations, and were by him forwarded to the Government at Bombay. Mr. Ellis concurred in the view of Lieutenant Sandford, and he deprecated putting Khan Mahomed and the others concerned on their trial, and for reasons which he gave he did not recommend the confiscation of his saranjam, but suggested that the name of Khan Mahomed be struck off the list of Sardars, and that he be deprived of all the honorary privileges enjoyed by persons of his rank, the only exception in his favour being the retention of the arrangement then in force, whereby a portion of his saranjam was assigned to his creditors and the balance allowed to him for subsistence. In a subsequent letter of Mr. Ellis to the Secretary to Government, dated the 16th April, 1858, he suggested that the Government should declare that even if Khan Mahomed "should leave a legitimate son, the saranjam will not be continued to him." This recommendation was ultimately, on the 5th April, 1860, adopted by the Government and communicated in a letter of that date to the Revenue Commissioner for Alienations, Captain T. A. Cowper. This resolution was communicated to Khan Mahomed, who thereupon, on the 22nd October, 1860, petitioned the Governor in Council to review the proceeding.

The petition was referred to Mr. Inverarity, the Collector at Satara, who on the 21st March, 1861, reported that he was not of opinion that Khan Mahomed had succeeded in shaking the validity of the evidence which had been brought forward, and that he did not recommend that a fresh inquiry be granted. And on the 8th April, 1861, Mr. Forbes, the Acting Secretary to the Government, informed Mr. Inverarity that, on a review of all the circumstances of this case, His Excellency the Governor in Council was of opinion that no reasons had been advanced by Khan Mahomed which would justify the grant of a fresh inquiry, and that the decision which he appealed against must, therefore, be regarded as final. Communication to this effect was directed to be made to Khan Mahomed.

[453] In 1863 Khan Mahomed again appealed to the Governor in Council, and his memorial was referred to the Duke of Argyll, Secretary of State for India in Council, who, on the 26th October, 1871, declined to re-open the case.

Khan Mahomed died on the 31st December, 1872. It then became necessary to determine to whom his saranjam should be granted. Amongst the candidates was Shekh Ajmodin, the present respondent, a descendant of Shekh Abdul Khan, the half-brother of Shekh Mahomed II. This led to a Resolution by the Government, dated the 23rd October, 1873, "that the Agent for Sardars should be requested to investigate judicially, and after due notice to all parties concerned whether Shekh

Ajmodin is under Mahomedan law the legitimate successor to the headship of the family, either by adoption or descent."

Baron Larpent, the Agent for Satara, in pursuance of the Resolution of the 23rd October, 1873, proceeded to investigate judicially the questions referred to him after due notice to all parties concerned. Amongst the parties who appeared before him was Sultan Khan Sani, claiming to be the son of Khan Mahomed.

On the 28th November, 1873, Baron Larpent made his report. The important passages are as follows :—"The fourth issue remains for decision, *viz.*, Is Ajmodin, under Mahomedan law, the legitimate successor to the headship of the family of Shaik Khan Mahomed? I think that there can be no doubt he is not. As I have already said, Shaik Khan Mahomed left a daughter, and she has sons, and these sons are nearer the head of the family than the son of a daughter of Shaik Abdul Kadar. The decision as to who should be recognized by Government as head of this family does not, in my opinion, rest on a consideration of who may be the next of kin to Shaik Khan Mahomed under Mahomedan law. Government appears to me to have decided in their letter No. 1497, of 5th April, 1860, that Shaik Khan Mahomed's branch should forfeit all right to succeed to the estate. Paragraph 6 is as follows :—'Shaik Khan Mahomed will not probably have another son of his own loins, but the Right Honourable the Governor in Council concurs with **[454]** Mr. Ellis in considering that the Waikar should be told that, even if he have a son, that son will not be allowed to succeed..... The forfeiture was imposed on account of the fraud practised by Shaik Khan Mahomed. His name also was struck off the list of Sardars, and although subsequently the name was re-entered, for certain reasons the order of forfeiture was not rescinded. It appears to me, therefore, that any property, the succession to which Government has power to regulate, should go to Shaik Abdul Kadar's heir, Ajmodin, both on the grounds of the former decision, and because of the great wrongs which Khan Mahomed inflicted on his brother.'"

On the 27th March, 1874, the Government confirmed Baron Larpent's report in the following terms :—

"Resolution.—The proceedings of the Agent for Sardars are approved, and for the reasons given by Baron Larpent, Shaik Ajmodin should be recognized as the head of the family, to whom the saranjam should be continued. To avoid disputes the allowances for maintenance of the widows of the deceased Shaik Khan Mahomed and Shaik Abdul Kadar, and of any others who have a claim for maintenance on the estate, should be settled by order of Government after receiving the recommendation of the Agent.

"The allowances now paid to Shaik Rakmodeen and to Rahimanbee, under Government letter No. 1293, of 28th March, 1861, should be continued."

And on the 18th June, 1874, Lord Salisbury, as Secretary of State in Council, expressed the Government's approval of the above Resolution in these terms :—

"In reply to the letter of your Excellency's Government in this Department No. 17, of the 4th May, 1874, in which you report the death of Khan Mahomed Waikar, and the nomination by you of his kinsman Ajmodin, a lineal descendant of the first British grantee, as the head of the family, to whom the saranjam should be continued, I have to inform you that I see no objection to this arrangement. Shaik Khan Mahomed's

1892
NOV. 19.
PRIVY COUNCIL.
17 B. 431 (P.C.) = 20 I.A. 50 = 6 Sar. P.C.J. 52 = 17 Ind. Jur. 100.

1892
NOV. 19.

PRIVY COUNCIL.

17 B. 431 (P.C.) = 20 I.A. 50 = 6 Sar. P.C.J. 52 = 17 Ind. Jur. 100.

fraud in endeavouring to obtain the succession of a supposititious child [455] having been punished by the exclusion of his own progeny from the succession, Her Majesty's Government can only express their hope that the branch of the family now installed may prove itself worthy of your selection."

In pursuance of these Resolutions the whole of the jaghir and inam incomes were made over to Shekh Ajmodin, and the agent and the administrators of the estate which had been taken into the hands of the Government, called on all persons to acknowledge him as owner. On the 6th October, 1876, Colonel Etheridge, the Alienation Settlement Officer, reported as follows :—

"He (Colonel Etheridge) is of opinion that as Government have sanctioned the adoption, the whole estate intact, saranjam and inam, as restored after the war, under the treaty of 3rd July, 1820, is continuable as a guaranteed estate to the adopted son (Ajmodin) as the head of the family, and should be entered in the accounts accordingly, the same as all other treaty estate of mixed saranjam and inam."

On the 6th November, 1876, Colonel Etheridge's report was confirmed by the Government in the following Resolution :—

"The suggestions of the Alienation Settlement Officer are approved, and should be carried out."

Thus it appears that the Government, on the death of Khan Mahomed, resumed the saranjam held by him, and re-granted it to Ajmodin, on the ground that the Government has the right to resume jaghirs. It is not to be supposed that this right would be exercised capriciously; but, assuming it to exist, it would not be competent for any Court to review this decision of the Government on the ground that the reasons upon which it proceeded were erroneous. This Board, therefore, does not feel called upon to express any opinion upon the question whether the spurious birth of Sultan Sani has been established. Their Lordships, however, see no reason to doubt that the inquiry by Lieutenant Sandford was conducted in a judicial manner, and that full opportunity was given to the accused to cross-examine the witnesses called against him, and to call witnesses in his favour. [456] The good faith of Lieutenant Sandford and his co-adjutor, Gopalrao Hurry, has not been called in question, and the various persons whose duty it has been to consider the findings of those officials have arrived at the conclusion that there was no ground to set aside those findings. Their Lordships are of opinion that the question to whom a saranjam or jaghir shall be granted upon the death of its holder, is one which belongs exclusively to the Government, to be determined upon political considerations, and that it is not within the competency of any legal tribunal to review the decision which the Government may pronounce. This principle is clearly expressed, not for the first time, in Bombay Act VII of 1863, s. 2, cl. 3, and is recognized in cases where the question has been raised.

Thus far as to the saranjams claimed by the appellant.

It has been contended that a different question arises with regard to the inams. Their Lordships, however, are of opinion that no distinction can be drawn between the inam and the other property in question. As has been pointed out, the sanad of 1785 included the inam villages and lands with the mokasa as parts of one saranjam for the support of troops. The effect of the treaty of the 3rd July, 1820, was to continue to Shekh Mira the whole of the property, including the inam, as a personal and

military jaghir. This was done by the Government on political considerations, and the tenure thereby created was political. This was the view taken by the Government in 1876, when it adopted the report of the Alienation Settlement Officer, that "the whole estate intact, saranjam and inam, as restored after the war under the treaty of 3rd July, 1820, is continuable as a guaranteed estate to the adopted son" (Ajmodin) "as the head of the family."

1892 NOV. 19. — PRIVY COUNCIL. — 17 B. 431 (P.C.) = 20 I.A. 50 = 6 Sar. P.C.J. 52 = 17 Ind. Jur. 100.

Their Lordships therefore concur in the opinion expressed by the Governor in Council that a mixed estate of saranjam and inam was granted by the treaty of July, 1820, to be held on the same political tenure, and passed intact to the person whom the Government might recognize as the head of the family, and that it is not competent for any Court of law to dispute it.

[457] In this view of the case it is unnecessary to consider the various other questions which have been discussed on the argument of this appeal.

Their Lordships will humbly report to Her Majesty that the decision of the Governor in Council be affirmed. The appellant must pay the costs of the appeal.

Appeal dismissed.

Solicitors for the appellant :—Messrs. *Blount, Lynch, and Petre.*
Solicitors for the respondent :—Messrs. *Burton, Yeates, Hart and Burton.*

---

17 B. 457 = Chitty's S.C.C.R. 367.

ORIGINAL CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Bayley.

DADA BHOY DAJIBHOY BARIA (*Plaintiff*) *v.* PESTONJI MERWANJI BARUCHA (*Defendant*).* [27th January, 1893.]

Contract—Consideration—Compromise of a bona fide claim a good consideration—Agreement to lend money on mortgage—Delay in completion of agreement—Subsequent agreement to pay interest from a certain date—Consideration for such agreement—Right to rescind—Time of essence of contract—Suit by lender against borrower.

On 31st August, 1891, the plaintiff agreed to lend the defendant Rs. 30,000 on a mortgage. By the agreement the mortgagor (defendant) was to clear the title, and the time fixed for completion of the agreement was eight days from its date. The mortgage was not completed within the stipulated time, in consequence of the non-production of the title-deeds by prior mortgagees, who were to be paid off out of the money to be advanced by the plaintiff. On the 9th September, 1891, the plaintiffs solicitors wrote to the defendant reminding him that the time for completion had expired, and stating that the plaintiff would require interest to be paid on the money which he had with him lying idle on the defendant's account. On the 24th September, 1891, the plaintiff formally tendered the Rs. 30,000 to the defendant, but as no mortgage-deed was then ready for execution the money was not then paid. The plaintiff was always ready and willing to advance the money but in consequence of the defendant's delay he insisted on interest being paid from the 24th September, 1891. The title-deeds were ultimately produced at the end of November or the beginning of December, and on 7th December, 1891, the draft mortgage was sent to the defendant for approval. It contained a clause stipulating for payment of interest from 24th September, 1891. On the 9th **[458]** December, 1891, the plaintiff had an interview with the defendant. The two points then discussed

* Small Cause Court Suit No. 259—17662 of 1892.

1893
JAN. 27.

ORIGINAL CIVIL.

17 B. 457 = Chitty's S. C. C. R. 367.

were (1) what time after due date should be allowed to the defendant (mortgagor) for payment of interest; (2) whether interest on the principal sum should run from the 24th September, 1891. On the first point the plaintiff gave way, allowing defendant fifteen days instead of eight as originally provided. As to the second point, he declined to advance the money unless interest was paid from the 24th September, 1891. The defendant ultimately agreed to this. The mortgage-deed was duly engrossed, with a stipulation for payment of interest from the 24th September 1891, and the 26th January, 1892, was fixed as the day for execution. On that day, however, one of the defendant's daughters who had to execute the deed was absent, and the plaintiff refused to advance the money until her signature was obtained. Subsequently the defendant refused to sign the deed on the ground that it contained the clause for payment of interest from 24th September, 1891. He contended that he was not liable to pay interest from that date. The plaintiff brought this suit, claiming Rs. 1,865-12-0 as damages for the defendant's breach of agreement. The lower Court held that although the original agreement of 31st August, 1891, mentioned no date from which interest should run, the defendant on the 9th December, 1891, had agreed to pay it from 24th September, 1891, and had made no objection on the point until February, 1892. The defendant contended that, if such an agreement was made on the 9th December, 1891, it was without consideration, but the Court held that the plaintiff was at that date at liberty to rescind the agreement altogether, and that he had consented not to rescind in consideration of being paid interest from the 24th December, 1891. The lower Court accordingly passed a decree for the plaintiff.

Semble that time was not of the essence of the contract, but

Held, that in any case, under the circumstances, there was consideration for the agreement made by the defendant to pay interest from the 24th September. The plaintiff clearly regarded himself as entitled to rescind, and at the defendant's request agreed to forbear to do so if the defendant would consent to pay interest from the 24th September, 1891. The claim of the right to rescind was undoubtedly a real one and made in good faith, and the forbearance to enforce it might well be an inducement to the defendant to agree to the plaintiff's terms, and the principle laid down in *Miles* v. *New Zealand Alford Estate Co.* (1) applied.

[R., 6 Ind. Cas, 651 (652) = 47 P.W.R. 1910; 20 Ind. Cas. 429.]

CASE stated for the opinion of the High Court under s. 69 of the Presidency Small Cause Courts Act (XV of 1882) by C. W. Chitty, Chief Judge.

1. This was a suit filed by the plaintiff to recover a sum of Rs. 1,865-12-0 as damages alleged to have been suffered by him in consequence of the defendant's breach of agreement to borrow from the plaintiff a sum of Rs. 30,000 on the security of three properties belonging to the defendant.

[459] 2. The original agreement for mortgage, as to which there is no dispute, bears date the 31st August, 1891, and provides for a loan of the sum of Rs. 30,000 with interest at the rate of 9 annas per cent. per mensem. The mortgagor was to clear the title, and the time fixed for the completion of the agreement was eight days from its date.

3. The facts of the case, as found by me, were as follows :— The mortgage was not completed within the time stipulated, in consequence of the non-production of the title-deeds by prior mortgagees, who were to be paid off out of the moneys advanced by the plaintiff. The same solicitors, Messrs. Little, Smith, Frere, and Nicholson, were acting for both parties and continued so to act up to the end of January, 1892.

4. On the 9th September, 1891, the solicitors sent a letter to the defendant reminding him that the time for completion had expired, and saying that the plaintiff would require interest to be paid on the money

(1) 32 Ch. D. 266.

which he had with him lying idle on the defendant's account. It was, however, thought that a formal tender should be made, and the sum of Rs. 30,000 was accordingly offered to the defendant on the 24th September 1891, but as no deed was then ready for execution, it was not paid. The idea of tender was no doubt erroneous, but it was from the date of the tender, 24th September, 1891, that the plaintiff claimed that interest should run. Putting aside the question of tender as immaterial, I considered that it was nevertheless open to the plaintiff to decline to carry out the agreement, the time for completion of which had gone by, unless the defendant agreed to pay interest on the money from that date, and this was in effect the position taken up by the plaintiff.

5. There was further delay owing to the non-production of the title-deeds by the defendant, on whom it lay to clear the title. There was no imputation of laches on the part of the plaintiff, who was always ready and willing to advance the money, but, in consequence of the defendant's delay, insisted on interest being paid thereon from the 24th September, 1891.

6. The deeds were ultimately procured at the end of November, 1891, or beginning of December, and on the 7th **[460]** December, 1891, the draft mortgage was sent to the defendant for his approval. This draft contained a stipulation for the payment of interest from the 24th September, 1891. The draft was read over to the defendant by his son Cowasji Pestonji (they both read and understood English well) and certain pencil alterations were made by Cowasji: *inter alia* the words "24th day of September, 1891," were scored through with a pencil line and other words written in pencil above them.

7. On the 9th December, 1891, the defendent and Cowasji brought plaintiff to Messrs. Little, Smith, Frere and Nicholson's office, where the matter was discussed in the presence of Byramji Darasha, the Managing clerk. The two main points in dispute were (1) as to what time after due date should be allowed to the mortgagor for payment of interest, and (2) whether interest on the principal sum should run from 24th September, 1891. On the first point the plaintiff gave way, allowing the defendant fifteen days instead of eight as originally provided. With regard to the second point, they declined to accede to the defendant's request, or to advance the money on any other terms, and the defendant ultimately agreed to pay interest from the 24th September, 1891. The pencil alterations in the draft were then written in red ink by Cowasji, except with regard to the words "24th day of September, 1891," where the pencil line and words written above were rubbed out by him. Cowasji then endorsed on the draft "approved as within altered for self and others, 9-12-91" and this was signed by the defendant.

8. There was some further delay on the part of the defendant in getting the necessary power of attorney from one of his prior mortgagees who was absent from Bombay, but ultimately the 26th January, 1892, was fixed as the day for execution. The mortgage-deed was engrossed and contained the stipulation for payment of interest from 24th September, 1891. On the 26th January, 1892, the defendant, his wife, sons and daughters (except Perozbai) attended at the office of Messrs. Little, Smith, Frere and Nicholson to execute the deed, which they were prepared to do. As, however, Perozbai was absent, the plaintiff, acting on the advice of Mr. Nicholson, declined to advance the money until her **[461]** signature was obtained, and another day was to be fixed for execution. No mention was at that time made of the date from which

1893
JAN. 27.

ORIGINAL CIVIL

17 B. 457 = Chitty's S. C. C. R. 367.

interest was to run, nor did the defendant or his sons raise any objection to the form of deed as engrossed.

9. In the beginning of February the defendant consulted other solicitors, but it was not until the 13th February, 1892, when they had written for and obtained a copy of the agreement, that the present contention was raised that the defendant was not liable to pay interest from the 24th September, 1891. It is true that the agreement of the 31st August, 1891, made no mention of the date from which interest should run, but I considered that that did not prevent the parties from subsequently making a verbal agreement which should be binding on the defendant. I found, therefore, that in this case the defendant did, on the 9th December, 1891, agree to pay interest on the principal sum from the 24th September, 1891, and that he made no objection to such agreement until the 13th February, 1892. It was argued that such agreement if so made was without consideration, but I held that the fact of the plaintiff being at liberty to rescind the agreement and consenting not to do so on payment of the interest, was sufficient consideration for such verbal agreement.

10. It was further argued for the defendant that no suit for damages would lie in cases of this kind, and the case *Bain* v. *Fothergill* (1) and similar cases were cited. I held, however, that the law on such matters in this country was as laid down in ss. 73 and 74 of the Indian Contract Act, IX of 1872, and for the proposition that such cases fall within the purview of those sections I was bound by the decision of Farran, J., in the very similar case of *Datubhai Ebrahim* v. *Abubaker Moledina* (2).

11. In this case I considered that damages should be awarded on the footing of the loss of interest sustained by the plaintiff from the 24th September, 1891, until such date as he could be reasonably expected to be able to invest his money on a similar security. Farran, J., allowed four months from the date on which the defendant ultimately repudiated the contract, and I accordingly allowed a similar period, namely four months, from **[462]** the 19th February, 1892. The plaintiff's money or the major portion of it was on current account with the Hongkong and Shanghai Banking Corporation, where interest at the rate of 2 per cent. per annum was allowed up to the 31st December, 1891, and 1 per cent. after that date. I accordingly deducted this from the contract rate of $6\frac{3}{4}$ per cent. and awarded to the plaintiff Rs. 1,197-11-2, being interest on Rs. 30,000 at $4\frac{3}{4}$ per cent. per annum from 24th September, 1891, to 31st December, 1891, and at $5\frac{3}{4}$ per cent. per annum from 1st January, 1892, to 19th June, 1892. I also awarded the plaintiff his costs of the abortive loan, the amount of which it was agreed should be the amount of the bill of costs when taxed, including the costs of taxation it allowed. I also certified the plaintiff's professional costs at Rs. 180.

12. The defendant's counsel requested me to state a case for the opinion of their Lordships on the following questions:—

(i) Whether the defendant was bound to execute the engrossment of the mortgage-deed in the form presented to him on the 26th January, 1892?

(ii) If yes, whether he is liable to the plaintiff in any and what damages?

And I accordingly made my judgment contingent on such opinion.

13. The defendant has deposited Rs. 1,800 in Court as security for the plaintiff's claim together with Rs. 50 to meet the costs of reference.

---

(1) 7 H.L.C. 158.

(2) 12 B. 242.

1893
JAN. 27.

ORIGINAL CIVIL.

17 B. 457 = Chitty's S. C. C. R. 367.

Anderson, for the defendant:—The defendant has not committed a breach of the agreement of 31st August, 1891, and is, therefore, not liable to the plaintiff. Under that agreement he was not bound to pay interest from the 24th September, 1892, and he was, therefore, justified in refusing on the 26th January, 1892, to execute a mortgage-deed, which provided that he should do so. It is said that there was a new agreement on the 9th December, 1891, by which he agreed to pay the interest. We deny there was such an agreement. But, in any case, the plaintiff gave no consideration for it, and it was, therefore, invalid. It is suggested that the plaintiff was entitled to rescind the first agreement **[463]** and that he agreed not to do so if the defendant would pay interest. That is the alleged consideration for the new agreement. But the plaintiff was not entitled to rescind, for time was not and had never been made of the essence of the contract. So there was no new agreement, and the first agreement was still in force in January, 1892, and the defendant was not, therefore, bound to execute the mortgage-deed which was prepared, and the plaintiff is not entitled to compensation. Section 55 of the Contract Act (IX of 1872) does not apply to contracts of sale or mortgage of land. Moreover, defendant's promise to execute a mortgage in eight days was dependent on the plaintiff's promise to have the deed ready within that time. He cited Pollock on Contract (3rd Ed.), p. 478; *Bain* v. *Fothergill* (1); *Rowe* v. *The London School Board* (2); Dart's Vendors and Purchasers (6th Ed.), pp. 483, 1083.

Lang and *Rivett-Carnac*, for the plaintiff:—The Court is bound by the finding of the Chief Judge that there was a new agreement for good consideration on the 9th December, 1891. The mortgage-deed to be executed was necessarily prepared in accordance with that new agreement, and the defendant was bound to execute it.

[SARGENT, C. J.:—Do you say time was of the essence of the contract?]

We say it was, but we say the agreement of the 9th December, 1891, was good whether or not. Even supposing the plaintiff had no legal right to rescind the original agreement, yet if he *bona fide* believed he had, and threatened to do so, unless he were allowed the additional interest, and if under those circumstances the defendant agreed to the new terms, the agreement then made is binding—*Miles* v. *New Zealand Alford Estate Co.* (3); *Callisher* v. *Bishoffscheim* (4).

JUDGMENT.

SARGENT, C. J.—The answer to the first question, whether the defendant was bound to execute the mortgage tendered to him by the plaintiff, on the 26th January, 1892, must depend upon whether the agreement bythe defendant on the 9th December, **[464]** 1891, that the mortgage to be executed should contain a clause that interest should run from the 24th September, 1891, was binding on him. The Chief Judge of the Small Cause Court has found that the plaintiff on that day declined to accede to the defendant's request to advance the money unless the defendant consented to the above clause being inserted in the document, but it is said that there was no consideration for the agreement, and, therefore, that the defendant, if he thought proper, could change his mind and decline to execute a mortgage, except in the form prescribed by the

(1) 7 H. L. C. 158.
(2) 57 L.T. 182.
(3) 32 Ch. D. 266.
(4) L. R. 5 Q.B. 449.

1893
JAN. 27.

ORIGINAL CIVIL.

17 B 457 = Chitty's S. C. C. R. 367.

contract, which provided that interest should run from the execution of the mortgage.

It appears from Mr. Chitty's judgment that he considered that the eight days mentioned in the contract was of the essence of the contract, and if this were so, it cannot be doubted that the plaintiff's forbearance to treat the contract as at an end on the 9th December, if the defendant agreed to the insertion of the clause, would be a good consideration for such agreement. But it was argued that time was not of the essence of this contract. We may remark that the case in I. L. R., 12 Bom., 242, which was referred to in argument by the plaintiff, has no bearing on that point. In that case subsequently to the execution of the contract, the parties definitely agreed that the contract should be finally settled on the 1st March, 1887, and the only question for decision was as to the compensation the plaintiff was entitled to by the defendant's default in performing his part of the contract on that day. If it were necessary to decide the question, we can scarcely doubt that in such a contract it must be presumed that it was not the intention of the parties that the eight days, mentioned in it, should be of the essence of the contract. However, we think that under the circumstances of this case, it is not material to decide the question, as the case of *Miles* v. *New Zealand Alford Estate Co.* (1) shows that there was good consideration for the agreement, although the plaintiff may not have had the strict right he claimed to have on the 9th December of treating the contract at an end. The Judges in that case, although differing as to the application of the rule under the circumstances of the case, were **[465]** all agreed that the forbearance to enforce a real *bona fide* claim is a good consideration for an agreement, although not one which the Court would have given effect to. Here, although the judgment of Fry, J., in *Green* v. *Sevin* (2) shows that, strictly speaking, the plaintiff's right on the 9th December was not to rescind the contract, but to give the defendant notice that he would rescind if the defendant did not complete within a reasonable time (which in the present case would have been a very short period, as the matter has been going on ever since 31st August), still the plaintiff clearly regarded himself as entitled to put an end to the contract, and agreed at the defendant's request to forbear to do so if the defendant would consent to pay interest from the 24th September, 1891. The claim of the right to rescind at once was undoubtedly a real one and made in good faith, and the forbearance to enforce it might well be an inducement to the defendant to agree to the plaintiff's terms. We think that under these circumstances the principle laid down in *Miles* v. *New Zealand Alford Estate Co.* (1) applies, and that there was, therefore, good consideration for the agreement of the 9th December, 1891.

The first question must be answered in the affirmative. As to the second question it cannot be doubted that the plaintiff became entitled to compensation when the defendant finally refused to execute the mortgage with the added clause to which he had agreed, and no argument was addressed to us to show that the compensation was improperly assessed by the Small Cause Court either in manner or account.

The plaintiff to have his costs of the reference, to be taxed by the Taxing Master as on the original side of the High Court.

Attorneys for the plaintiff: Messrs. *Little, Smith, Nicholson and Bowen.*

Attorneys for the defendant: Messrs. *Ardesir, Hormasji and Dinsha.*

(1) 32 Ch. D. 266.

(2) 13 Ch. D. 589.

17 B. 466.

1893
MARCH 10.

ORIGINAL CIVIL.

17 B. 466.

[466] ORIGINAL CIVIL.

Before Sir Charles Sargent Kt., Chief Justice, and Mr. Justice Bayley.

FOOLIBAI (*Original Defendant*), *Appellant v.* RAMPRATAB SAMRATRAI AND ANOTHER (*Original Plaintiffs*). *Respondents.**

[10th March, 1893.]

Practice—Adding a defendant in a suit where leave to sue under cl. 12 *of the Letters Patent*, 1865, *was necessary—Alternative liability—Order to add new defendant—Appeal against such order by original defendant.*

The plaintiff filed this suit against the defendant Foolibai, alleging that she had a firm and carried on business at Sihore in the territory of Bhopal. Before the suit was filed, leave was duly obtained under cl. 12 of the Letters Patent, 1865. In her written statement Foolibai denied that she was the owner of the Sihore firm, or that she was responsible for any of its dealings with the plaintiffs. She alleged that the Sihore firm had belonged to her son Poonamchand, who died in *Samvat* 1943, leaving a daughter named Goolibai, a minor, who was still living. The plaintiff then obtained a summons calling on the defendant Foolibai to show cause why the plaint and proceedings should not be amended by adding the name of Goolibai as a party-defendant. The summons was made absolute, and an order was made to add Goolibai as a defendant. The defendant Foolibai appealed, contending that the effect of adding a defendant would be to institute a new suit against Goolibai without obtaining the necessary leave under the Letters Patent. She relied on *Rampurtab* v. *Premsukh Chandamal* (1).

Held, dismissing the appeal, that the defendant Foolibai could not appeal against the order making Goolibai a party. It might be that Goolibai might object to the order either before or at the hearing, but she only could take the objection. The defendant Foolibai could not take it for her. The case of *Rampurtab* v. *Premsukh Chandamal* (1) did not apply. In that case the proposed amendment altered the cause of action. Here it was left unaffected. On the cause of action as set forth in the plaint, leave had been given under cl. 12 of the Letters Patent to sue the defendant Foolibai, and so far as she was concerned there was no objection to the form of the suit. If her allegation was true, Goolibai and not Foolibai was liable. That question would be decided at the trial.

APPEAL from an order made by the Judge in Chambers, dated 13th August, 1892, directing that one Goolibai should be made a party defendant to the suit.

The suit was filed on the 12th February, 1892, against the appellant (defendant), Foolibai, alone. The plaint alleged that she had a firm at Sihore in the territory of Bhopal, where she formerly carried on business under the name of Chotamal Ballaram; that the plaintiffs had large dealings with the said **[467]** firm; and that in respect of such dealings a sum of Rs. 53,833 was due by the defendant to the plaintiffs. The plaintiffs prayed for judgment for that sum, or, if necessary, for an account, &c.

Before filing the suit leave was duly obtained under cl. 12 of the Bombay Letters Patent, 1865.

On the 15th June, 1892, the defendant Foolibai filed her written statement. She denied that she was the owner of the Sihore firm, or that she was responsible for any of its dealings with the plaintiffs. She alleged that the Sihore firm had belonged to her son, Poonamchand, who died in

* Suit No. 76 of 1892.

(1) 15 B. 93.

1893
MARCH 10.

ORIGINAL CIVIL.

17 B. 466.

Samvat 1943, leaving a daughter Goolibai, a minor, and that Goolibai was still alive.

On receipt of the written statement the plaintiffs' attorney asked the defendant to consent to have Goolibai added as a defendant. On her refusal the plaintiffs on the 25th June, 1892, took out a Judge's summons calling on her to show cause why the plaintiffs should not have liberty to amend the plaint by adding the name of Goolibai, a minor, as a party-defendant and by making such other amendments as might be necessary to be made in the plaint. On the 13th August, 1892, the summons was made absolute, and an order was made to add Goolibai as a defendant and to amend the plaint and proceedings as might be necessary. From this order the present appeal was brought by the defendant Foolibai.

Vicaji, for the appellant (defendant) :—The suit has been filed against us, and for this suit leave has no doubt been obtained. But now the plaintiffs seek to add a new defendant, the effect of which would be to institute a new suit against this new defendant without obtaining leave under the Letters Patent. They cannot do this, and they cannot obtain leave now. It is when the suit is filed that leave must be obtained. It cannot be obtained afterwards—*Rampurtab* v. *Premsukh Chandamal* (1).

Macpherson, for respondents was not called upon.

JUDGMENT.

SARGENT, C. J.—We do not think that the decision in *Rampurtab* v. *Premsukh Chandamal* (1) applies to the present case. In that case the amendment which it was proposed to make in the [463] plaint altered the cause of action, and the Court held that under cl. 12 of the Letters Patent, 1865, the amendment could not be made after the suit had been instituted. Here, however, the cause of action is left unaffected. On the cause of action set forth in the plaint leave has been given under cl. 12 to sue Foolibai; and so far as she is concerned there is no objection to the form of the suit, and it will go on to a hearing. In her written statement she, however, says that she is not the proper defendant, that the firm with which the plaintiffs had dealing was not hers, but her son's, and that her son is dead and has left a daughter Goolibai, who is still alive. If that be true it is clear that Goolibai is the person liable. Whether it is true or false, will be a question for determination at the trial of the case. The plaintiffs naturally wish to have Goolibai added as a defendant, so as, if possible, to obtain judgment in this suit against one or the other. It may be that Goolibai can apply to have her name taken off the record on the ground that the suit has been instituted against her without the necessary leave, or she may possibly take this objection at the hearing. We need not give any opinion on that question. Such an objection, however, can only be taken by her. Foolibai cannot take it for her. Mr. Justice Farran has ordered that Goolibai should be made a party, and Foolibai appeals against that order. We do not think she is the person to appeal, and we dismiss the appeal with costs.

Attorney for the appellant :—Mr. D. S. *Garud*.

Attorneys for the respondents :—Messrs. *Payne, Gilbert and Sayani*.

(1) 15 B. 93.

17 B. 469.

1892
JULY 11.

APPELLATE CIVIL.

17 B. 469.

[469] APPELLATE CIVIL.

Before Mr. Justice Bayley, Chief Justice (Acting), and Mr. Justice Candy.

MALICHAND DHARAMCHAND (*Original Defendant*), *Appellant v.* DALSUKHRAM HARGOVINDAS, LIQUIDATOR OF THE GUJERAT OIL MILL COMPANY, LIMITED (*Original Plaintiff*), *Respondent.** [11th July, 1892.]

Company—Suit by liquidator—Limitation—Allotment of shares—Commencement of shareholder's liability—Indian Companies Act (VI of 1882), s. 125.

The liquidator of the Gujerat Company in September, 1889, sued the defendant as a registered shareholder of the company to recover a sum of Rs. 2,483 due from him in respect of his shares. The plaint set forth the particulars of demand, one of which was Rs. 250, being the amount of deposit payable before allotment on 15th July, 1886, and another a sum of Rs. 250 payable on allotment on 15th July, 1886. This suit was brought on 10th September, 1889, and the defendant contended that the above two items of claim were barred by limitation. The lower Courts, notwithstanding the statement in the plaint, found, as a fact, that the allotment of the shares was really made in November, 1886.

Held, therefore, assuming three years to be the period of limitation, that the claim was not barred. The debt due from the defendant did not become recoverable until he was registered as a shareholder.

SECOND appeal from the decision of Gilmour McCorkell, District Judge of Ahmedabad.

The plaintiff, as liquidator of the Gujerat Oil Mill Company, Limited, sued to recover Rs. 2,483-12-0 (*i.e.* Rs. 2,000 principal and Rs. 483-12-0 interest), from the defendant due as a registered shareholder of the company in respect of ten shares allotted to him.

The particulars of the claim as given in the plaint were as follows :—

			Rs.	A.	p.
Deposit payable before allotment	...	...	250	0	0
Payable on allotment, 15th July, 1886	...	...	250	0	0
First call, 15th November, 1886	...	...	500	0	0
Second call, 20th January, 1887	...	...	500	0	0
Third call, 18th April, 1887	...	...	500	0	0
Total	...		2,000	0	0
Interest	...		483	12	0
			2,483	12	0

[470] The defendant (*inter alia*) as to the first two items pleaded limitation. The suit was filed on the 10th September, 1889.

The Subordinate Judge, relying on the decision in *The Parel Spinning and Weaving Company, Limited, in Liquidation* v. *Manek Haji* (1), found that the claim was not time-barred, and that the plaintiff was entitled to recover interest at 9 per cent. from the 4th July, 1889. He found that defendant's name was not placed in the register until November, 1886. He decreed the plaintiff's claim to the extent of Rs. 2,033, and rejected the rest. In his judgment he remarked as follows :—

"The list of allottees does not appear to have been prepared in pursuance of the terms of the resolution of the 10th June, 1886, but only

* Second Appeal No. 718 of 1891.

(1) 10 B. 483.

1892
JULY 11.
APPELLATE CIVIL.
17 B. 469.

after the last application for allotment was received from Shivlal Mayachand on the 13th November, 1886. The reason why no allotment was made to the defendant before the 1st of that month is obvious enough. The resolution in question only authorizes allotment of shares to those who had made applications for the same. . . . The letters of allotment appear to have been issued about the 25th June, 1886, and, as the defendant's name was not placed on the register until after the 1st November following, none could have been sent to him before the latter date."

On appeal by the defendant the District Judge confirmed the decree.

The defendant then appealed to the High Court.

Starling (with *Govardhanram M. Tripathi*), for the appellant (defendant).—The lower Courts held, on the authority of *The Parell Spinning and Weaving Company, Limited, in Liquidation* v. *Manek Haji* (1), that the present claim is governed by six years' limitation. We contend that the limitation applicable is three years, and, therefore, the claim with respect to the first two items is time-barred. The Bombay decision relied on by the lower Courts is based upon *In re Whitehouse & Co.* (2), but in that case there was merely a summons, and the liquidator had appeared in Chambers. The ordinary rule of law is that a suit is barred after three years, but a summons may be taken at any time. Again, the point involved in *In re Whitehouse & Co.* (2) was specially provided **[471]** for in the Company's Act (of 1862) itself. The other cases referred to in the Bombay decision are *In re National Funds Assurance Company* (3) and *Whitehouse* v. *Jamieson* (4). In the former also a summons was taken out by the liquidator. The above cases are in our favour, and they show that a liquidator merely represents the company, and when he sues as such he can recover only what the company could have recovered.

Russell (with *F. Chalk*), for the respondent (plaintiff) :— A liquidator is not merely a representative of the company ; he is also a representative of the company's creditors. The appellant subscribed the memorandum of association. He is therefore, a shareholder, and as such subject to all liabilities—ss. 61 and 124 of the Indian Companies Act (VI of 1882) ; Buckley on Companies (6th ed.), p. 325 ; Starling on Limitation, p. 291 ; *In re Kathiawar Trading Company* (5).

The position of a liquidator in voluntary winding up is set forth in s. 177 of the Indian Companies Act. If it is once established that the liquidator is a trustee for the creditors of the company, then the limitation would be six years. We strongly rely upon *The Parell Spinning and Weaving Company, Limited, in Liquidation* v. *Manek Haji* (1).

He also cited *Brighton Arcade Co.* v. *Dowling* (6) ; *In re Hull and County Bank* ; *Burgess's case* (7).

JUDGMENT.

CANDY, J.—The only point taken in second appeal is that of limitation with respect to the demand for deposit and the sum payable on allotment of the shares.

In the plaint it is stated that these sums were payable—The deposit *before* 15th July, 1886, and the second sum payable on allotment *on* 15th July, 1886. Apparently the meaning of this date is that in June, 1886, the directors decided that shares should be allotted, and that the sums due on

(1) 10 B. 483. (2) 9 Ch. Div. 595. (3) 10 Ch. Div. 118.
(4) H.L. Sc. 29. (5) See *Times of India*, dated 2nd May, 1887.
(6) L.R. 3 C.P. 175. (7) 15 Ch. Div. 507.

allotment should be payable, on 15th July, 1886. But it is found as a fact, by which finding this Court is bound, that the allotment of the shares in [472] question was really made in November, 1886. This suit was filed in September, 1889, and so, assuming three years to be the period of limitation, the suit would not be barred. For by art. 9 of the articles of association the money became due on the inscription of the defendant's name as the holder of such shares. His liability may have commenced, and the debt may have accrued, when he signed the registered memorandum of association, but the debt could not become recoverable before notice was sent to him for enforcing such liability, or at least before the inscription of his name (*cf.* s. 125, Act VI of 1882). Under these circumstances we confirm the decree of the District Judge with costs.

Decree confirmed.

---

17 B. 472.

APPELLATE CIVIL.

Before Mr. Justice Bayley, Chief Justice (Acting), and Mr. Justice Candy.

CHHOTALAL CHHAGANLAL (*Original Defendant*), *Appellant v.* DALSUKHRAM HARGOVINDAS, LIQUIDATOR OF THE GUJERAT OIL MILL COMPANY, LIMITED (*Original Plaintiff*), *Respondent.**

[11th July, 1892.]

Company—Suit by liquidator against shareholder—Limitation—Commencement of liability of shareholder in respect of shares—Memorandum of association—Subscriber to memorandum—Attestation of signature of subscriber—Want of attestation—Irregular attestation—Indian Companies Act, VI of 1882, *s.* 11.

A suit against a shareholder to enforce liability in respect of his shares, if brought within three years from the date at which his name is inscribed in the register as the holder of such shares, is not barred by limitation.

Where a memorandum of association of a company has been registered, a subscriber cannot divest himself of his liability as a member of the company, although his signature to the memorandum may not have been properly attested. The transaction may be irregular, but it is not void.

THIS was a second appeal from the decision of Gilmour McCorkell, District Judge of Ahmedabad.

The plaintiff as liquidator of the Gujerat Oil Mill Company, Limited, sought to recover Rs. 400 and interest Rs. 97-12-0, in all Rs. 497-12-0, from the defendant, being the amount due by him in respect of two shares held by him in the company.

[473] The defendant Sha Chhotalal Chhaganlal pleaded (*inter alia*) that the suit was time-barred. He also contended that he was not a shareholder, on the ground that his subscription to the registered memorandum of association was not duly attested. The fact was that the witness, who was said to have attested the defendant's signature, had attested other signatures written above that of the defendant, and had written his name in the parallel column. Instead of again writing his name in that column opposite the name of the defendant, the witness had merely made two marks (,,) commonly used to signify "ditto."

The Subordinate Judge allowed the plaintiff's claim to the extent of Rs. 400 only, and disallowed it with respect to interest.

---

* Second Appeal No. 732 of 1891.

1892
JULY 11.
APPELLATE CIVIL.
17 B. 472.

On appeal by the defendant, the District Judge in confirming the decree made the following observations:—

"It is established beyond all reasonable doubt that the defendant's signature appears below the registered articles of association. It is, however, contended that his signature has not been attested as required by law. It is true that the attesting witness has not signed his name in full against the signature of the defendant, but it appears that the witness attested the names just above and below that of the defendant, and the defendant's signature is attested in exactly the same way as those signatures. It appears to me that the requirements of law have been fully satisfied. * * Having become a shareholder by signing the registered articles of association, the defendant cannot divest himself of his legal liability."

The defendant appealed to the High Court.

Chimanlal Hiralal Setalvad, for the appellant (defendant):—In this case, in addition to the point of limitation argued in *Malichand* v. *Dalsukhram* (1), there is the question of attestation. Under s. 11 of the Indian Companies Act (VI of 1882), attestation is necessary for each signature. The defendant's signature is not attested. The marks indicating "ditto" are not a sufficient attestation—*D. Fernandez* v. *R. Alves* (2); *Nitye Gopal Sarkar* v. *Nagendra Nath Mitter* (3). There are cases **[474]** which lay down that a mark is a sufficient attestation, but the mark must be some distinguishing mark, and not mere dots. The provisions of attestation and registration are made as a safeguard against fraud and deception, and, therefore, it is imperative that the attestation should be made in the usual manner.

The provisions of s. 11 of the Companies' Act have not been complied with, and the defendant has not become a shareholder of the company.

Russell (with *F. Chalk*), for the respondent:—Section 11 does not say that the signature of each shareholder shall be attested by a witness. It merely lays down that the signatures shall be attested by one witness at least. In the present case the mark (dots) made by the witness is a sufficient attestation. We further say that for the purpose of the present case no attestation is necessary, because when a memorandum is subscribed to and registered, the person subscribing cannot divest himself of liability—s. 45 of the Indian Companies Act (VI of 1882).

JUDGMENT.

CANDY, J.—Two points have been raised in second appeal: (1) first that the defendant cannot be held to be a shareholder at all, because his subscription to the registered memorandum of association was not duly attested according to law; (2) second, that the claim is barred by limitation.

The point of limitation may be disposed of at once. Assuming three years to be the period of limitation, it is clear on the face of the plaint that three years had not elapsed, when the suit was first brought, since the date when defendant's name was inscribed in the register of members as the holder of such share as he had agreed to take.

With regard to the first point, we are of opinion that, assuming the mark made to represent the signature of the attesting witness to be bad, it would nevertheless be very difficult to hold that the plaintiff, who is proved to have signed the registered memorandum of association, is not

(1) 17 B. 469. (2) 3 B. 382. (3) 11 C. 429.

a member. The language of s. 11 of Act VI of 1882, which follows the English Act, is somewhat peculiar. "The memorandum of association shall be signed by each subscriber in the presence of, and be attested by, [475] one witness at the least." In its strict grammatical sense this would mean that the memorandum of association shall be attested by one witness at the least, not that the signature of each subscriber shall be attested by one witness at the least. Form A in sch. II of the Act contemplates one witness attesting at the foot of the memorandum the signatures of all the subscribers. However that may be, and whatever weight the consideration of the question might have before the registration of the memorandum, we think that when the memorandum has been registered, a subscriber cannot divest himself of his liability. The transaction may have been irregular, but it is not void. Under these circumstances we confirm the decree with costs.

Decree confirmed.

---

17 B. 475.

APPELLATE CIVIL.

Before Mr. Justice Bayley, Chief Justice (Acting), and Mr. Justice Candy.

VISHVANATH BHIKAJI (*Original Plaintiff*), *Appellant v.* DHONDAPPA AND OTHERS (*Original Defendants*), *Respondents.**

[27th July, 1892.]

Landlord and tenant—Inamdar—Enhancement of rent—Landlord's right of enhancement—Ejectment for non-payment of enhanced rent—Plea of permanent tenancy—Decision of Judge not based on evidence given in the case—Practice—Second appeal—Finding of fact when binding in second appeal—Sheri *and* khata *lands—Rights of* khata *tenants not holding under express contract, how proved—Evidence as to similar tenants in similar villages admissible.*

In a suit for ejectment for non-payment of enhanced rent the defendants pleaded (1) that they were permanent tenants, (2) that the plaintiff had no power to enhance, (3) that the enhancement by the plaintiff was unreasonable. The lower Courts held that the defendants were permanent tenants, but were bound to pay a reasonable rent. Their decision was not based on evidence given in the case, but on what was termed a "well known distinction between the *sheri* or private lands of an inamdar and the *khata* or *rayatwar* lands held by recognised tenants." The exercise of certain rights of transfer or inheritance, &c., were regarded as evidence of fixity of tenure at a reasonable rent. On second appeal by the plaintiff to the High Court it was argued that the District Court having found, as a fact, that the defendants were permanent tenants bound to pay a reasonable rent, the High Court in second appeal was bound by that finding.

[476] *Held*, that the case should be remanded for proper enquiry. No doubt, if the appeal in the District Court were conducted as if all the facts recorded by the Subordinate Judge were admitted, the plaintiff could not in second appeal question these facts. But it did not appear that it was admitted that the distinction drawn between *sheri* and *khata* tenants was correct, or that every *khata* tenant, as such, exercised the rights described by the Subordinate Judge. Under the circumstances it was clear that the decision of the District Judge was based neither on evidence nor admissions, and was, therefore, not binding in second appeal.

In determining the rights of *khata* tenants who held under no express contract, the best evidence no doubt, if possible, would be the evidence of custom in the particular village in question, but evidence of similar tenants in similar villages would not be excluded.

---

* Second Appeal No. 279 of 1891.

1892

JULY 27.

APPEL-LATE CIVIL.

17 B. 475.

Mirasdars in an inam village cannot always claim to hold at a fixed rent. An inamdar can enhance their rents within the limits of custom.

[R., 1 Bom. L.R. 373 (380) ; 5 Bom. L.R. 186 (194).]

SECOND appeal from the decision of Dr. A. D. Pollen, District Judge of Belgaum.

Suit to recover possession of fields.

The plaintiff sued to recover possession of two fields (Survey No. 12 and a specified portion of Survey No. 175) situate in the village of Zunzurvad, alleging that they belonged to him as his inam; that they had been in the possession of the defendants as yearly tenants at a rent of Rs. 38, but that he had given them notice; that he called upon them to pay an enhanced rent of Rs. 130 and to execute a rent-note to that effect. The defendants had refused the notice, and the plaintiff, therefore, brought this suit.

The defendants denied that they were yearly tenants, and contended that they were not liable to enhancement of rent; that their family had held field No. 12 since 1820, in which year the village had been granted as saranjam to the family of Chinchnikars; that field No. 175 had been given to them by one of that family on a perpetual lease in or about the year 1844; that the original rent of Survey No. 12 was Rs. 16, which was subsequently enhanced to Rs. 26; that the rent of the other field was fixed at rupees twelve, and was never enhanced; that the plaintiff's demand was extortionate, and was made with a view to deprive them of their holdings; that they were willing to pay such proper and equitable rent as might be fixed by the Court; and [477] that the plaintiff was not entitled to eject them so long as the rent was paid.

The Subordinate Judge found that the plaintiff was not entitled to enhance at his pleasure, but that he might demand a reasonable rent. As there was no satisfactory evidence on the point he ordered that the questions whether the rent now claimed by the plaintiff was excessive, and, if so, what would be the proper amount, should be determined in execution. He made a decree accordingly. In his judgment he made the following observations :—

"We should bear in mind that the fields are situate in an inam village; the defendants have been in possession for forty years and upwards, paying practically an unchanged amount of rent. Plaintiff wants to treat them as mere annual tenants liable to be evicted after due notice, but they appear to me to possess some superior rights. It is a notorious fact that the lands of an inam village are divided into *sheri* ones, which stand under the inamdar's name and *khata* ones under the names of separate holders. Regular heirship proceedings take place i nrespect of the latter, but the former are not dealt with in this way. The rents of the former are collected directly by the inamdar, while there is a legal prohibition against such direct collection of those of the latter. The transfer of the *khata* of the second class requires the passing of the *kabulayat* and *razinama*, while such is not the case of the other class. The Registry Office bears abundant testimony that the *khata* fields are often mortgaged, sold, purchased, sub-let and otherwise disposed of by their holders, and this exercise of those legal rights has never been challenged or interfered with by the inamdar. An annual tenant cannot exercise any such rights for the simple reason that he has no interest in his holding at the expiry of the year. These considerations sufficiently differentiate a

registered tenancy from an annual one, and must give more security to it than what can be claimed by the latter.

* * * *

"In disposing of the question of limit of enhancement, I forgot to state an important point favourable to defendants. It will be seen that these fields were taken up at a time when the holder had a life interest in them, and they were liable to be resumed [478] by Government after the demise of the holder. So defendants' ancestors might reasonably be presumed to have entered into possession under a belief that their eventual landlord, *viz.*, Government, would extend to them the same rights as would be given to its other tenants, and that a liberal margin of profit would be allowed to them at the time of enhancement. The subsequent summary settlement could not affect this understanding to which the present inamdar is, therefore, bound to give effect."

The plaintiff appealed. The District Judge confirmed the decree with slight variations which it is not necessary to state for the purpose of this report.

The plaintiff then preferred a second appeal.

Vasudeo Gopal Bhandarkar, for the appellant (plaintiff) :—The defendants have been the plaintiff's tenants from the year 1844. He has been an inamdar for a much longer time. The lower Courts have held that because the defendants have held possession for a long time, and have been paying a fixed rent, they are permanent tenants. But this does not prove permanent tenancy—*Narayanbhat* v. *Davlata* (1); *Gangabai* v. *Kalapa* (2). The lower Courts have based their decisions on alleged facts, of which no evidence was given, and on inferences from those facts. There is no evidence of permanent tenancy. The lands in dispute are *rayatwar* lands. The plaintiff gave notice to the defendants to pay enhanced rent, or to vacate the lands, and they having failed to do either the plaintiff is entitled to eject them. *Endra Lala* v. *Lallu Hari* (3) is in point.

Manekshah J. Taleyarkhan, for the respondents :—The lower Courts have found as a fact that the lands in dispute are *khata* and not *sheri*, lands, and this finding cannot be upset in second appeal. In *khata* lands in inam villages the tenants have, all over the country, the same hereditary rights which the tenants in Government *khata* land possess. The Subordinate Judge has in his judgment given in detail the rights of such tenants. The conduct of the plaintiff estops him from raising any contention with respect to our rights. In his appeal to the District Court [479] he did not object that the Subordinate Judge had, in the absence of evidence, relied upon his own knowledge, and held that defendants are permanent tenants. As the point was not raised in the lower Court, it cannot now be taken for the first time in second appeal—*Mohima Chunder Roy* v. *Ram Kishore Acharjee* (4); *Devji Goyaji* v. *Godabhai* (5). The facts found by the Subordinate Judge were not disputed in appeal to the District Court, and consequently the inferences drawn by the lower Courts on those facts cannot now be interfered with.

JUDGMENT.

CANDY, J.—Defendants in this and the companion cases being sued in ejectment set up a right as permanent tenants. The plaintiff, the

---

(1) 15 B. 647. (2) 9 B. 419. (3) 7 B.H.C.R.A.C. J. 111.
(4) 15 B.L.R. 142 (155). (5) 2 B.H.C.R. 27.

1892
JULY 27.
APPELLATE CIVIL.
17 B. 475.

inamdar, alleged that they were yearly tenants to whom he had given due notice of enhancement of rent. Defendants pleaded that they were not liable to enhancement of rent, and that in any case they could not be made to pay more than the proper and equitable amount as fixed by the Court.

In suit No. 102, defendants pleaded that field No. 12 had been in their possession for many years, the rent having been raised in 1853 A. D. with their consent from Rs. 16 to 26; that field No. 175 had been leased to them in A. D. 1844 by the then inamdar under a permanent lease, the rent having remained unchanged. Defendants also pleaded that they had spent large sums in improving the fields; and the enhancement of rent claimed by the plaintiff was excessive.

The Subordinate Judge found in suit No. 102 that neither of the fields (Nos. 12, 175) was *mirasi*, and that the lease of No. 175 was certainly not a permanent lease; that both fields appear to have been taken up by defendants when they were mere waste land and turned into good cultivable land by them. He expressed no opinion as to the amount said to have been expended on improvements. His chief ground for holding that there was a limit to the inamdar's power of enhancement was that the defendants' holdings were *khata* holdings, as distinguished from *sheri* lands, *i.e.*, lands in which tenant-rights have lapsed, and which are cultivated by the inamdar by his farm servants. The Subordinate Judge took it to be "a notorious fact" that there **[480]** is such a division of the lands of an inam village, and that the holders of *khata* lands possess and exercise the rights of mortgaging, transferring, and alienating their lands to other people, their holdings being hereditary, and the inamdar never challenging or interfering with those rights. On the above grounds the Subordinate Judge held that the plaintiff could not enhance at his pleasure, but might demand a reasonable rent. The question whether the present enhancement was reasonable, and if not what is the proper amount, he left to be determined at execution.

Plaintiff appealed to the District Judge on the grounds, *inter alia*, that the distinction drawn between *sheri* lands and *khata* holdings was wrong, and that the Subordinate Judge had based his judgment on materials not supplied by the evidence. The District Judge held that the 2nd clause of s. 83 of the Land Revenue Code (Act V of 1879, Bombay), did not apply, "that is to say, it cannot be presumed in the absence of evidence that defendants' tenancy is a permanent one, because there is evidence in this case as to its commencement." The District Judge did not give any distinct finding as to whether the defendants were mirasdars (defendants apparently accepting the finding of the Subordinate Judge in the negative on that point, as also the finding that the lease of No. 175 was not a permanent lease), nor whether they had taken up the lands when waste and brought the same under cultivation, nor as to what sums (if any) had been spent on improvements; but (he went on to say) "as the Subordinate Judge remarks, there is a well known distinction between the *sheri* or private lands of an inamdar and the *khata* or *rayatwar* lands held by recognized rayats. If we find that the rayats in an inam village have been cultivating the same lands for generations at a practically uniform rate, that the lands are heritable and transferable, that on the death of a tenant a *varsa* or heirship enquiry is held (as in Government villages) and the name of the heir invariably entered; if the holdings are the subjects of sale and mortgage without let or hindrance on the part of the inamdar; if

instances of arbitrary eviction or enhancement are unknown; if the tenants' names are recorded as khatedars as in Government villages; if the lands were taken up in order to bring them into a state of cultivation; if the tenants, [481] have spent capital and labour on improvements,—it may generally speaking be inferred that the tenants of such lands are not mere tenants at will or even yearly tenants, but that they enjoy a virtual tenant right and that they have a permanent interest in their holdings subject to the payment of rent. This interest is in accordance with the ancient customs of the country, and it may be also said to rest on an implied contract. From the facts recorded in the lower Court's judgment it would appear that the tenants, who are the defendants in this and in the companion suits, belong to the class of tenants described above, and there does not seem to be any real dispute about this point, though the evidence does not appear to have been specially directed to elucidate it."

It has been contended before us that as the District Judge has found as a fact that the defendants are permanent tenants bound to pay a reasonable rent, this Court is bound by that finding. This might be so, if the finding were based on evidence. In the present case it is admitted that "the facts recorded" by the Subordinate Judge regarding *sheri* and *khata* lands generally are not based on any evidence. He regarded the division between *sheri* and *khata* lands and the rights exercised by the holders of the latter as *notorious*. Plaintiff disputed and still disputes that notoriety. But it was argued before us for the respondent-defendants, that in the appeal in the District Court there was no real dispute, —in fact, it was admitted that there was a well-known distinction between *sheri* and *khata* lands, and that the holders of the latter exercised the rights described by the District Judge, which exercise is good evidence of fixity of tenure at a reasonable rent. No doubt, if the appeal was conducted in the District Court as if all the facts recorded by the Subordinate Judge were admitted, the plaintiff cannot in second appeal question those facts. But the language used by the District Judge will not bear this construction. No doubt the plaintiff or his pleader may have admitted that the defendants did belong to the class of tenants described generally as *khata* tenants; but it would be difficult, in the face of the grounds of appeal as recorded by the District Judge, to hold that it was admitted that the distinction drawn between *sheri* and *khata* [482] tenants was correct, or that every *khata* tenant, as such, exercises the rights described by the Subordinate Judge. There may not to the District Judge have seemed to be any real dispute as to the inclusion of defendants in the class of tenants described as *khata* tenants, but that can hardly be taken as an admission that all the details of the description are correct. Whatever may have been the "point," to the elucidation of which (the District Judge says) the evidence did not appear to have been specially directed, it can hardly have been the exercise by *khata* tenants generally of certain rights, for it is admitted before us that there was no evidence at all on this point. Under these circumstances it is clear that the decision of the District Judge must be taken as based neither on evidence nor admission, and, therefore, not binding in second appeal; and the case must accordingly be remanded for proper enquiry.

It may be remarked that the distinction drawn by the District Judge between *sheri* and *khata* lands, and the rights and privileges assigned by him to the latter, were intended by him to apply solely to those *khata* tenancies in which there is no express contract between landlord

1892
JULY 27.
APPELLATE CIVIL.
17 B. 475.

and tenant. Under s. 85 of the Land Revenue Code (Bombay Act V of 1879), it is incumbent on every superior holder of an alienated village in which there exists an hereditary patel and village accountant to receive his dues on account of rent or land revenue from the inferior holders through the said village officers. By s. 3 'inferior holder' signifies a holder liable to pay the rent or land revenue to a superior holder, and 'tenant' signifies a person who holds by a right derived from a superior holder called his landlord. Thus a tenant is an inferior holder, whose superior holder is his landlord. Now it is easy to conceive a case of land of which tenant-rights have lapsed to the inamdar, but which he does not wish to cultivate by his farm servants; accordingly he leases it, say, on a lease for five years to a tenant, with power of re-entry at the expiration of the term. It would be absurd to say that this tenant is a permanent tenant whose rent could never be enhanced beyond a reasonable rate. And yet the land would be "*khata* or *ryatwar* land held by a recognized tenant;" "the tenant's name is recorded as khatedar as in Government villages;" it is **[483]** a "registered tenancy;" the landlord is prohibited from collecting the rent otherwise than through the village officers. In the same way the landlord may, by a permanent lease, have expressly bound himself never to enhance the rent. Therefore when it is said that the holders of *khata* lands as such have rights of alienation, transfer and inheritance, the reference must be solely to those *khata* tenants who do not hold under express contracts. There is nothing to show that in the village in which are situated the lands now in dispute, there are any *sheri* lands properly so called. All the lands may be *khata* holdings. The plaintiff inamdar deposed in suit No. 383 that there were no *sheri* lands. It is possible that the tenants of some of these lands, though they are not mirasdars, have by local usage in virtue of their length of possession and uniformity of payment of rent or otherwise acquired a right to hold in perpetuity their lands on payment of rent ascertainable by local usage. The District Judge in the cases now before the Court has not arrived at any specific finding as to how many years the defendants and their predecessors in title have held their lands, and as to whether any of the lands were taken up when mere waste, and brought under cultivation at great expense. These are important elements in the consideration of the question whether there is any limit to the landlord's right of enhancement. It is not enough to say "if the lands were taken up, &c.," "if the tenants have spent capital, &c.;" and "it would appear to be admitted that defendants did take up the lands and did spend capital." Clear definite admissions or findings are required on important allegations made by defendants in support of their pleas. The Subordinate Judge held that there had been enhancement in respect to some of these lands; so a clearer finding by the District Court is necessary than the general statement "if we find that the rayats in an inam village have been cultivating the same lands for generations at a practically uniform rate, &c."

Then comes the important question whether *khata* tenants who hold under no express contract reserving or limiting the right of the landlord, have possessed and exercised the rights of mortgaging, transferring and alienating their lands to other people, the holdings being hereditary, and the inamdar never **[484]** challenging those rights or interfering with their exercise. The best evidence, no doubt, if procurable, would be evidence of custom in this particular village; but evidence as to similar tenants in similar villages must not be excluded. As was said in *Prataprav Gujar*

v. *Bayaji* (1), does the tenure by which the lands are held impose, *according to the customary law of the district*, any and what limits upon the power of a grantee from the Government in inam to enhance the rent or assessment payable on account of the said lands? In *Baba* v. *Vishvanath* (2) the plaintiff was the same plaintiff as in the present cases; but the defendant pleaded that he was not bound ever to pay anything beyond the fixed rent of Rs. 11. He did not plead (as here) that he was willing to pay a reasonable rent, and the important question of local usage was not raised.

We may remark here that we do not agree with the Subordinate Judge that, if the lands were leased to the tenants at a time before the inamdar had accepted the provisions of the summary settlement, the tenants must necessarily be presumed to have entered on their tenancy under a belief that should the inam lapse to Government, their rent would not be enhanced beyond a reasonable rate, and, therefore, the present inamdar is bound to give effect to that understanding. The defendants raised no such plea, nor apparently was it accepted by the District Judge. Nor do we agree with the Subordinate Judge that mirasdars in an inam village can always claim to hold at a fixed rent. As stated in *Lakshman* v. *Ganpatrav* (3), an inamdar can enhance the rents of mirasdars within the limits of custom. In the present cases the tenants, though found not to be mirasdars, claim the same right.

Lastly, it must be noted that in these cases a distinct issue was raised as to what should be the limit of the rent, if the inamdar's power of enhancement is limited. We do not think that this should be left to be determined in execution proceedings. As the cases must go down, we think that the question should be decided in the trial, if the inamdar's right of enhancement is found to be limited.

[485] In order that the various questions above indicated may be duly investigated, we reverse the decree of the District Judge and remand the case for a further investigation with reference to the above remarks, with power to take such fresh evidence as may be necessary and legally admissible. Costs throughout should be disposed of on the further trial in such manner as may be just.

Decree reversed and case remanded.

---

17 B. 485.

APPELLATE CRIMINAL.

Before Mr. Justice Jardine and Mr. Justice Telang.

QUEEN-EMPRESS *v.* BHIMA.* [3rd August, 1892.]

Evidence Act (I of 1872), ss. 25 and 26—Confession—Confession made to a police patel, admissibility of—Evidence—Police officer.

A police patel is a police officer within the meaning of ss. 25 and 26 of the Indian Evidence Act (I of 1872). A confession made to a police patel is inadmissible in evidence.

[D., 2 C.W.N. 71 (73); 1 L.B.R. 65 (67).]

---

* Criminal Appeal No. 130 of 1892.

(1) 3 B. 141 (144). (2) 8 B. 228. (3) 3 B. 145, note.

1892
AUG. 3.

APPELLATE CRIMINAL.

17 B. 485.

APPEAL against the conviction and sentences passed by Rao Saheb Venkatrao R. Inamdar, Joint Sessions Judge of Bijapur, in the case of *Queen-Empress* v. *Bhimabin Hanmapa*.

The accused was charged under s. 457 of the Indian Penal Code with house breaking by night with intent to commit rape, and under s. 354 with assaulting the complainant with intent to outrage her modesty.

At the trial the prosecution tendered in evidence a confession made by the accused to the police patel in the presence of the *panch*.

The Sessions Judge admitted this confession on the ground that the police patel was not a police officer within the meaning of ss. 25 and 26 of the Indian Evidence Act.

On this confession as well as on other evidence in the case the accused was convicted under ss. 457 and 354 of the Indian Penal Code respectively, and sentenced to rigorous imprisonment for one year for the first offence, and for six months for the second.

[486] Against this conviction and sentences the accused appealed to the High Court.

There was no appearance for the Crown or for the accused.

JUDGMENT.

JARDINE, J.—The joint Sessions Judge admitted evidence of a confession made by the prisoner to a police patel, holding that a police patel is not a police officer within the meaning of ss. 25 and 26 of the Indian Evidence Act. He thought this novel view of the law is supported by the cases, of *Queen-Empress* v. *Sama Papi* (1) and *The Empress* v. *Ramanjiyya* (2) on Village Munsifs in the Presidency of Madras. But these cases are decided on the view that those Munsifs are Magistrates and not police officers, which cannot be said of police patels in this Presidency. *Vide* the Bombay Village Police Act, 1867. We follow *Queen* v. *Hurribole Chunder Ghose* (3), in which it was held that the term "police officer" in these sections should be read not in any strict technical sense, but according to its more comprehensive and popular meaning, and we are of opinion that the evidence of the confession was inadmissible. But as the conviction can be sustained on the remaining evidence, we dismiss the appeal.

Appeal dismissed.

---

17 B. 486.

APPELLATE CIVIL.

Before Mr. Justice Bayley, Chief Justice (Acting), and Mr. Justice Candy.

BHASKAR PURSHOTAM AND OTHERS (*Original Plaintiffs*), *Appellants v.* SARASVATIBAI (*Original Defendant*), *Respondent.**

[11th August, 1892.]

Hindu law—Verbal gift of immoveable property—Death of the donor—Possession given to the donee by the son of the donor.

One Ganesh Vithal, being possessed of certain lands which were his self-acquired property, died in 1878. On his death-bed he told his son, Purshotam Ganesh, (the plaintiff's father), to give these lands to his (Ganesh Vithal's) daughter,

---

* Second Appeal No. 337 of 1891.

(1) 7 M. 287. (2) 2 M. 5. (3) 1 C. 207.

the defendant. In the following year (1879) Purshotam by a registered deed of gift gave the lands to the defendant. The deed contained the following recital:—"Our vadil (father) Ganesh Vithal has made a gift to you of his self-acquired lands Nos. 101 and 102 of Mauze Vadgaon for your own and your **[487]** children's maintenance, and has directed me (Purshotam Ganesh) to execute an instrument according to law. I (Purshotam Ganesh) hereby execute a deed of gift to you." Shortly after the execution of this document, the defendant was put into possession of the lands, and she admittedly continued in possession down to the commencement of this suit in 1888. The plaintiffs, who were the minor children of Purshotam Ganesh, now sought to recover these lands from the defendant, alleging that on the death of their grandfather, Ganesh Vithal, the lands had devolved by inheritance upon his son Purshotam (their father), and contending that the latter had no power to make a gift of them to the defendant. The lower Court found that the question of Purshotam's competency to give the lands did not arise, as they had already been given to the defendant by his father, Ganesh Vithal, and that Purshotam was simply an instrument in carrying out the wishes of his father, and in executing the deed of gift to the defendant. On appeal, the District Judge considered that the point for determination was whether the gift by Ganesh Vithal to the defendant was valid by Hindu law, not having been accompanied by possession. He held the gift to be valid. On special appeal to the High Court,

Held, dismissing the appeal, that whether the gift by Ganesh Vithal to the defendant was to be regarded as a gift, possession being afterwards given to the defendant, or whether Ganesh Vithal was to be regarded as having constituted himself a trustee and having made Purshotam a trustee to carry out his wishes, the defendant was in lawful possession of the lands, and that the plaintiffs had neither by Hindu law nor otherwise, any legal or equitable claim to have the deed of gift to the defendant cancelled.

[R., 21 M. 10 (17); 21 P.L.R. 1901.]

SECOND appeal from the decision of T. Hart-Davies, Acting District Judge of Poona.

Suit to recover land and to set aside an alleged gift. The plaintiffs alleged that the lands in question were the self-acquired property of their grandfather Ganesh Vithal Gharpure, and that after his death his son (the plaintiffs' father), on whom the lands devolved by right of succession and inheritance, made a gift of them to his sister, the defendant, under a registered instrument of gift. The plaintiffs contended that the property being ancestral in the hands of their father, he had no authority to make a gift of it under the Hindu law; they, therefore, sought to set aside the gift and to recover possession of the property from the defendant.

The defendant contended that the gift to her was a valid gift. She stated that owing to her father's death he had not delivered possession of the land, but that after his death she had been put into possession by his (the donor's) son.

[488] The Subordinate Judge held that though the gift to the defendant was not accompanied with the delivery of possession at the time it was made, nevertheless as possession was subsequently delivered, the gift was valid under Hindu law. He rejected the plaintiffs' claim.

The plaintiffs appealed, and the decree being confirmed by the District Judge the plaintiffs then preferred this second appeal.

(Facts in addition to those stated above appear in the judgment).

Purushottam Parashuram Khare, for the appellants (plaintiffs).—Delivery of possession by a donor and the acceptance by the donee are essential to constitute a valid gift under the Hindu law—*Vasudev* v. *Narayan* (1); *Harjivan Anandram* v. *Naran Haribhai* (2); *Lalubhai Surchand* v. *Bai Amrit* (3); Mayne's Hindu Law, paras. 351, 352. In this case the

(1) 7 B. 131. (2) 4 B.H.C.R.A.C.J. 31. (3) 2 B. 299.

1892
AUG. 11.
APPEL-
LATE
CIVIL.
17 B. 486.

donor Ganesh did not deliver possession. The gift is, therefore, invalid. Moreover, on the death of Ganesh the lands in question devolved on his son (the plaintiff's father) and were ancestral property in his hands. He could not, therefore, alienate it by way of gift to his sister (the defendant).

The case of *Kali Das* v. *Kanhya Lal* (1) is distinguishable. There the object of the gift was not in the possession of the donor and the dispute was between the donor and a stranger. But in this case the donor Ganesh was in possession of the property and could have given possession to the donee. Further, the dispute here is between the donor's representatives and the donee. Ganesh no doubt directed his son Purshotam to execute a deed of gift. Purshotam, however, could not legally do so, for as soon as the property came to him, it became ancestral in his hands. Ganesh died without effectually completing the gift, and the subsequent delivery of possession by Purshotam could not validate his father's incomplete gift.

Vishnu Krishna Bhatavdekar, for the respondent.—We rely on the case of *Kali Das* v. *Kanhya Lal* (1). At the time of making the gift the donor was on his death-bed at Poona and the property **[489]** was 30 miles distant from that place. Under the circumstances the donor did all in his power to complete the gift. By directing Purshotam to execute a deed of gift to the defendant, Ganesh made him a trustee for her. Purshotam carried out the trust, and after his father's death he was in possession of the property on behalf of the donee and not as his father's heir. The following cases were cited:—*Meherali* v. *Tajudin* (2); *Dharmodas* v. *Nistarini Dasi* (3); *Mahomed Buksh Khan* v. *Hoseini Bibi* (4).

Cur. adv. vult.

JUDGMENT.

11*th August* 1892. BAYLEY, C. J. (Acting).—This suit was instituted by the plaintiffs, who are minors, through their mother and next friend Luxmibai against the defendant, who is sister of the plaintiff's father, Purshotam Ganesh, to recover possession of two pieces of land, measuring, respectively, 21 acres 16 gunthas and 25 acres, 36 gunthas, at Vadgaon, in the Maval Taluka of the district of Poona, which they state in their plaint was the self-acquired property of their grandfather Ganesh Vithal, and which on his death devolved upon their father Purshotam in right of succession and inheritance, and of which he made a gift to his sister, the defendant, under a registered instrument of gift, which by Hindu law he was incompetent to do. They pray for a declaration that their father had no authority to transfer the land in dispute by deed of gift, and for a cancellation of the deed, and for recovery of possession of the property in dispute. They also ask for mesne profits and the costs of the suit.

The defendant by her written statement said that the lands in dispute, which were the self-acquired property of Ganesh Vithal were given to her as a gift; that plaintiffs' father with the consent of their mother setting aside Ganesh's act and receiving Rs. 1,800 got the defendant to have the instrument executed in her favour in the form of a deed of gift; that the reason of the instrument being executed in that form was that there were disputes going on between defendant and her husband in regard to her maintenance, and that, in order that the

(1) 11 I.A. 218=11 C. 121.
(2) 13 B. 156.
(3) 14 C. 446.
(4) 15 C. 684.

amount of her *stridhan* might be secured, she paid a part of the amount [490] of her *stridhan* and got the instrument executed, which was not really a deed of gift, though the plaintiffs have described it to be so, and that, in the event of its being decided that the present suit will lie, the plaintiffs are not entitled to possession of the lands unless the sum of Rs. 1,800 and the costs of suit are paid.

Amongst other issues the following were framed by the Subordinate Judge:—

4. Whether the minor plaintiffs' father had authority to make the alleged gift, and whether the lands, the subject of the alleged gift, were the self-acquired property or the ancestral property of the plaintiffs' grandfather, and whether he had made a gift of the same?

5. Whether the alleged deed of gift is proved?

The Subordinate Judge found on the 4th issue that the lands, the subject of the gift, were the self-acquired property of the plaintiffs' grandfather, who had made a gift of the same; on the 5th issue he found that the deed of gift was proved, and rejected the plaintiffs' claim with costs.

The plaintiffs appealed on the ground that it was wrong to hold that the grandfather had made a gift of the lands; that the gift, if made, was not legal, as it was not accompanied by possession; and that the evidence was wrongly weighed.

The District Judge considered that the point for determination appeared to be, was the lower Court correct in holding that the gift by the grandfather, which was without possession, was valid under Hindu law? No further issue was suggested.

The District Judge held that the actual delivery and acceptance was made after Ganesh's death, so that it was doubtful whether his gift was a valid one or not; that on the general principle of Hindu law that a father's promises are looked upon as binding, and that his dying directions should be obeyed, this gift by his son must be held to be valid. He was inclined to think that the rule that possession must be given during the donor's lifetime is not of universally binding application, and that if the gift is sufficiently proved in other ways it would be valid. Accordingly he thought that the gift by the grandfather [491] was valid, and as to the fact of the gift, there was, he thought, no doubt on the evidence which was believed by the Subordinate Judge, supported as it was by the recital in the deed of gift by the grandfather's son Purshotam. He did not think that the transaction as to Rs. 1,800 rendered the gift by the grandfather invalid, and he dismissed the appeal with costs. The plaintiffs specially appealed to the High Court, and on the argument before us it was contended on their behalf that the gift by Ganesh Vithal not having been accompanied by possession must fail.

The lower Courts have found that the plaintiffs' grandfather Ganesh Vithal on his death-bed told his son Purshotam (the plaintiffs' father) to give the lands in dispute to the defendant (daughter of Ganesh and sister of Purshotam). Ganesh died a few days afterwards in 1878. Purshotam in 1879 by registered deed of gift, as to the execution of which there was no dispute, gave the property to defendant. The deed contained this recital: "Our vadil (father) Ganesh Vithal has made a gift to you of his self-acquired lands Nos. 101 and 102 of mauje Vadgaon for your own and your children's maintenance, and has directed me (Purshotam Ganesh) to execute an instrument according to law. I (Purshotam Ganesh) hereby execute a deed of gift to you."

1892
AUG. 11.
APPEL-
LATE
CIVIL.
17 B. 486.

The Subordinate Judge states that Purshotam in his evidence alleged that the deed of gift was executed by him without any direction from his father so to do; but the Subordinate Judge has held that such allegation was false, as besides the recital in the deed of gift above quoted, the plaintiffs' witness No. 15, Hari Dhonddev, the writer of it, deposed that he wrote the words " that the lands were given to defendant by defendant's father " at the instance of defendant, and that Purshotam gave his assent to the insertion of those words. The writer also stated (says the Subordinate Judge) that the clause restricting the alienation of the lands was inserted in the deed of gift at the instance of Purshotam. The Subordinate Judge said that defendant's witnesses, Hari Ganesh Joshi, maternal uncle of defendant and Purshotam, Hari bin Govinda, tenant of the lands in dispute, and Doorgabai, who lived in defendant's house and **[492]** who said she used to go and see Ganesh Vithal during his last illness, all deposed that Ganesh Vithal made a gift of the lands to his daughter, and that he did not see any reason for disbelieving such witnesses on this point, especially because they fully corroborated the recital in the deed of gift that the lands had been given to defendant by her father Ganesh Vithal.

The District Judge, as to the fact of the gift by Ganesh Vithal, concurred in the view of the evidence taken on that point by the Subordinate Judge.

The Subordinate Judge towards the conclusion of his judgment said, and we think correctly said, that the question of the competency or otherwise of Purshotam in making a gift of the lands to defendant did not arise, since they were already given by Ganesh Vithal, and Purshotam was simply an instrument in carrying out the wishes of his father and in executing the deed of gift to defendant accordingly.

The Subordinate Judge found that it was proved by Purshotam that on or shortly after the execution of the deed of gift in 1879 defendant was put into possession of the lands in dispute, and that she admittedly continued in possession down to the commencement of this suit in 1888, a period of nine years.

The Transfer of Property Act (No. IV of 1882) is not yet in force in the Bombay Presidency, and the fact that the gift by Ganesh Vithal was a verbal one is no objection to its validity, if such gift was in other respects in accordance with Hindu law. In *Balaram* v. *Appa* (1) Sir M. Westropp, C. J., in delivering the judgment of the Court says : " We must re-collect that by the law of Hindus, who constitute the great majority of the population and landholders of this country, a deed or writing is not necessary to effect the transfer of land. That transfer may be fully effected by verbal contract or gift, if accompanied by possession—6 Moore's I. A. 267 , 1 Mad. H. C. Rep. 100." Is, then, the circumstance that in the present case the defendant was not put into possession of the lands in dispute during her father's lifetime, but only in the year after his death, fatal to her right to retain them as against the plaintiffs? There are **[493]** decisions in this Court that according to Hindu law, in order to give complete validity to a gift of lands as between donor and donee, the donee must be put into possession. It will be sufficient to quote a recent decision in 1882 on this point. In *Vasudev* v. *Narayan* (2), Sir Charles Sargent, C.J., says : " We think the language of the texts set out *in extenso* in *Hargovan* v. *Narran* (3) and at pp. 327 and 328 of Mr. Justice West's

(1) 9 B.H.C.R. 121. (2) 7 B. 131 (132, 133.) (3) 4 B.H.C.R.A.C.J. 31.

judgment (1) is too clear and express in requiring delivery and acceptance of the subject of the gift to be effected in the case of land by putting the donee into possession in order to give complete validity to a gift as between donor and donee, and their authority in their literal terms has been too frequently and too long recognized by judicial decisions to allow of that ceremoney (in some form or other) being dispensed with otherwise than by legislative enactment." The case of *Dharmodas Das* v. *Nistarini Dasi* (2), which came before the High Court at Calcutta in 1887, was decided on s. 123 of the Transfer of Property Act, IV of 1882. There a man shortly before his death had in 1883 executed a deed of gift of certain land in favour of his daughter, but it was not shown that possession of the property was delivered to her during her father's lifetime. In a suit by the daughter to recover possession, the District Judge, upholding the decision of the Munsif, held that s. 123 of the Act was applicable to Hindus, and that delivery of possession was no longer, if it ever was, necessary to make valid a gift of immoveable property among Hindus. The High Court, consisting of Mitter and Beverley, JJ., supported the view taken by the District Judge and said (p. 488): "We may, however, state here that it is by no means clear under the Hindu law that, to make a gift of immoveable property valid and complete, delivery of possession is essentially necessary. What is laid down in the Hindu law is this, that to constitute a valid gift there must be acceptance by the donee, and one of the modes of acceptance in gifts of immoveable property is delivery of possession on the part of the donor and receipt of possession by the donee." In *Maharaja Moheshur Buksh Singh* v. *Mussamut* **[494]** *Gunoon Koonwar* (3) decided by Kemp and Markby, JJ., in 1866, it was held that the absence of seisin is no objection to the validity of a gift by a Hindu.

Mr. Mayne in his valuable Treatise on Hindu law, s. 351, says that few propositions have been laid down with more confidence than the doctrine that under Hindu law a gift is invalid without possession. Yet Hindu law, properly so called, appears to lay little stress on any such rule as specially applicable to gifts. Gifts, he says, have always been favoured by the Brahmin lawyers, for the obvious reason that they were generally made to Brahmins. The early sages, says Mr. Mayne, discuss the Law of Gifts with special reference to their liability to resumption. That depends on the purpose of the gift or the special circumstances of the giver, and he then proceeds to quote the various dicta of the sages on the point.

During the argument before us, Mr. Khare, pleader for the plaintiffs, called our attention to the evidence of Hari bin Govinda, the tenant of the lands in dispute, who had been present when Ganesh Vithal had made the gift to the defendant, a witness whose statement the lower Courts saw no reason to disbelieve, who stated in cross-examination that Ganesh Vithal said that he bought the property to give to his daughter, that if he recovered he would execute a document to her, if not "you (Purshotam) and my own wife are to execute a deed in favour of the daughter." Clearly, therefore, Ganesh Vithal had no intention of resuming his gift. Mr. Mayne in s. 351 quotes Harita as laying it down broadly that "a promise legally made in words but not performed in deed, is a debt of conscience both in this world and the next." That text is given in Colebrooke's Digest, Vol. I, p. 447. At p. 444 of that Digest

(1) 2 B. 299. (2) 14 C. 446. (3) 6 W.R.C.R. 245.

1892
AUG. 11.
APPELLATE CIVIL.
17 B. 486.

another text of Harita is quoted: "He who gives not what he has promised, and he who takes back what he has given, sinks to various regions of torment, and springs again to birth from the womb of some brute animal."

It is stated by the District Judge that the gift was made by Ganesh Vithal when on his death-bed. His daughter, we were [495] told, was living with him at that time, and the District Judge stated that the lands in question, the object of the gift, were about 30 miles distant from the residence of the donor and donee.

A *donatio mortis causa* of moveable property is recognized in Hindu law—1 West and Bühler, 219 (3rd ed.). At Vol. II of that work, p. 747 (Note (*a*)), it is stated that "a father's promises are looked on as binding, unless the performance of them would prevent the fulfilment of some still more sacred duty. But that the Courts will not enforce such obligations except subject to the conditions of the Statute law where that is in force."

In 1878, when this gift was made, there was not, nor is there yet in the Mofussil of this Presidency any legislative enactment applicable to a gift such as the one now in question. We may here notice the case of *Kumara Upendra* v. *Nabin Krishna Bose* (1). There a Hindu, when on his death-bed, caused certain Government papers for the sum of Rs. 30,500 to be given to his son in his presence, saying: "Bring out the papers and give them to my son," but he did not make or direct any endorsement thereof. Subsequently being asked to endorse them he said: "I am very weak, how can I sign so many papers: when I get a little strength I will sign them, what cause have you for being anxious." Phear, J., decided that it was a good *donatio mortis causa*, which had not the same signification in India as in England. The decree was affirmed on appeal, Sir Barnes Peacock, C. J., holding that the gift was not governed by the strict principles of English law, but by the Hindu law. That by English law there was a valid *donatio mortis causa*, but assuming it to be a gift *inter vivos* it was a valid gift by Hindu law. Sir Barnes Peacock said (p. 122): "If the gift were to be governed by the English law, and treated as a voluntary gift without condition, and not as a *donatio mortis causa*, I think the relation of trustee and *cestui que trust* was created between the donor and the donee." See, too, his remarks at p. 123, to the effect that the donor, if he had lived, or his representatives after his death, could not at law have compelled the donee to have returned the Government papers.

[496] We think it cannot be denied that the decisions in this Court as to the necessity for a donee to be put into possession in order to give complete validity to a gift of land according to Hindu law have been more or less affected by the case of *Kali Das Mullick* v. *Kanhya Lal Pundit* (2) decided by the Judicial Committee of the Privy Council in 1884. Three of the Bombay decisions reported in 4 Bom. H. C. Rep., A. C. J., 31; 7 Bom. H. C. Rep., A. C. J., 4; 10 Bom. H. C. Rep., 491, were criticised and explained in the judgment in that case. It was strenuously argued before the Judicial Committee by Mr. Doyne and Mr. Mayne that the deed of gift, which was the basis of the plaintiff's title, was wholly invalid, as the donor was out of possession at the time, and no possession was ever given to the donee, and that a gift by a Hindu is invalid, without delivery of possession and acceptance. Their Lordships, however, held that by Hindu law a gift of property, whether moveable or immoveable,

(1) 3 B.L.R.O.C.J. 113.

(2) 11 I. A. 218.

may operate, where no question of resumption arises, to give to the donee a right to obtain possession, and is not invalid by reason of its not being immediately followed by possession ; and therefore that where a donor had done all she could to complete the gift, was a party to the suit to set it aside brought by a plaintiff claiming adversely to both parties thereto, and admitted the gift to be complete, it was held that such a gift could not be set aside as utterly invalid because the donor was out of possession, and no possession was ever given to the donee.

In a case that came before the Judicial Committee of the Privy Council in 1888—*Mahomed Buksh Khan* v. *Hosseini Bibi* (1)—where the question was, whether a gift, assuming one to have been made, was good by Mahomedan law, their Lordships say (p. 95) : "The other point was, that the gift was invalid because possession was not given. That subject was considered in a case which came before this Board in 1884—*Kali Das Mullick* v. *Kanhya Lal Pundit*, L. R., 11 I. A., 218. There it is stated that the principle on which the rule rests has nothing to do with feudal rules, and that the European analogy is rather to be found in the cases relating to voluntary contracts or transfers **[497]** where, if the donor has not done all he could to perfect his contemplated gift, he cannot be compelled to do more. In this case it appears to their Lordships that the lady did all she could to perfect the contemplated gift, and that nothing more was required from her. The gift was attended with the utmost publicity, the *hibbanama* itself authorizes the donees to take possession, and it appears that in fact they did take possession. Their Lordships hold, under these circumstances, that there can be no objection to the gift on the ground that *Shahzadi* had not possession, and that she herself did not give possession at the time."

The question as to the right of the defendant in the present case to retain, as against the plaintiffs, the lands, possession of which in fulfilment of his father's directions was given to her by her brother Purshotam in 1879, the year following that in which Ganesh Vithal died, may, we think, be regarded from another point of view. The Subordinate Judge, it will be remembered, considered that the plaintiffs' father Purshotam was simply an instrument in carrying out the wishes of his deceased father Ganesh Vithal.

During the argument of the appeal before us, the Court asked the learned pleaders whether Ganesh Vithal might not be taken to have constituted Purshotam a trustee to carry out his (Ganesh's) intention ? As pointed out to us by the pleader for the plaintiffs, Hari bin Govinda, the tenant of the lands in dispute, whose evidence was considered trustworthy by both the lower Courts, had stated that Ganesh Vithal, after saying that if he recovered he would execute a document, added, but if not, Purshotam and his own wife were to execute a deed in favour of the defendant.

The difficulty which arose in some of the transactions, which in previous cases became the subject of judicial decision, owing to their incomplete or imperfect character, does not arise here where everything that was intended by Ganesh Vithal to be done has been done. In the year after his father's death, Purshotam carried out his father's instruction thus far, *viz.*, he executed the document to the defendant, and she was put in possession of the property. Whether in framing that document **[498]** Purshotam had any power to insert in it the clause prohibiting the

(1) 15 I. A. 81=15 C. 684.

1892
AUG. 11.
APPEL-
LATE
CIVIL.
17 B. 486.

defendant from mortgaging, selling or otherwise alienating the lands to any one else, a clause which the Subordinate Judge says Purshotam admits was written by him of his own will and was not inserted at the instance of the defendant, need not now be considered. It is clear that Purshotam executed the document for the purpose of carrying out his father's wishes. It became necessary for him to execute such deed of gift, since owing to his death his father had been unable to execute a formal deed of gift in his lifetime, and which, had he recovered, he intended to have done.

It must be borne in mind that the gift and directions regarding it by Ganesh Vithal were, as found by the lower appellate Court, made and given when he was on his death-bed.

The case of *Duffield* v. *Elwes* (1) (decided by the House of Lords), where a mortgage was held a good subject of *donatio mortis causa*, shows that there may in England be a good *donatio mortis causa* of an instrument which does not pass by delivery, and that the executors of the donor are trustees for the donee for the purpose of giving effect to the gift. In *In re Dillon* (2), which came before the Court of Appeal in 1890, where it was held that a banker's deposit note was a good subject of a *donatio mortis causa*, Cotton, L. J., and Lindley, L. J., in commenting on *Duffield* v. *Elwes* say that in the case of an incomplete voluntary gift *inter vivos* the Court would not interfere to compel either the donor or his executors to perfect it, but that the House of Lords in *Duffield* v. *Elwes* held, and it was established by that decision, that the principle of not assisting a volunteer to perfect an incomplete gift does not apply to a *donatio mortis causa*.

In *In re Richards* (3) decided by Mr. Justice North in 1887, a testatrix by her will, made in 1873, bequeathed a legacy of £150 to her servant, Elien Harris. In 1877 she handed to Cottrell, her solicitor, a promissory note for £200 signed by herself and payable on demand to Ellen Harris, telling Cottrell not to mention the note to any one but Ellen Harris, but on the **[499]** death of the testatrix to give it to Ellen Harris if she should remain in the service of the testatrix until her death. The testatrix died in 1881 and had never revoked the direction which she had given to Cottrell about the note. It was held that Cottrell was constituted a trustee of the note that he might after the death of the testatrix hand it over to Ellen Harris, if she fulfilled the prescribed condition, and that Ellen Harris was entitled to prove for the amount of the note in the administration of the estate of the testatrix. It was argued on behalf of Ellen Harris that there was a complete gift of the note to her or a declaration of trust of it in her favour, subject only to the condition that she should remain in the service of the testatrix until the death of the latter, and that such condition was fulfilled. On the other side it was contended that the gift of the note was voluntary and was incomplete; it was only intended to be made, not actually made, and that the Court will not aid in perfecting an imperfect voluntary gift. North, J., said (p. 544): "It is sufficient if there was either a complete transfer of the property in the note, or a declaration of trust of it. The testatrix might have made a declaration of trust making herself trustee. It was equally competent to her to make a third person a trustee for the purpose. It appears to me that the note was handed to Mr. Cottrell for the purpose and

(1) 1 Bligh. N. S. 497. (2) 44 Ch. Div. 76. (3) 36 Ch. Div. 541.

with the intention expressed by the testatrix at the time when it was given, which intention was never altered down to the time of her death, and that enough was done to constitute him a trustee of the note for Mrs. Brock (*i.e.*, Ellen Harris) in case she should fulfil the prescribed condition. . . . It appears to me that the note was placed by the testatrix in his hands as a trustee in order that he might hand it over to Mrs. Brock upon the happening of the particular event mentioned by the testatrix. It is not necessary to consider what the power of the testatrix might have been in the meantime, if she had changed her mind because she did not do so."

The question whether a person who purchased a Government Promissory Note of the nominal value of Rs. 5,000 in his own name had constituted himself a trustee of it for his daughter, arose in the case of *Hirbai* v. *Jan Mahomed Khalakdina* (1), **[500]** came before Mr. Justice West, and afterwards before the Court of Appeal consisting of Sir Charles Sargent, C. J., and Bayley, J. Both Courts held that the alleged trust was not established by the evidence, and the suit by Hirbai, the daughter, was dismissed, but without costs, the father's intention that his daughter should have the benefit of the Rs. 5,000, to which, however, he failed to give effect being clear. The law on such subject was very clearly stated by Sir Charles Sargent, C. J., in delivering the judgment of the Court of Appeal. He said (p. 250): "Now the plaintiff's case is that, although there was no complete transfer of the legal ownership in the note, Khalphanbhoy constituted himself a trustee of the note, for the benefit of Hirbai, and that the Court will enforce the trust, although a voluntary one. A long series of authorities in the Courts of Equity in England have established that, although the Court will not assist an incomplete gift, it will give effect to a declaration of trust by the donor when clearly and satisfactorily established. The application of this doctrine to particular cases has, doubtless, given rise to much divergence of opinion; but we think that, having regard to the weight of authority, the law may now be taken to be as stated by Sir G. Jessel in *Richards* v. *Delbridge* (2). "The principle is a very simple one. A man may transfer his property, without valuable consideration, in one of two ways: he may either do such acts as amount in law to a conveyance or assignment of the property, and thus completely divest himself of the legal ownership, in which case the person who by those acts acquires the property takes it beneficially, or on trust, as the case may be; or the legal owner of the property may, by one or other of the modes recognized as amounting to a valid declaration of trust, constitute himself a trustee, and, without an actual transfer of the legal title, may so deal with the property as to deprive himself of its beneficial ownership, and declare that he will hold it from that time forward on trust for the other person. It is true he need not use the words, 'I declare myself a trustee,' but he must do something which is equivalent to it, and use expressions which have that meaning; for, however anxious the Court may be to **[501]** carry out a man's intention, it is not at liberty to construe words otherwise than according to their proper meaning."

At p. 251 the Chief Justice says: "The equitable doctrine of the transfer of ownership by acknowledgment of trust when it is sought to establish it by oral evidence, requires to be applied in this country with the greatest caution; and we cannot doubt that to allow an acknowledgment of trust to be established by the evidence of interested parties speaking

(1) 7 B. 229.

(2) L. R. 18 Eq. 14.

1892
AUG. 11.
APPEL-
LATE
CIVIL.
17 B. 486.

as to conversations which took place seventeen years ago, without the corroboration derived from other evidence pointing irresistibly in the same direction, would be to introduce a most dangerous mode of appreciating evidence in this country and would offer a direct encouragement to perjury."

In the present case no such difficulty or danger exists. From the oral and documentary evidence produced before the Subordinate Judge, both he and the Judge of the lower appellate Court have arrived at the clear conclusion that the lands in question were given by Ganesh Vithal to the defendant, and that as his death a day or two afterwards prevented his carrying out his intention of executing a formal instrument of gift, his son Purshotam executed the deed of gift in obedience to and for the purposes of carrying out the wishes of his father, and possession of the lands mentioned in it was, therefore, given to the defendant. We think that Ganesh Vithal, considering the dying condition he was in, must be taken to have done all or nearly all he could to carry out his intention, but at all events that he must be considered as having constituted himself a trustee and also his son Purshotam a trustee to execute a formal deed of gift of the lands in question to the defendant, although by law no formal deed was necessary. Why Purshotam delayed executing the document for several months, does not clearly appear. When it was at length executed, it had as much binding effect as if it had been executed the day after Ganesh Vithal's death. In executing it, Purshotam was carrying out the trust expressly imposed on him by his father. The property was admittedly the self-acquired property of Ganesh Vithal, and he was at perfect liberty to dispose of it as he thought proper.

[502] The plaintiffs in their ninth ground of appeal presented to this Court object that the lower Court should have construed Ex. 16 (the deed of gift by Purshotam to defendant) and determined the rights of the parties under it. No arguments were addressed to us as to whether or not the defendant, in the events which have happened, took more than a life-interest in the lands in dispute, nor is it necessary for the determination of this appeal for us to consider the extent of the interest which she now has in the property. We cannot gather from the findings on the issues raised in the lower Courts or from the judgments of the Subordinate Judge or of the District Judge that the quality or extent of the defendant's interest in the lands in dispute was either argued or determined.

Upon the whole case, therefore, we are of opinion, whether the gift of the lands in dispute by Ganesh Vithal be regarded as a gift, possession thereof being afterwards given to and taken by the defendant, Ganesh Vithal having, as it appears, bought the property to give to his daughter, or whether Ganesh Vithal be considered as having constituted himself a trustee, and as having also made Purshotam a trustee to carry out his wishes, that the defendant ever since 1879 has been and still is in lawful possession of the lands in dispute, and that the plaintiffs have neither by Hindu law nor otherwise any legal or equitable claim to have the deed of gift (Ex. 16) cancelled or to deprive the defendant of her possession of the property. Consequently the decree of the lower appellate Court must be confirmed and the appeal dismissed with costs on the appellants.

Decree confirmed.

17 B. 503.

1892
AUG. 15.

APPELLATE CIVIL.

17 B. 503.

[503] APPELLATE CIVIL.

Before Mr. Justice Bayley, Chief Justice (Acting), and Mr. Justice Candy.

ANNAJI DATTATRAYA (*Original Plaintiff*), *Appellant v.* CHANDRABAI (*Original Defendant*), *Respondent.** [15th August, 1892.]

Civil Procedure Code (Act XIV of 1882), *s.* 266—*Attachable interest—Vested remainder—Gift—Gift to a woman gives a life-interest.*

The plaintiff sued to have it declared that a certain house was liable to be attached and sold in execution of a decree obtained by him against the defendant's son. The defendant, who was 80 years of age, claimed the house as her absolute property, alleging that her son by a deed had given it to her as a provision for her maintenance. The deed stated that she had been made the owner of the house; that the donor had no right to it, and that it wholly belonged to her.

Held, that the plaintiff was entitled to the declaration prayed for. The surrounding circumstances showed that the house was revertible to the donor on the defendant's death. He had what in English law would be termed a vested remainder on her death, and he had, therefore, a saleable interest during her life. He had an interest which could be attached and sold under s. 266 of the Civil Procedure Code (Act XIV of 1882).

In the case of gifts, as in the case of wills, the well-established rule must be followed that, in the absence of express words showing such an intention, a gift to a woman does not confer an absolute estate of inheritance which she is enabled to alienate.

[R., 19 B. 36; 29 B. 306 (311)=6 Bom. L.R. 975 (978); 1 Bom. L.R. 303 (307); 3 Bom. L.R. 790 (791); 6 Bom. L.R. 625 (627); 9 O.C. 119 (122); 1 S.L.R. 211 (214); **Expl.,** 32 C. 1051 (1057)=2 C.L.J. 50=9 C.W.N. 784; **D.,** 22 B. 984 (986).**]**

THIS was a second appeal from the decision of Dr. A. D. Pollen, District Judge of Belgaum.

The plaintiff sued for a declaration that a certain house was liable to be attached and sold in execution of a decree obtained by him against the defendant's son, Ravji Raghunath Karnik, in the Bombay Court of Small Causes.

The defendant Chandrabai contended that the house was her absolute property under an assignment from her son Ravji Raghunath for her separate maintenance. The assignment was in the following terms:—

"You are my adoptive mother. We lived together till to-day, but we cannot live together hereafter. If you live apart I am not likely to provide maintenance for you at the proper time. Hence as a provision for your support I have delivered my house to you and made you the owner thereof. You should live in the house and let it to others. You may recover its rent direct. I have no **[504]** right to it. It wholly belongs to you. I have this day delivered possession of the house to you, and caused the tenants to execute *kabulyats* in your favour. I have not mortgaged or sold the house to others. I have no right to do so in future. You will hereafter have no claim for maintenance against me. You should support yourself by the rent of the house. I have no objection to your managing the house according to your pleasure."

The Subordinate Judge found that the house was liable to sale in execution against Ravji Raghunath subject to the defendant's right to enjoy it till her death, and decreed the claim making the declaration sought for.

---

* Second Appeal No. 321 of 1891.

1892
AUG. 15.

APPELLATE CIVIL.

17 B. 503.

The defendant appealed, and the District Judge reversed the decree. The plaintiff preferred a second appeal.

Vasudeo Gopal Bhandarkar, for the appellant.—The question is whether the appellant, who is the judgment-creditor of Ravji, is entitled to sell the house in dispute in execution of his decree. The effect of the deed made by Ravji in his mother's favour is to give her only a life-estate, and Ravji has a vested right in remainder—*Hirabai* v. *Lakshmibai* (1); *Seth Mulchand* v. *Bai Mancha* (2); *Koonjbehari* v. *Premchand Dutt* (3). Unless an express power of alienation is given to the widow in the document itself she cannot alienate—*Ganpat Rao* v. *Ram Chandar* (4); *Umes Chunder Sirkar* v. *Zahur Fatima* (5). The present is, therefore, not a case of contingent interest, and consequently it does not fall under the provisions of s. 266 (*k*) of the Civil Procedure Code.

Mahadeo Chimnaji Apte, for the respondent.—Though the document does not authorize the mother to alienate, still the question with respect to succession after her death is to be taken into consideration. If Ravji be not alive at the time, some other person would succeed, but if he be living he would succeed as heir to his mother. His interest is, therefore, contingent and not a vested remainder; consequently the case is governed by s. 266 (*k*) of the Civil Procedure Code—*Ram Chunder Tantra Doss* v. *Dhurmo Narain Chuckerbutty* (6). Under the **[505]** document the son has given up all his rights to the property till his mother's death, and his interest is contingent upon his surviving her. During the lifetime of the mother, at least, his interest being contingent, it cannot be sold—*Bebee Tokai Sherob* v. *Davod Mullick Fureedoon* (7). Under the document the mother has become absolute owner, because at the outset the document purports to be *malaki patra* (deed of ownership). Further, in the body of the document it is distinctly stated that she is made the full owner, and is to deal with the property as she likes.

JUDGMENT.

CANDY, J.—We are unable to agree with the view taken by the District Judge, that Ravji had no saleable interest in the house, on the ground that the conveyance executed by him in favour of his adoptive mother was an absolute transfer of full ownership, and, therefore, Ravji's right to succeed to the property on his mother's death, if she still had an interest in it at the time of her death, was, as a mere contingent interest, not liable to attachment and sale under the Civil Procedure Code. We think in the case of gifts as in the case of wills, that the well-established rule must be followed, *i. e.*, that in the absence of express words showing such an intention, a gift to a woman does not confer an absolute estate of inheritance which she is enabled to alienate (see *Herabai* v. *Lakshmibai* (1) and *Koonjbehari* v. *Premchand Dutt* (3)).

It may be assumed that a Hindu generally desires that an estate, especially an ancestral estate, shall be retained in his family; and it may be assumed that a Hindu knows that, as a general rule at all events, women do not take absolute estates of inheritance which they are enabled to alienate (*Mahomed Shumsool* v. *Shewukram* (8)). Now what are the surrounding circumstances here? It is admitted that

---

(1) 11 B. 573. (2) 7 B. 491. (3) 5 C. 684. (4) 11 A. 296.
(5) 18 C. 164. (6) 15 W. R. F. B. 17. (7) 6 M. I. A. 510.
(8) 2 I. A. 7 (14).

defendant, the adoptive mother, is over 80 years old; and the deed A recites that Ravji makes over to her the house in question (which is admittedly the only ancestral property remaining in the family) as a provision for her maintenance. She is to support herself by "the rents, &c., of the house." There are no words giving her **[506]** expressly the power to alienate the property. She is made *owner* thereof, but that is quite consistent with a life-interest. We have no doubt, therefore, that the Subordinate Judge was right in holding that the surrounding circumstances show that the house was revertible to Ravji on the lady's death. If so, then Ravji had a saleable interest in the house during the lady's life. The Subordinate Judge quoted a case in which the rights of an adopted son in the family property were, by express agreement, deferred till the death of his adoptive mother—see *Chitko Raghunath* v. *Janaki* (1); and this Court held in second appeal, No. 547 of 1888, decided 18th December, 1889, that such rights could be attached and sold. Whatever may have been the rulings under Act VIII of 1859, it is clear that, under the present Civil Procedure Code, Ravji's interest could be attached and sold. The lady had an estate for life with power to appropriate the profits; and Ravji had what would be termed in the phraseology of English law a vested remainder on her death (*Cf. Bhagbutti* v. *Bholanath* (2)). Such a property is capable of being attached under s. 266, Civil Procedure Code. It does not fall within the description of an expectancy or of a merely contingent or possible right or interest (*Umes Chunder Sircar* v. *Zahur Fatima* (3)).

Under these circumstances we must reverse the decree of the District Judge and restore that of the Subordinate Judge, with all costs on defendant.

Decree reversed.

17 B. 507.

[507] APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Telang.

ROSHANLAL (*Original Defendant*), *Applicant v.* LACHMI NARAYAN (*Original Plaintiff*), *Opponent.** [6th September, 1892.]

Presidency Small Cause Courts Act (XV of 1882), *s.* 37—*Decree*—Ex parte *decree*—*Application to set aside* ex parte *decree*—*Limitation*—*Limitation Act* (*XV of* 1877), *sch. II, art.* 164.

Section 37 of the Presidency Small Cause Courts Act (XV of 1882) does not apply to an *ex parte* decree.

An application to set aside an *ex parte* decree passed by a Presidency Court of Small Causes falls within the terms of s. 108 of the Code of Civil Procedure (Act XIV of 1882), and the period of limitation for such an application is thirty days as prescribed by art. 164 of the Limitation Act (XV of 1877).

THIS was an application under s. 622 of the Code of Civil Procedure (Act XIV of 1882).

One Lachminarayan Makhanlal filed a suit in the Presidency Court of Small Causes to recover a sum of Rs. 1,999-15-6 from the applicant Roshanlal Gokhal.

---

* Application No. 110 of 1892.

(1) 11 B. H. C. R. 199. (2) 2 I A. 256 (259, 260). (3) 18 C. 164.

1892
SEP. 6.

APPELLATE CIVIL.

17 B. 507.

Roshanlal was described in the plaint as residing at Hatras and carrying on business in Bombay by his *munim*, Jaganath Badridas.

The summons issued to the defendant Roshanlal was served upon his alleged *munim*, who it appears did not communicate the fact of the service to Roshanlal.

The suit came on for hearing on the 22nd March, 1892, when an *ex parte* decree was passed against Roshanlal.

The decree was transferred for execution to the Court of the Subordinate Judge at Aligarh, in the North-West Provinces, within whose jurisdiction the defendant was residing.

On the 9th April, 1892, certain property belonging to the defendant was attached in execution of the decree.

Thereupon the defendant applied to the learned Judges of the Small Cause Court at Bombay to set aside the *ex parte* decree, alleging that he had not been served with the summons, and **[508]** that Jaganath Badridas was not his *munim*, and had no authority to accept service on his behalf.

On the 3rd May, 1892, this application was rejected as time-barred under s. 37 of the Presidency Small Cause Courts Act XV of 1882.

The defendant Roshanlal thereupon made the present application to the High Court under its revisional jurisdiction.

A rule *nisi* was granted, calling upon the plaintiffs to show cause why the *ex parte* decree should not be set aside.

Jardine (with *Bhaishankar Nanabhai*), showed cause:—The present case falls under s. 37 of the Presidency Small Cause Courts Act (XV of 1882). That section applies to every decree and order of the Small Cause Court, except a decree based upon an award. An application to set aside an *ex-parte* decree must, therefore, be made within eight days as provided by that section. The procedure laid down by s. 108 of the Code of Civil Procedure (XIV of 1882) and the period of limitation prescribed by art. 164 of the Limitation Act (XV of 1877) are inconsistent with the special procedure laid down in s. 37 of the Small Cause Courts Act. They are, therefore, inapplicable under s. 23 of the latter Act. In the present case the application to set aside the *ex parte* decree was made more than a month after the date of the decere. It is, therefore, time-barred.

Hart (with him *Manekshah Jahangirshah*) *contra*:—The procedure laid down in s. 108 of the Code of Civil Procedure (XIV of 1882) is the only procedure to be adopted for setting aside an *ex parte* decree. It is not inconsistent with the provisions of s. 37 of the Small Cause Courts Act, which contemplates cases in which a decree is to be reviewed or a new trial sought. To such cases alone the eight days' limitation applies. An application to set aside an *ex parte* decree is governed by art. 164 of the Limitation Act (XV of 1877). The present application is, therefore, within time.

JUDGMENT.

PARSONS, J.—We think the Chief Judge of the Small Cause Court was wrong in applying to the application under review the provisions of s. 37 of the Presidency Small Cause **[509]** Courts Act, 1882, and the period of eight days' limitation therein prescribed. The application was one to set aside a decree that had been passed *ex parte* against the applicant. It comes strictly within the terms of s. 108 of the Code of Civil Procedure, and the period of limitation for an application made under that section is

thirty days from the date of executing any process for enforcing the judgment (see Act XV of 1877, sch. II, art. 164). Section 108 is one of the sections comprised in chap. VII of the Code of Civil Procedure, the whole of which is in terms extended to the Court of Small Causes by s. 23 of the Presidency Small Cause Courts Act, 1882, which provides that the procedure prescribed thereby shall be followed, except where such procedure is inconsistent with the procedure prescribed by any specific provisions of this Act. It is argued that the procedure prescribed in s. 108 is inconsistent with the procedure prescribed in s. 37 of the Act. We cannot assent to this argument. Section 37 deals with new trials and revisions of decrees and orders. The procedure under which *ex parte* decrees may be set aside is in no way inconsistent with a procedure under which a decree or order may be reviewed or a new trial ordered. Both exist under the Code of Civil Procedure, and there is no reason why both should not exist under the Small Cause Courts Act. In fact the intention that both should exist seems beyond doubt. Section 108 contains a procedure by which *ex parte* decrees alone can be set aside, and its extension to the Court of Small Causes would be quite meaningless if they could also be set aside under some specific provision contained in the Act itself. The period of limitation allowed by s. 37 is so short that that circumstance by itself militates strongly against the supposition that the section applies to *ex parte* decrees.

We make the rule absolute. We send back the application to be disposed of under the provisions of s. 108 of the Code of Civil Procedure on its merits. We order the costs of this rule to be costs in the application before the Small Cause Court.

Rule made absolute.

---

17 B. 510.

[510] APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Telang.

PITAMBERDAS (*Original Plaintiff*), *Applicant v.* JAMBUSAR TOWN MUNICIPALITY (*Original Defendant*), *Opponent.**

[6th September, 1892.]

Estoppel—Tax—Payment of a tax for one year without protest—Payment of the tax in a subsequent year under protest—Suit to recover money so paid—Cause of action.

The plaintiff paid a house tax, at the rate of Rs. 6, for the year 1890 without any protest. When the tax was sought to be levied from the plaintiff at the same rate for the year 1891, he objected to the levy as illegal and excessive, and paid the tax under protest. He then sued to recover what he alleged was an excess charge of Rs. 5 in respect of the tax for 1891. His claim was rejected on the ground that he was estopped from recovering the alleged excess by reason of his having paid the tax for 1890 without protest.

Held, that the suit was not barred. The levy of a tax in each year gives a new and distinct cause of action, and the payment of the tax without protest for one year does not bar a suit to recover a sum paid in a subsequent pear under protest on account of a tax which was not legally chargeable for that year.

THIS was an application under s. 622 of the Code of Civil Procedure (Act XIV of 1882).

This action was instituted by the plaintiff against the Town Municipality of Jambusar to recover Rs. 5, which he alleged to be an

---

* Application No. 100 of 1892.

1892
SEP. 6.

APPEL-
LATE
CIVIL.

17 B. 510.

excess charge in respect of the house tax levied from him for the year 1891.

The plaintiff alleged that his house had been overvalued for the purpose of the tax; that though he was liable to pay the tax at the rate of Re. 1 only, a tax of Rs. 6 per year had been levied from him for the years 1890 and 1891.

The Subordinate Judge held that as the plaintiff had paid the tax at the rate of Rs. 6 without any protest for the year 1890, he was estopped from recovering the alleged excess charge for the year 1891. He also held that the suit was barred by limitation. He, therefore, rejected the plaintiff's claim.

Against this decision the plaintiff applied to the High Court under its revisional jurisdiction.

[511] *Nagindas Tulsidas*, for the applicant.

There was no appearance for the opponent.

JUDGMENT.

PARSONS, J.—The decision of the Subordinate Judge with Small Cause Court powers on the first issue is not according to law. Plaintiff paid the house tax at the rate of Rs. 6 for the year 1890 and also for the year 1891. He sued for the recovery of what he alleged was an excess charge of Rs. 5 in respect of the tax for the year 1891 only. The Subordinate Judge held that the fact of his not having issued a notice, or presented an application against the charge of Rs. 6 for the year 1890, barred—that is, estopped—him from bringing the present suit. But this is not so. The levy of the tax in each year would give a new and distinct cause of action, and the payment of the tax without protest for one year would not bar a suit to recover a sum paid in a subsequent year under protest on account of a tax which was not legally chargeable for that year on the plaintiff.

With reference to the finding on the 4th issue (that the suit is time-barred), we would observe that if the valuation of the plaintiff's house was made annually, a fresh cause of action in respect of over-valuation would also arise annually even if the valuation remained the same; and the fact that no objection had been made to the valuation for the year 1890 would not render this suit, which is based on an alleged over-valuation for 1891, time-barred. It would be in time, provided that it is brought within the period allowed by s. 48 of the Municipal Act of 1884 counting from the date of the act complained of, that is, the overvaluation made in 1891.

We make the rule absolute, and return the case for trial on the merits. Costs of this application to be costs in the cause.

Rule made absolute and case remanded.

17 B. 512.

1892
SEP. 27.

APPELLATE CIVIL.

17 B. 512.

[512] APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Telang.

BHASKER TATYA SHET AND OTHERS (*Original Defendants*), *Appellants v.* VIJALAL NATHU (*Original Plaintiff*), *Respondent.** [27th September, 1892.]

Limitation Act (*XV of* 1877), *s.* 19—*Acknowledgment—Manager of a joint Hindu family—His authority to acknowledge a family debt—Hindu law—Manager.*

The manager of a joint Hindu family has authority to acknowledge the liability of the family for the debts which he has properly contracted, so as to give a new period of limitation against the family from the time the acknowledgment is made. He is an agent duly authorized in this behalf within the meaning of s. 19 of the Limitation Act XV of 1877.

Chinnaya Nayudu v. *Gurunatham Chetti* (1) followed.

[**F.**, 18 M. 456 (457); **R.**, 20 B. 61 (74); 37 C. 461=11 C.L.J. 484=14 C.W.N. 741 (745)=5 Ind. Cas. 484; 3 Bom. L. R. 144 (149); 9 Bom. L.R. 1289 (1292); 20 M.L.J. 811.]

SECOND appeal from the decision of Rao Bahadur G. A. Mankar, First Class Subordinate Judge of Thana, A.P., in appeal No. 204 of 1889 of the District File.

The plaintiff sued to recover Rs. 632-3-3 as principal and Rs. 64-4-9 as interest due on a *khata* or account adjusted and signed by defendant No. 1 on 7th November 1885.

The plaintiff sought to make the defendants Nos. 2, 3 and 4 also liable to pay the debt in question, on the ground that they were younger brothers of defendant No. 1, living in union with him, and therefore bound by his acts as a manager of a joint Hindu family.

Defendant No. 1 admitted the plaintiff's claim.

Defendants Nos. 2, 3 and 4 pleaded that the debt in question was not incurred for the benefit of the family, and that defendant No. 1 had no authority to bind them by executing the *khata* sued upon.

Both the lower Courts awarded the plaintiff's claim as against all the defendants, holding that the defendant No. 1 had contracted the debt as a manager for the benefit of the family, and that the *khata* sued upon was binding on all the defendants.

Against this decision defendants Nos. 2, 3 and 4 preferred a second appeal to the High Court.

[513] *Vasudev Gopal Bhandarkar*, for appellants.—The *khata* sued upon is an acknowledgment of a debt. The question is, whether it is a sufficient acknowledgment within the requirements of s. 19 of the Limitation Act (XV of 1877). I contend that the manager of a joint Hindu family has no authority to acknowledge a debt due by the family so as to keep it alive. He is not an "agent duly authorized in this behalf" within the meaning of s. 19 of the Act—*Kumarasami Nadan* v. *Pala Nagappa Chetti* (2) and Mayne on Hindu Law, s. 308.

Rao Saheb *Vasudev J. Kirtikar*, for the respondent, was not called upon.

---

* Second Appeal No. 334 of 1891.

(1) 5 M. 169.

(2) 1 M. 385.

1892

SEP. 27.

APPELLATE CIVIL.

17 B. 512.

JUDGMENT.

PARSONS, J.—The finding of the Court below that the debt was contracted by the first defendant, the manager of the family, for the benefit of the family is binding upon us in second appeal, and we see no reason to interfere with it on the ground of any presumption being illegally made, or *onus* wrongly placed.

The only other question argued before us relates to the power of the manager of a joint Hindu family to acknowledge the liability of the family in respect of a debt which is not at the time barred by the law of limitation, so as to give a new period of limitation against the family from the time when the acknowledgment is signed. The answer to the question, which is one that arises under s. 19 of the Limitation Act, 1877, depends upon whether the manager is an agent of the family, duly authorized in this behalf. In the case of *Kumarsami Nadan* v. *Pala Nagappa Chetti* (1), it was held that "the relation of the managing member of a Hindu family to his co-parceners does not necessarily imply an authority upon his part to keep alive, as against his co-parceners, a liability which would otherwise become barred." This case was referred to, apparently with approval, by a Bench of this Court in *Naranji* v. *Bhagvandas* (2). Since then, however, the Full Bench of the Madras High Court in *Chinnaya Nayudu* v. *Gurunatham Chetti* (3) has decided that "a manager has authority to make payments for the family, he has the same authority to acknowledge as he has to create debts." This later decision appears to us to be correct, [514] and we follow it. We can see no practical difference between the power to create a debt and the power to acknowledge a liability for the debt so created. Ordinarily the power to do the one impliedly involves the power to do the other. No greater authorisation is needed for the one act than for the other. If then, by Hindu law the manager of the family has under certain conditions authority to contract debts for which the family is liable, he has by the same law authority to acknowledge the liability of the family for the debts which he has properly contracted. This latter authority is, we think, entitled equally with the former to be considered a part of the functions of that member who is managing on behalf of the family. The exercise of such an authority must often be necessary and may be very beneficial to the family. In our opinion the manager must ordinarily be held to be an agent duly authorized in this behalf within the meaning of s. 19 of the Limitation Act, 1877. Evidence may of course be adduced in each case of facts or circumstances to show the contrary, but there is no such evidence in this case, the appellants having rested their defence upon the allegation that the family was not joint when the acknowledgment in question was made. We confirm the decree with costs.

Decree confirmed.

(1) 1 M. 385. (2) P. J. 1891, p. 238. (3) 5 M. 169.

17 B. 514.

1893
MARCH 23.

ORIGINAL CIVIL.

17 B. 514.

ORIGINAL CIVIL.

Before Mr. Justice Starling and before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Telang.

In re PREMJI TRIKUMDAS.* [11th and 23rd March, 1893.]

Civil Procedure Code—(XIV of 1882), s. 267—Practice—High Court Rule No. 183—Order made by a Judge in chambers on client to pay taxed costs of his attorney—Right of attorney to execute such order as a decree—Application under s. 622 of Civil Procedure Code (XIV of 1882) to review such order.

An order obtained from a Judge in chambers by an attorney against his client for the payment of costs is a decree or order, to the execution of which the provisions of chap. XIX of the Civil Procedure Code (XIV of 1882) apply.

[515] Section 267 of the Civil Procedure Code is applicable to all the property of the judgment-debtor out of which the decree can be satisfied either by delivery in obedience to the decree or by sale.

The words "liable to be seized" contained in s. 267 of the Civil Procedure Code are words of description pointing out the kind of property in respect of which an enquiry can be held, *viz.*, any property which is attachable under the decree.

Property of a judgment-debtor which he has mortgaged is *prima facie* liable to be seized in execution of a decree against him, and the fact that he has mortgaged it will not prevent its being attached and sold in execution of the decree subject to the mortgage-debt.

A person may be examined, under s. 267, in respect of property which is *prima facie* the property of the judgment-debtor, although such person may allege that he is a mortgagee in possession of the attached property.

Section 622 of the Civil Procedure Code (XIV of 1882) does not apply to a case where the order of which review is sought, is made by the High Court. The Court referred to in s. 622 is a Court other than the High Court.

[R., 54 P.R. 1901=45 P.L.R. 1901.]

SUMMONS in chambers.

On the 26th January, 1893, Messrs. Bhaishankar and Kanga, attorneys, took out a summons calling on Premji Trikumdas to show cause why he should not be ordered to pay to them a sum of Rs. 6,256-2-1, being the balance of taxed costs due to them in respect of certain suits in which they had acted as his attorneys. The summons was obtained under Rule 183 of the High Court Rules, which is as follows:—

"An attorney, when he has taxed his bill of costs against his client, may obtain an order in chambers for payment of the sum allowed on taxation, and such order may be executed under chap. XIX of the Code of Civil Procedure."

On the 6th February, 1893, the above summons was made absolute, and Premji Trikumdas was ordered to pay Messrs. Bhaishankar and Kanga the said sum of Rs. 6,256-2-1.

On the 9th February, 1893, Mr. Bhaishankar Nanabhoy, the senior partner of the firm of Bhaishankar and Kanga, filed an affidavit, in which he alleged that the said Premji Trikumdas was concealing himself, and keeping out of the way, in order to delay and defeat the execution of the above order passed against him. He further alleged that Premji Trikumdas had mortgaged certain immoveable property to his wife, Premabai, and had pledged [516] valuable ornaments to a Marwari, Jana Ookha, and

* In the matter of suits Nos. 657 of 1869, 421 of 1883, 374 of 1890, 613 of 1890, 461 of 1891, and 580 of 1891.

1893
MARCH 23.

ORIGINAL CIVIL.

17 B. 514.

that these three persons, *viz.*, Premji Trikumdas, Premabai, and Jana Ookha, were able to give information as to property liable to be attached in execution of the said order.

Upon this affidavit an order was obtained on the 9th February 1893 under s. 267 of the Civil Procedure Code (XIV of 1882), requiring Premji Trikumdas, his wife Premabai and Jana Ookha to attend before the Judge in chambers to be examined in respect of any property in their possession liable to be seized in satisfaction of the order of the 6th February, 1893, and to answer all such questions as might be put to them, &c., and requiring the said Premabai to produce all deeds and documents relating to any of the immoveable property mortgaged, or alleged to have been mortgaged, with her by the said Premji Trikumdas, &c.

Premabai thereupon filed an affidavit, in which she stated that on the 3rd December 1891 Premji Trikumdas had mortgaged certain immoveable property to her, and that having failed to pay her the interest due on the mortgage he had given her possession of the property on the 21st October 1892, since which date she had continued in possession: and that on the 9th February Messrs. Bhaishankar and Kanga had attached the said property under an order of 6th February 1893. On the allegations contained in this affidavit she, on the 17th February 1893, obtained a summons calling on Messrs. Bhaishankar and Kanga to show cause why the above order of the 9th February 1893 should not be set aside.

The summons now came on for hearing.

Macpherson, for Messrs. Bhaishankar and Kanga showed cause.

Jardine, for Premabai in support of the summons.

The following authorities were referred to:—*Bhugobat Singh* v. *Ram Adhin Singh* (1); *Maharajah Rajendro Kishore Singh Bahadoor* v. *Hyabul Singh* (2); *Kassirav* v. *Vithaldas*(3): Civil Procedure Code (XIV of 1882), ss. 267, 647—649.

ORDER.

13*th March* 1893. STARLING, J.—In this matter Mr. Bhaishankar, on having obtained an order for payment of costs in a number [517] of suits against his client Premji Trikumdas, attached certain property of which Premji was the owner, but which it was alleged he had mortgaged to his wife, Premabai, and of which he subsequently put her in possession.

On the 9th February, 1893, Mr. Bhaishankar obtained an *ex parte* order from me under s. 267 of the Civil Procedure Code, directing Premabai to appear and be examined. On the 17th February, 1893, Messrs. Bicknell, Merwanji and Motilal on behalf of Premabai obtained a summons from me calling upon Mr. Bhaishankar to show cause why that order should not be set aside.

The grounds on which the order was sought to be set aside were that Mr. Bhaishankar was not a decree-holder; that the section only applies to property which, under the decree, had to be given up *in specie*; and that, if it did apply to property which could be attached and sold in execution of a decree, then that the property in question was not "liable to attachment, as Premabai was a mortgagee in possession, and that this property was not liable to be seized," as it had already been attached.

Section 267 provides that "the Court may, . . . on the application of a decree-holder, summon any person whom it thinks necessary, and examine him in respect to any property liable to be seized

(1) 22 W.R.C.R. 330. (2) 17 W.R.C.R. 379. (3) 10 B.H.C.R. 100.

in satisfaction of the decree, &c." Now, the High Court Rule No. 183 provides that "an attorney when he has taxed his bill may obtain an order in chambers for payment of the sum allowed in taxation, and such order may be executed under chap. XIX of the Code of Civil Procedure." Section 647 of the Civil Procedure Code provides that 'the procedure prescribed in the Code shall be followed in all proceedings in any Court of civil jurisdiction other than suits and appeals;' and s. 649 provides that "the rules contained in chap. XIX shall apply to the execution of any judicial process for the arrest of a person or the sale of property or payment of money, which may be desired or ordered by a Civil Court in any civil proceeding."

Taking all these provisions together I must hold that an order obtained by an attorney against his client for the payment of costs is a decree or an order to the execution of which the provisions of chap. XIX of the Code apply; and as s. 267 is **[518]** a portion of that chapter, its provisions are also applicable to proceedings taken in the execution of such an order. Then, is property which is desired to be attached in execution of a money decree " property liable to be seized in execution of a decree "? I think it is. The words are not " property ordered to be delivered under or in execution of a decree," which might limit the powers of the Court to the ascertaining what the property was to which the decree referred, but " property liable to be seized in *satisfaction* of a decree," and, in my opinion, the word "satisfaction" causes the section to be applicable to all the property of the judgment-debtor out of which the decree can be satisfied, either by delivery in obedience to the decree, or by sale.

I am further of opinion that the words " liable to be seized " do not point to any particular period of time at which the enquiries may be made, so as to confine the operation of the section to a period anterior to the issue of process, but are words of description pointing out the kind of property in respect of which an enquiry can be held, *viz.*, any property which is attachable under the decree. The only point now to be determined is whether the allegation by Premabai, that she is a mortgagee in possession, prevents the property being " property liable to be seized." The property in question is admittedly the property of the judgment-debtor, and therefore, *prima facie*, is liable to be seized in execution of a decree against him ; and the fact that he has mortgaged it will not prevent its being attached and sold in execution of the decree subject to the mortgage-debt.

It is quite true that a mortgagee in possession may come in and get removed an attachment against the property of which he is in possession; yet I do not think that the fact that the person who is sought to be examined alleges, even on oath, that he is a mortgagee in possession (such allegation not having been tried and determined by the Court) deprives the Court of the power to order such a person to be examined respecting the property; because it must be remembered that at the time the order has to be made, in all probability it is not known whether the mortgagee is in possession or not, and it is possible that, on examination, the Court might be of opinion that the examinee was either not in possession at all, or not in possession *as mortgagee*, **[519]** and thereafter order an attachment to be placed or continued on it. To hold that such an allegation would prevent the Court examining such a person, would be, in my opinion, placing a premium upon judgment-debtors setting up persons to prefer false claims as mortgagees in possession, and would thus hamper the Court in giving to judgment-creditors that assistance to which they are entitled

1893
MARCH 23.

ORIGINAL CIVIL.

17 B. 514.

at its hands. Consequently I hold that the order of 9th February, 1893, was rightly made, and the summons of the 17th February, 1893, must be dismissed with costs. Counsel certified for.

Summons dismissed.

On the 23rd March, 1893, *Lang* (Acting Advocate General) on behalf of Premabai applied to the Court (consising of Sargent, C.J., and Telang J.) in its extraordinary jurisdiction for revision of the order made by Starling, J., on the 9th February, 1893, under s. 622 of the Civil Procedure Code (XIV of 1882), and for a rule *nisi* calling on Messrs. Bhaishankar and Kanga to show cause why the said order should not be set aside, and also for an *interim* stay of the said order.

JUDGMENT.

SARGENT, C. J.—We do not think we have power to grant the application under s. 622. That section does not seem to apply to a case like this, where the order, of which a review is sought, was made by the High Court. We think the Court referred to in the section, whose records may be called for, is a Court other than the High Court, and we must, therefore, refuse this application.

Application refused.

Attorneys:—Messrs. *Bhaishankar and Kanga*, and Messrs. *Bicknell, Merwanji and Motilal.*

---

17 B. 520.

[520] ORIGINAL CIVIL.

Before Mr. Justice Farran, and on appeal before Sir. Charles Sargent, Kt., Chief Justice, and Mr. Justice Starling.

JAFFERBHOY LUDHABHOY CHATTOO (*Defendant*), *Appellant v.* THOMAS D. CHARLESWORTH AND OTHERS (*Plaintiffs*), *Respondents.** [17th and 18th March, 1893.]

Principal and agent—Principal and factor—Consignment for sale—Advances by factor on consignment—Right of factor to sell goods consigned to him for sale below the limit of price prescribed by consignor.

In January 1889 an agreement was made between the plaintiffs and the defendant which provided that the defendant in Bombay was to act for the plaintiffs "in influencing consignments of produce" to the care of the plaintiffs in London. Such produce was to be sold by the plaintiffs in London for a certain commission and brokerage. One of the terms of the agreement was that the business in England was to be worked entirely in the defendant's name and the defendant was to "undertake to guarantee the plaintiffs free of all loss in connection with the said consignments and to guarantee the payment of redrafts, &c."

On the 25th January 1889 the defendant consigned 435 packages of cloves to the plaintiffs in London and drew against the consignment a draft for £3,100 on the plaintiffs. In his consignment letter the defendant stated that the consignment was from his constituent Chatturbhuj Khimji, but that as Rs. 30,000 had been advanced to him, the consignment was shipped in the defendant's name. The letter continued: "The cost is 9½ d. per pound, but he expects more, and *not to be sold under the above rate.*"

The sum drawn against the cloves (£3,100) was £100 in excess of their value, and on receipt of the consignment letter on the 11th February 1889, the plaintiffs at once telegraphed to the defendant to remit by cable £100 against overdraft

* Suit No. 139 of 1890; Appeal No. 735.

against cloves. On the next day the defendant replied by telegraph: "I will remit you by outgoing mail." The plaintiffs accepted and paid the draft for £2,100 drawn against the cloves.

The price of cloves in the London market fell rapidly. The defendant from time to time lowered the limit of price, but not to such an extent as to allow of a sale being effected. The lowest limit named by him was 6*d.* per pound on the 31st October 1889. In December 1889 the market price was only 5*d.* per pound, and the deficit owing to the plaintiffs was £1,300. The plaintiffs presented bills to the defendant for this balance, but they were refused.

On the 5th February 1890, after due notice to the defendant, the 435 bales of cloves were sold—20 of them at $4\frac{3}{4}d.$ per pound and 415 at $4\frac{5}{8}d.$ The balance due to the plaintiffs in respect of this consignment, after allowing for the proceeds of sale, was £1,432-15. This sum was part of the amount for which the present suit was brought. The defendant contended that the plaintiffs were not justified in selling the cloves below the price limited, *viz.*, 6*d.* per pound, and claimed to be credited with [521] £329-1-8, which was the difference between the amount actually realized by the sale and the amount which would have been obtained if the cloves had been sold at the prescribed price.

Held by Farran, J., and by the Court of appeal, on the evidence,

(1) that the plaintiffs had accepted the consignment and had advanced money against it on condition of being kept in funds in case a deficit should arise, owing to a falling market, and that the defendant acquiesced in that condition;

(2) that the plaintiffs had throughout claimed the right to sell if the condition was not observed, and that the defendant had inferentially admitted the right claimed by the plaintiffs. The conclusion to be drawn was that the business was conducted on that basis, and that when the condition was broken the plaintiffs' right to sell arose according to the course of business, notwithstanding the limit of price imposed by the defendant.

Per SARGENT, C. J.—The result of the authorities is to show that where a factor for sale, who has made advances, claims the right to sell, *invito domino*, the question is whether there was an agreement between the parties, either express or to be inferred from the general course of business or from the circumstances attending the particular consignment, that the factor should under any and what circumstances have the power to sell against the wish of the owner of the goods. The *onus* of proving such agreement lies on the factor who has made the advances.

Per FARRAN, J.—On the whole the authorities warrant the inference that where goods are consigned to a foreign merchant as security for an advance, albeit he may be a factor entrusted with the sale of goods on commission and where by reason of the fall in the market or other causes his security is declining in value, and becoming insufficient, such foreign merchant is invested with a power of sale over the goods after due notice to his principal, although the latter may place a limit on their sale, and desire to hold them on, if the principal do not put his factor in funds to make up the deficit so caused.

[R., 20 M. 97 (101).]

THE plaintiffs carried on business in London. The defendant was a merchant in Bombay. The suit was brought by the plaintiffs in March, 1890, to recover from the defendant a sum of £1,512-15-11 (then equivalent to Rs. 22,000-4-10) as the balance due to them on consignment transactions which had been carried on between them.

The defendant had made, or caused to be made, various consignments of goods to the plaintiffs for sale in England, against which (as the plaintiffs alleged) bills had been drawn upon them for amounts larger than the value of the consignments. The plaintiffs had paid these bills and had sold all the consignments, the result being that the above-mentioned sum claimed in the suit remained due to the plaintiffs in respect of these transactions.

[522] The defendant did not admit the correctness of the plaintiffs' account, and the suit was referred to the Commissioner for taking accounts. He reported that a sum £1,314-10 was due by the defendant to the

1893
MARCH 18.
ORIGINAL CIVIL.
17 B. 820.

plaintiffs on the 9th March 1890. The defendant filed exceptions to this report, the most important exception being with reference to a certain consignment of cloves, which had been sold by the plaintiffs below the limit of price prescribed by the defendant. The defendant contended that in the account they were entitled to charge the plaintiffs with the highest price obtained for cloves at any time subsequent to their sale, or at all events the difference between the price obtained by the plaintiffs and the price limited by the defendant.

From the evidence it appeared that prior to the year 1889 the plaintiffs and the defendant had done business with each other. In January, 1889, however, one of the partners in the plaintiffs' firm visited Bombay, and a new arrangement was come to between them with regard to the terms in which the business was subsequently to be carried on. This arrangement was a verbal one, but the following letters passed between them :—

7th January 1889.

"TO LUDHABHOY CHATTOO, ESQ.,

"Dear Sir,—I have now the pleasure to restate the arrangement verbally agreed upon between us in regard to the proposed increase in consignment business between our two houses. Briefly stated, the leading points are :—

"That you will act for us in influencing consignments of produce (cotton to be excepted) to our care.

"The business on this side to be worked entirely in your name, and you undertake to guarantee us free of all loss in connection with the said consignments, and you guarantee the payment of our redrafts, &c.

"It is distinctly understood that the entire business in Europe is to be confined to ourselves, the only exception being in such cases where dispute may arise between us and any of your consignors, in which event, should the latter so wish and with the object of retaining that particular connection, the consignment in question may be entrusted to some other London house until the dispute may be settled.

"We on our part agree to a net commission and brokerage of $1\frac{1}{2}$ per cent. The only exception to this will be in the case of hides and any other goods on which the customary London brokerage is 1 per cent., and in such instances our inclusive charge will be 2 per cent. for commission and brokerage.

[523] "Awaiting your confirmation and agreement to the foregoing terms, and trusting a large trade may arise between us to our mutual benefit,

"I am, &c.

"(Signed) W. B. CHARLESWORTH."

The defendant's reply was as follows :—

"*Bombay, 11th January 1889.*

"TO W. B. CHARLESWORTH, ESQ.,

"In reply to your letter of the 7th instant, we agree to the terms therein stated.

"Yours, &c.

" (Signed) LUDHABHOY CHATTOO."

The plaintiff was examined on commission in London, and he swore that, besides the points referred to in his above letter of 7th January, the verbal arrangement included two other terms, *viz.* :—

(1) That in all drafts drawn by the defendant on the plaintiffs against consignments, there should be a margin of 20 per cent. between the amount of the draft and the value of the goods exclusive of charges.

(2) That whenever that margin was not kept up owing to a fall in the market, the plaintiffs were to draw on the defendant.

No sworn evidence was given by the defendant as to whether or not these terms formed part of the agreement between him and the plaintiffs. From the cross-examination of the plaintiff, however, it appeared that the defendant did not admit them, and in a letter written by him to the plaintiffs, dated 15th February, 1889, which was put in evidence by the plaintiffs, it was alleged that the agreement was only that, when the deficit was found to amount to £1,000, the plaintiffs were to draw on the defendant for the amount. This version of the agreement was, however, at once repudiated by the plaintiffs in their letter of reply dated 8th March, 1889, in which it was said that to allow the deficiency to reach £1,000 "would, by obliging them to keep so large a sum locked up for months, cause the greater part of their commission to disappear." The plaintiff also swore in his evidence that no arrangement of that kind had been made.

The consignment in question, which consisted of 435 packages of cloves, was made by the defendant in January, 1889. The goods **[524]** were the property of Chatturbhuj Khimji, one of the defendant's constituents. Before shipping them to England the defendant advanced upon them to Chatturbhuj the sum of Rs. 30,000. He then consigned the goods in his own name to England and drew against them on the plaintiffs for £ 2,100. The following was the material part of the consignment letter :—

"*25th January 1889.*

"MESSRS. THOMAS D. CHARLESWORTH & CO.,

"London.

"Dear Sirs,—We have to acknowledge the receipt of your favour of the 4th instant, and thank you for informing us fully with the tone of the different markets, which please continue by every one.

"We have by the present mail consigned to your good care 435 packages of cloves and 5 cases of fishmaws per S.S. 'Clan Sinclair,' and drawn against the same for £2,100 and £5 respectively. Please accept on presentation.

"The consignment of cloves is from our constituent Mr. Chatturbhuj Khimji; but as we had advanced Rs. 30,000 to him since a month, we have shipped the same in our own name. He is a very large shipper of cloves, and generally consigns them to Messrs. A. D. Sassoon and E. D. Sassoon & Co.; but a great deal of persuasion from us and promise to pay special attention and care on the sale and expenses, made here personaliy by your Mr. Williams, has given it to us. We need not, therefore, say any more about it, but we are sure that you will try your utmost to fetch the highest prices. The cost is $9\frac{1}{2}d.$ per pound, but he expects more and not to be sold under the above rate. He has also requested us to write to you that he has consigned to Messrs. David Sassoon & Co., 600 packages of cloves sold by them to arrive, but from their recent letter he finds that

1893
MARCH 19.
ORIGINAL CIVIL.
17 B. 520.

dispute might arise; if so, he will telegraph to you through us to look to his interest and appoint a surveyor, which please do if needful. * * * * * *

"We have, &c., &c.

"(Signed) LUDHABHOY CHATTOO."

In his evidence the plaintiff stated that the amount of £2,100 was not a fair sum to draw against the cloves. The sum should not have exceeded £1,625. The defendant in his invoice valued the cloves at 9 annas per pound. The price of "fair quality" cloves was only 9*d*. per pound, and the defendant's cloves were dark, inferior cloves below the standard of fair quality.

On receipt of the consignment letter the plaintiffs on the 11th February 1889 telegraphed to the defendant in Bombay as follows:—"Please remit £400 for your over draft on cloves per S.S. 'Clan Sinclair'; reply immediately." The defendant replied by telegram dated the next day: "I will remit you by outgoing **[525]** mail." On the same day the plaintiffs received another telegram from Bombay purporting to come from one Tharia Topan guaranteeing the bills drawn by the defendant. The telegram was as follows:—

"Accept Ludhabhoy's bills. I guarantee.

"(Signed) THARIA TOPAN."

The plaintiffs accepted and paid the draft for £2,100 drawn against the cloves.

By the mail of the 15th February, 1889, the plaintiffs addressed the following letter to the defendant with reference to the consignment in question:—

"We have your esteemed favour of the 25th January for further consignments, for which we are much obliged.

"435 bales cloves per 'Clan Sinclair' against which you draw £2,100. In doing so you appear to have made a considerable error in your calculations. Taking the cabled value at the time of shipment at 9*d*., and each bale at 134 lbs., net (a very outside) will give a gross value of ... £2,150

Less charges, freight, &c.... 325

£1,825

Margin as customary ... 200

£1,625

"We therefore cabled 11th instant: 'Empress cloves Sinclair Moroxite, or remit by cable £100 overdraft against cloves Clan Sinclair; reply immediately.' On following morning came your answer, that you would remit by mail; we also had telegram from Mr. Topan that he guaranteed you. Of course we know you cannot be responsible for fall in market, though our advices have been persistent in anticipating a fall; but you appear to have overlooked entirely the loss of weight on the voyage, and the freight and charges. As pointed out by Mr. W. B. Charlesworth, your business can only be done on the terms named, provided we are kept in funds. Now, looking at your other consignments at present market prices, we calculate that, in addition to overdraft on 435 bales cloves, there is a deficiency of between £500 and 600. Such style of

business will not remunerate any one and is quite opposed to the understanding. In any further business please adhere strictly to this understanding. We very much regret the position the account has assumed, but we are not the cause, and we did not wire for a cable transfer through any doubt, but as *a matter of business entirely*. We enclose a memo of our calculation, showing, irrespective of 435 bales cloves, a deficiency of £550. Against this we have to-day drawn upon you for Rs. 4,447-14-0, the equivalent of £300 at exchange ¼, ¾, at 15 d/s, in favour of the Chartered Bank of India, Australia and China, which please duly honour, leaving still a large balance against you.

[526] "Please note acceptance to your drafts as follows :—

£2,100 a/c. of 435 bales cloves 'Clan Sinclair' due 14th May.
£505 a/c. issue glass do. 14th May.

"We will do our best with both. We note remarks as to appointment of a surveyor for 600 bales cloves, but there would be no need for our interfering in any way with the firm mentioned. Unfortunately a large quantity of the cloves received here from Bombay have been of mixed or inferior quality, which in a falling market has naturally been availed of by rival buyers whose claims for allowances have been large. These have been assessed by arbitrators in a fair and honourable manner, ranging from ⅛ to ½*d.* per lb. and indeed some lots have been so bad that the buyers thought seriously of refusing the quality tendered and bringing an action againt the seller for breach of contract. A few good fair sold at 8¼ being ¼ lower, and other weak holders may also have to sell. Landed stock 15,000 bales with heavy supplies close at hand. Only an accident can improve us."

There was also a mail from Bombay to London on the 15th February 1889, and by that mail the defendant wrote the following letter to the plaintiffs with reference to the consignment of cloves :--

"In acknowledging the receipt of your favour of the 25th ultimo, we have also to acknowledge the receipt of your telegram, dated 11th instant, stating 'remit by wire £ 400 on account of our draft overdrawn against cloves *ex* S. S. 'Clan Sinclair,' in reply to which we cabled you that 'we will remit by the outgoing mail,' and another telegram was also sent by our mutual friend, Mr. Thariabhoy Topan, saying 'I stand guarantee. Accept Ludhabhoy's bills.'

"We are very much surprised to receive such a telegram from you, especially when a clear understanding was made between us and your Mr. Williams, at the time of the arrangements, that whenever you find the deficit amounting to £1,000 you are to draw against us for the amount, while only a very short time has passed, and you have grown impatient as to keep our bill standing, and wiring us to remit, otherwise you will not accept the said bills is . . . astounding ; but we thank you for giving us such a lesson. You will know (that is, your Mr. Williams must have fully informed you) that we have been doing business with other firms from a long time, but only through strong personal persuasions of Mr. Williams and Mr. Fazullbhoy (of Mr. Thariabhoy Topan) we consented to give the bulk of our business to you, and a very fair business was done in the last month, but are sorry to say that you have thought proper to terminate the arrangement so very soon. We cannot come to any conclusion what made you so very impatient and take alarm at such a paltry sum. However, to bring an end to this unpleasant matter, we have only to say that as there is no consignment by the present mail, we will remit by documentary bill by the next. We would not have waited till the next

1893
MARCH 18.

ORIGINAL CIVIL.

17 B. 520.

mail, but now as you are safe enough for any deficit whatever, we have taken time.

"Hoping this will be sufficient.

"We remain, &c."

[527] On the 21st February, 1889, the defendant wrote again, enclosing to the plaintiffs a sum of £ 250, directing him to "credit the same to our general account, or to the deficit in cloves, just as you think proper." The letter then continued :—

"We consider the above amount to be sufficient to cover any deficiency in our overdrawn draft on the consignment of cloves per 'Clan Sinclair' for which you took alarm and cabled us to remit even at the present low market, besides also you have our friend Mr. Thariabhoy Topan as guarantee. We have placed a limit of $9\frac{1}{2}d.$, on the said shipment, but on arrival, if you fail to obtain our limit, kindly wire the valuations, and consulting with our client Mr. Chatturbhuj Khimj we will send you a reply whether to hold or to sell the parcel. Please act accordingly, that is, if it is to be sold we will wire, but if it is otherwise we will not reply; be pleased then to hold the same for some time. But according to the information received from Zanzibar, as well as the strong market here, we hope the market on your side will also increase in a short time, but we have induced the shipper to lower down the limit to $9\frac{1}{4}d.$"

In the London market the price of cloves fell rapidly. On the 8th March, 1889, the plaintiffs wrote to the defendant enclosing a report and valuation of the cloves made by a broker. It described them as "dull and mixed," and valued them at $7\frac{3}{4}d.$ per lb., which was nearly $2d.$, under the limit fixed. The plaintiffs also enclosed an account showing that the deficiency on the consignment then amounted to £516. On the 13th March the defendant telegraphed to the plaintiffs: "Hold cloves; have mailed a remittance of £400." They followed this telegram by a letter dated the 15th March, 1889, in which they said :—

"We have sent you a reply on the 13th that 'hold cloves; have mailed a remittance of £400' which we do by the present opportunity—that is, enclosed draft of £360 on Messrs. Heller and Weiss, of Mincing Lane, against documents of two different shipments of gum arabic per S.S. 'Huntingdon.' Please present them the bills, and receiving the amount credit the same to our general account, but hold the parcels each and all, on which limits are placed, till further instructions. Let us also tell you that you received from us in all (with your draft of £300 drawn by you) £960, and we may still regularly go on remittting from time to time, as we think fit, but if even upon this you are afraid of still more deficiencies and are willing to discontinue business with us foregoing your commission on all our unsold shipments in your hands, we are ready to have them transferred to our friends Messrs. Heller and Weiss, of Mincing Lane. If you agree to this, please wire only one word 'Jafferbhoy,' on the receipt whereof we will at once wire our above friends to take charge of all such shipments."

On the 29th March, 1889, the plaintiffs wrote stating that the then price of cloves was $6\frac{5}{8}d.$ per lb. They enclosed *pro forma* [528] account sale, which showed the deficiency, had then reached the sum of £ 760.

On the 18th June 1889, the price of cloves having fallen still lower, the defendant wrote to the plaintiffs as follows :—

"We have also at the last moment persuaded Mr. Chatturbhuj Khimji to withdraw his limit on cloves, which he hereby does, and leaves

the same in your hands to sell 200 packages out of 435 packages at the best market rate, either retail or wholesale, but not under $7\frac{3}{4}d$ per lb. and as soon as you have sold the 200, please cable us the price, and we will then try to leave the remaining to your good discretion. You know very well that he will be a great loser in this transaction, and the same were only not sold to arrive for a difference of $\frac{1}{8}$ per lb. and your Mr. Williams gave him solemn promise to obtain the contended price; but unfortunately as the market has gone so very low, please try to mitigate the loss by selling them retail at the above price. Kindly, therefore, try your utmost to obtain the above prices even $\frac{1}{4}d$. lower, but please don't sell the above 200 under $7\frac{3}{4}$ per lb., and we are fully convinced you will secure the above prices."

On the 25th June 1890 the defendant wrote again expressing regret to hear of further fall of cloves, and saying "after trying very much, and persuading Mr. Chatturbhuj to accept lower rate, we have no other resource left but to wait for some time more for a better opportunity. Save and except this parcel of cloves and gum arabic, we hereby withdraw all limits on our shipments now in your hands, and leave them entirely at your good discretion, and to dispose of them at the best market prices."

On the 23rd August, 1889, the plaintiffs addressed the following letter to the defendant threatening for the first time to sell the cloves:—

"We have no letter from you by mail 30th July, which greatly surprises us, as we fully expected, according to your promise, a considerable remittance to keep your account square. We therefore enclose *pro forma* account sales of all the produce unsold by reason of your over limits, calculated at the selling value of to-day, also a *pro forma* account current, which will give you a correct view of the state of affairs, *viz.*, a deficiency of £883-12-9. As we have all this sum lying idle, we have drawn the following drafts on you, say Rs. 5,976-10-6, exchange 1*s.* $4\frac{1}{16}d.$, £400-0-3, in favour Chartered Bank; Rs. 5,976-1-6, exchange 1*s.* $4\frac{1}{16}d.$, £400-0-3, in favour New Oriental Bank, which please do the needful with and pay at maturity. We have been very patient in allowing the above large balance to remain in your hands so long, as we could have turned it over many times to our great advantage, and we have only to add that if you refuse to pay we shall at once sell all the goods at best price obtainable.

"Yours, &c.

"(Signed) THOMAS D. CHARLESWORTH."

[529] *P. S.*—We have your favour of 6th instant without any remittance which we cannot understand, as you must know, as well as we do, the state of your account, which you promised to keep in order. We note you withdraw limits on all goods except cloves, and as the whole of the large deficiency is entirely caused by the shipment of 435 bales cloves *ex* 'Clan Sinclair' you will please take notice that, if you dishonour our drafts for £800, we shall proceed to sell the parcel forthwith."

To this letter the defendant sent the following reply refusing to accept the plaintiffs' bills, and warning them not to sell the cloves:—

"*10th September, 1889.*

"Dear Sirs,—Your esteemed favour of the 23rd ultimo is duly to hand, but we are very much astonished to find two drafts, of £400 each, written by your kind selves upon us, which, as a matter of course, and which you fully expected, being quite unreasonable are not accepted, but refused.

1893

MARCH 18.

ORIGINAL CIVIL.

17 B. 520.

"We had clearly written to you not to draw upon us, but whenever we will find any deficit in our consignments in your hands, we will at once remit, and we can assure you that calculating even the present declining prices the differences in the rates obtained by you much lower than the actual ruling rates in many instances, and the difference in charges (so very exorbitant), complaints for which have long been written to you, shortness in weights, as well as our return commission at 2 per cent., no material sum will be due by us; consequently it is out of common sense for us to accept the bills. We had so frequently requested you to forego your commission, and we will transfer all our goods to some other firm, but you would not accept our proposal, and have mercilessly sacrified our constituents, who would all have left us had we not long ago discontinued business with you, and arranged with better people, with whom, we are happy to say, all our constituents are well pleased and satisfied, and there is no cause of any complaint. It is needless, therefore, to mention that through your own indifference and carelessness you have displeased, and through zeal and energy others have satisfied, all our constituents.

"Those that have totally (but fairly and justly) refused to pay your redrafts we have already mentioned to you, and you must rest assured that every penny we have to refund to them you shall have to pay. Whatever remonstrations and reproaches we have to hear we cannot describe, and that is all for your worthy selves.

"Let us also convince you that we are fully prepared with all the proofs required for our above statement as regards the loss in weights, differences in rates and extraordinary charges.

"Hoping you will still try to satisfy those who have removed their limits and, placing confidence, have entrusted their goods to your kind discretion. Regarding the cloves account Chatturbhuj Khimji, we have persuaded him to reduce the limits to 7*d*. per lb., which please note, and bear in mind that you shall be held responsible if you sell the same under the above limit.

"We remain, &c.,

"(Signed) LUDHABHOY."

[530] Further correspondence passed between the parties. On the 31st October the defendant by telegraph lowered the limit of price to 6*d*., but the price had then fallen below that limit. On the 11th December 1889, the plaintiff, who had then come out to Bombay, wrote to the defendant as follows:—

"The only goods we now hold on your account are 435 bales cloves *ex* 'Clan Sinclair,' on which there is a deficiency at present market values of about £1,300. You have repeatedly promised Mr. W. B. Charlesworth that you would settle this matter, but you have not done so, and we now inform you for the last time that unless you answer to-morrow (12th instant) we must cable instructions to our London house to sell without reserve."

The 435 bales of cloves were sold by auction by the plaintiffs on 5th February 1890—20 of them at $4\frac{3}{4}d.$ per lb. and 415 at $4\frac{5}{8}d.$ Accounts were duly presented to the defendant, showing a balance due to the plaintiffs, in respect of the cloves, of £1,432-15. This sum was included in the amount (£1,512-15-11) above stated for which the suit was brought. In taking the accounts the Commissioner struck out certain items, and the

amount reported by him as due to the plaintiff in March 1890 was £1,314-10.

The exceptions to the report filed by the defendant, as above stated, were argued in December 1891 before Farran, J.

Kirkpatrick and *Russel* appeared for the plaintiffs :—As to the question arising with reference to the sale of the cloves they contended that the plaintiffs had accepted the consignment and advanced £2,100 upon the condition that they were kept in funds, and that as the defendant had broken the condition, the plaintiffs were justified in selling the cloves to repay the amount of their advance. They referred to *Brown* v. *McGran* (1) and *Pothonier* v. *Dawson* (2).

Badrudin Tyabji and *Jardine* appeared for the defendant:—They contended that a factor had no power to sell against the orders of the principal, and they relied on *Smart* v. *Sandars* (3).

29th February, 1892. FARRAN, J. (after allowing the first and second exceptions to a certain extent) continued :—

[531] The third objection is one of great importance to the parties and also to merchants generally. I shall state with some particularity the facts which give rise to it.

The plaintiffs are a firm of merchants and commission agents carrying on business in London. They have no branch firm or place of business in Bombay, though one of the partners in the firm occasionally visits this city. The defendant is a merchant residing and carrying on business in Bombay. Previous to the 7th of January, 1889, the defendant had done consignment business with the plaintiffs. I cannot find evidence as to the exact terms upon which that business was carried on, or what was its exact nature, beyond this that it was of the same kind as that which was done subsequent to that date. In January, 1889, the plaintiffs and the defendant contemplated doing business together on a larger scale, and the plaintiff W. Charlesworth, who was then in Bombay, addressed a letter to the defendant, dated the 7th January, embodying the terms of an arrangement which they had come to. It was in the following words:—

"Dear Sir.—I have now the pleasure to re-state the arrangement verbally agreed upon between us in regard to the proposed increase in consignment business between our two houses. Briefly stated, the leading points are :—

"That you will act for us in influencing consignments of produce (cotton to be excepted) to our care.

"The business on this side to be worked entirely in your name, and you undertake to guarantee us free of all loss in connection with the said consignments, and you guarantee the payment of our redrafts, &c.

"It is distinctly understood that the entire business in Europe is to be confined to ourselves, the only exception being in such cases where a dispute may arise between us and any one of your consignors, in which event, should the latter so wish, and with the object of retaining that particular connection, the consignment in question may be entrusted to some other London house until the dispute may be settled.

"We on our part agree to a net commission and brokerage of 1½ per cent. The only exception to this will be in the case of hides or any other goods on which the customary London **[532]** brokerage is 1 per cent., and

---

(1) 14 Peters, 479 (American Rep.).
(2) Holt. (N. P.), 383.
(3) 3 C. B. 380=5 C. B. 895.

1893
MARCH 18.
ORIGINAL CIVIL.
17 B. 520.

in such instances our inclusive charge will be 2 per cent. for commission and brokerage.

"Awaiting your confirmation and agreement to the foregoing terms, and trusting that a large trade may arise between us to our mutual benefit, I am, Dear sir, yours faithfully, W. B. Charlesworth."

From this letter it will be observed that it relates exclusively to the terms made by the defendant as an influencer of consignments and the plaintiffs as those in whose favour such consignments are to be influenced. There is no reference in it as to the nature and extent of the advances which the plaintiffs undertake to make upon goods consigned to them by consignors, or to the terms upon which they will make advances, or to the rights which such advances, if and when made, confer upon the plaintiffs over the goods consigned to them. All this is left to depend upon the previous course of dealing between the parties, the custom of the trade (if any), and the general law merchant applicable to the case. Charlesworth says that it was verbally arranged between him and the defendant that drafts would be drawn on the plaintiffs against consignments, and that such drafts should have a margin of 20 per cent. between the amount of the draft and the value of the goods exclusive of charges; and that whenever there was a deficit arising from a fall the plaintiffs were to draw on the defendant. It is, however, nowhere specifically alleged that it was agreed that in the event of there being such a deficit, the plaintiffs were to have a power of sale over the goods consigned to them irrespective of the wishes and directions of the consignors, except in so far as such agreement may be inferred from the correspondence. Upon that point also there is no evidence as to the custom of the trade between Bombay and London. The extent of the right is, so far as the evidence in this case is concerned, left to depend upon inference from the letters put in and the general law. The defendant admits the plaintiffs' right to draw upon him when a deficit arose, but says that such right did not accrue until the deficit amounted to £1,000. This limitation on the plaintiffs' right to draw for a deficit put forward in the correspondence is not proved; and I think it must, at all events, be taken that it was a term of the arrangement between the parties, whether [533] resting in the course of previous dealing or on direct contract, that the plaintiffs had the right to draw on the defendant when a deficit arose, and consequently that the defendant was under obligation to honour the plaintiffs' drafts when so drawn.

On the 25th January, 1889, the defendant consigned 435 packages of cloves to the plaintiffs in London and drew against such consignment a draft for £2,100 on the plaintiffs. The following is an extract from the defendant's letter notifying the consignment: "We have by the present mail consigned to your good care 435 packages of cloves.....per S. S. 'Clan Sinclair' and drawn against the same for £2,100. Please accept on presentation. The consignment of cloves is from our constituent, Mr. Chatturbhuj Khimji, but as we had advanced Rs. 30,000 to him since a month, we have shipped the same in our own name..... We are sure that you will try your utmost to fetch the highest prices. The cost is $9\frac{1}{2}d.$ per pound, but he expects more, and not to be sold under the above rate." The invoice of the cloves is Ex. 89. The draft was apparently held by the Hongkong Bank.

On receipt of this letter and invoice the plaintiffs telegraphed to defendant: "Remit by cable £400 against overdraft against cloves per 'Clan Sinclair' 435 bales. Reply immediately." The defendant wired

a reply on the 12th February: "I will remit you by the outgoing mail." On the same day a telegram was received by the plaintiffs purporting to come from Tharia Topan as follows:—"Accept Ludhabhoy's bills. I guarantee." These telegrams are explained by the plaintiffs' letter of 15th February. The following are extracts from it:—"435 bales cloves per 'Clan Sinclair' against which you drew £2,100. In doing so you appear to have made a considerable error in your calculations. Taking the cabled value at the time of shipment at 9*d.* and each bale at 134 lbs., net (a very outside net weight) will give a gross value of ... £2,150

Less charges, freights, &c, ... „ 325

£1,825

Margin as customary... „ 200

£1,625"

[534] The letter then refers to the telegrams, and proceeds: "Of course we know that you cannot be responsible for fall in market..... but you appear to have overlooked entirely the loss of weight in the voyage, and the freight and charges. As pointed out by Mr. W. B. C., your business can only be done on terms named, provided we are kept in funds." It is then pointed out that on other consignments, independently of cloves, there was a deficit of £550, against which the plaintiffs had drawn on defendant for £300, and it is notified that the draft for £2,100 had been accepted. The defendant also wrote from Bombay on the 15th February referring to the telegrams, and adding: "We are very much surprised to receive such a telegram from you, especially when a clear understanding was made between us and your Mr. Williams at the time of the arrangement that whenever you find the deficit amounting to £1,000 you are to draw against us for the amount, while only a very short time has passed, and you have grown impatient as to keep our bill standing, and wiring us to 'remit, otherwise you will not accept the said bill' is.....astounding, but we thank you for giving us such a lesson..... However, to bring an end to this unpleasant matter, we have only to say that as there is no consignment by the present mail, we will remit by documentary bill by the next, and we would not have waited till the next mail, but now as you are safe enough for any defiicit whatever, we have taken time. Hoping this will be sufficient..."

The plaintiffs wrote to Tharia Topan also on the 15th February about his own business, and added to the letter this paragraph: "On the 10th instant we received your telegram 'Accept Ludhabhoy's bills. I guarantee.' Our telegram to that friend, of whom we have a high opinion, was the outcome of ordinary business principle. There is a question raised in the case whether Tharia Topan authorized the sending of the telegram sent in his name." I may say at once that it appears to me that the plaintiffs never accepted the unasked for guarantee of Tharia Topan in lieu of the rights (if any) which they had over the goods consigned to them, and that even if the guarantee was given, which seems very questionable, it cannot affect the legal rights of the parties. The telegram was sent to induce the plaintiffs to accept the bill **[535]** without a cabled remittance of £ 400; I shall make no further reference to this alleged guarantee. On the 21st February the defendant sent a bill for £250 to the plaintiffs, and authorized them to place it to his general account, or to the deficit in cloves, as they might think proper. The letter adds: "We consider the amount to be

1893
MARCH 18.
ORIGINAL CIVIL.
17 B. 520.

sufficient to cover any deficiency in our overdrawn draft on the consignment of cloves *ex* 'Clan Sinclair' for which you took alarm and cabled us to remit) even at the present low market. Besides, you also have our friend, Mr. Thariabhoy Topan, as guarantee. We have placed a limit of $9\frac{1}{2}d.$ on the said shipment, but on arrival, if you fail to obtain our limit, kindly wire the valuations, and consulting with our constituent, Mr. Chatturbhuj Khimji, we will send you a reply whether to hold or to sell the parcel. Please act accordingly, that is, if it is to be sold we will wire, but if it is otherwise we will not reply. Be pleased, then, to hold the same for some time. We have induced the shipper to lower the limit to $9\frac{1}{4}d.$"

On the 8th March the 435 bales cloves having arrived were reported on as dullish and mixed, and valued at $7\frac{5}{8}d.$ This was telegraphed to the defendant, and on the same day the plaintiffs wrote to the defendant explaining the state of the accounts, which showed a large deficit. This letter also repudiated the idea that the plaintiffs were to wait until the deficit amounted to £1,000 before drawing. The defendant on the 13th March telegraphed to plaintiffs: "Hold cloves; have mailed a remittance of £400." The plaintiffs understood this as in addition to the £ 250 advised in defendant's letter of 21st February and received before 15th March, and on the 15th March wrote that in conformity with the defendant's instructions they would hold the cloves, but they point out that they feared a decline in price. The defendant followed up his telegram of 13th March by letter of 15th March: "We have sent you a reply on the 13th that hold cloves, and we have mailed remittance of £400, which we do by the present opportunity; that is, enclosed two drafts for £360, but hold the parcel each and all, on which limits are placed, till further instructions. Let us also tell you that you received from us in all £960, and we may still regularly go on remitting from time to time as we think fit. But if even upon [536] this you are afraid of still more deficiencies, and are willing to discontinue business with us, foregoing your commission on all your unsold shipments in our hands, we are ready to have them transferred to our friends, Messrs. Heller and Weiss, of Mincing Lane. If you agree to this, please wire only 'Jafferbhoy,' and we will at once wire our friends to take charge of all such shipments." On the 29th March the plaintiffs sent the defendant *pro forma* account sales to date, showing the probable deficiency in the cloves to be £760, against which the plaintiffs admit the receipt of £300 and purpose drawing in the residue according to the arrangement. The plaintiffs did not wire "Jafferbhoy" in reply to the defendant's letter of 15th March, and must therefore be taken to have refused the offer to hand over the unsold consignments to Heller and Weiss. The defendant on 5th April wrote as to that this: "We expected a reply by wire that you were willing to have all our consignments entrusted to some other firm, but, not having received it we think that you have thought proper to wait, which is the only remedy even left to us."

The above is the important part of the correspondence relating to the consignment of cloves, the terms upon which it was consigned, and the terms upon which the consignment is accepted. The proper inference to be drawn from it appears to me to be that the defendant consigned the cloves with a limit upon their sale of $9\frac{1}{2}d.$, subsequently reduced to $9\frac{1}{4}d.$, and that the plaintiffs accepted the consignment with such limit imposed, upon the condition that they were kept in funds, if a deficit should occur, owing to a fall in the market, or other cause, between the value of the goods and the amount advanced against them, and that the defendant acquiesced in the

plaintiffs' condition. What the plaintiffs' rights and remedies were to be if the condition were broken by the defendant, is not specifically set out.

In accordance with the views expressed by the plaintiffs the clove market fell with great rapidity. The defendant lowered the selling limit, but not to such an extent as to allow of a sale being effected. The defendant did not make up the deficit thus caused.

[537] On the 23rd August the plaintiffs wrote to defendant enclosing *pro forma* account sales of all the goods then in their hands, showing a deficiency of £883-12-9. For this they drew bills on the defendant for £800, and gave the defendant notice that, unless he accepted and paid them, they would proceed to sell the cloves at once. At this time the cloves were the only goods which the plaintiffs held subject to a limit. To this letter the defendant replied on the 10th September. He refused to pay the drafts on the ground that owing to the plaintiffs having sold goods below the ruling rates, their exorbitant rates on charges, the shortness of weight which they had allowed, and the return commission which they had to account for, no material sum would be found due from him to them. The letter closed with the following paragraph relating to the cloves:—Regarding the cloves account of Chatterbhuj Khimji, we have persuaded him to reduce the limit to 7*d*. per lb., which please note and bear in mind that you shall be held responsible if you sell the same under the above limit."

The correspondence about this time assumes a character of much bitterness. On the 28th October the plaintiffs wired to the defendant that they would sell the cloves at Wednesday market, unless he cabled them a margin of £ 800. In this telegram the market price is put at $5\frac{3}{4}$. This was followed by a telegram on the 30th, sent to the defendant: "Limit or we can sell at $5\frac{1}{2}$. If you wish us to continue holding your goods, cable a margin of £800, otherwise selling." The reply on the 31st was: "Limit for cloves 6*d*." That limit was never afterwards reduced. The plaintiffs did not sell then. On the 15th November cloves had fallen to 5*d*. The plaintiffs made out an account showing a deficit of £1,192-3-10 against the defendant. A telegram was sent the same day.

On receipt of the defendant's letter of 25th October, 1889, Charlesworth came out to Bombay bringing the account of 15th November with him and reached Bombay on the 1st December and presented bills for the balance £1,192 3-10 to the defendant, which the latter refused. On the 5th December cloves were 5*d*., but this was a nominal price. There were several interviews between the plaintiff and the defendant, the result of **[538]** which was that the defendant refused to do anything about the deficit on the cloves unless the plaintiffs allowed him £600 for alleged overcharges, &c. Cloves were still going down. The plaintiff Charlesworth waited some time, hoping for a settlement.

On the 30th January 1890 Charlesworth wrote to the defendant informing him that he was in receipt of a telegram from London that his cloves were in course of being offered for sale by public auction, and that they would be sold on his account to the highest bidder. The cloves were accordingly sold, and realized $4\frac{3}{4}d$. to $4\frac{5}{8}d$.

The defendant seeks to be credited with the price of the cloves at 6*d*. per lb., the lowest limit placed upon them. The difference amounts to £329-1-8. The question is, whether according to the terms upon which the plaintiff did consignment business for the defendant, or according to the general law, the plaintiffs not being kept in funds to meet

1893
MARCH 18.
ORIGINAL CIVIL.
17 B. 520.

the deficit arising from the fall in the market, were justified in selling when they did below the defendant's limit, or are liable to defendant for having done so. It is quite clear that when they sold there was a large deficit which the defendant was under obligation to make up. The conclusion I have arrived at is that the plaintiffs claimed that right throughout, though at first not specifically, and that the defendant inferentially admitted it. The defendant's letters of the 15th March and of the 10th September appear to be open to no other construction. His answer to the plaintiffs' demand for margin is in the one case to send it: on the other to contend that the plaintiffs were really fully covered. From this I think that the fair inference arises that the business was conducted on that basis. It is natural that it should be so. The plaintiffs in London have no practical remedy against the defendant in Bombay personally. They advance their moneys on the security of the goods, and it would seem a strange mode of doing business if in a falling market the defendant could prevent the plaintiffs from realizing their security without making up the deficit occasioned by such a fall. I have already pointed out that the plaintiffs did not advance their money on those particular goods, and accept the [539] defendant's limit, except conditionally. That condition being broken, the plaintiffs' right to sell arose, according to the course of business, notwithstanding the 6*d*. limit imposed by the defendant.

The point, whether a foreign consignment agent or factor, to whom goods are consigned for sale and who accepts and pays bills drawn against such goods, can sell them below the limit placed upon them by the consignee when he is not kept in funds to meet a deficit caused by falling markets, is a question of some difficulty in the authorities. Story lays down the law very broadly (1). He says: "As a lien is, ordinarily, nothing more than a right of retainer of the property, the party cannot sell or dispose of the property.....unless with the consent of the owner, either express or implied, from the nature and objects of the very transaction. Thus, for example, if goods are consigned to a factor for sale, and he makes advances upon them, he is, of course, invested with a right to sell them, and may out of the proceeds satisfy his lien, or use it by way of set off. Nay in certain cases where he has made advances as factor, it would seem to be clear that he may sell to repay those advances without the assent of the owner (*invito domino*), if the latter, after due notice of the intention to sell for the advances, does not repay the amount." The case of *Smart* v. *Sandars* (2) is not on all fours with the present. There the advances were made subsequent to the consignment, and it was admitted that such advances conferred a lien on the factor who made them. It was contended that they did more, (*viz.*) enlarged the factor's original power, and as a matter of law conferred upon him a right to sell *invito domino*. It was held that they did not. The distinction between that case and the case where consignment (*i.e.* the acceptance of the consignment) and the advance are concurrent, is pointed out by Channell Sergeant in his reply at p. 913 of the report in 5 C. B. Where such is the fact he admits, in effect, that he puts the case in the same position as that of pawnor and pawnee, and makes the principle laid down in *Pothonier* v. *Dawson* (3) applicable. The distinction [540] is also taken by Wilde, C. J., in delivering the judgment of the

(1) Story on Agency (9th Ed.), p. 443, para. 371.
(2) 3 C. B. 380=5 C. B. 895.
(3) Holt. (N. P.) 383.

Court at p. 918 of the latter report (5 C.B.). On the other hand, *Brown* v. *McGran* (1), an American authority, in its facts very closely resembles the case before me, and is strong authority in favour of the right of the plaintiffs to sell under circumstances like the present. On the whole, I think that the authorities warrant the inference that where goods are consigned to a foreign merchant as security for an advance, albeit he may be a factor entrusted with the sale of goods on commission, and where by reason of the fall in the market or other causes his security is declining in value, and becoming insufficient, such foreign merchant is invested with a power of sale over the goods after due notice to his principal, although the latter may place a limit on their sale, and desire to hold them on, if the principal do not put his factor in funds to make up the deficit so caused. I must therefore disallow this exception.

The defendant appealed. The chief grounds of appeal were, first, that the defendant was not bound, and did not agree, to provide a margin to cover any deficit in respect of the consignment of cloves; second, that Farran, J., was wrong in holding that either by express or implied agreement or by law the plaintiffs had authority to sell the cloves without the authority or consent of the defendant.

Lang (Acting Advocate-General) and *Jardine*, for appellant (defendant).—The lower Court has by inference imported a term into the contract giving the plaintiffs a right to sell the goods consigned to them, unless they were kept in funds sufficient to cover any difference there might be between the amount drawn by the defendant against the goods and the value of the goods. There is no evidence of such an agreement. The general mercantile law does not permit a factor to sell against the wish of his principal—Smith's Mercantile Law (10th Ed.), p. 126; *Smart* v. *Sandars* (2). The law as laid down in Story is not English law: see Story on Agency (9th Ed.), para. 371 and note. If the law does not give the plaintiffs the right to sell, there is nothing in the **[541]** evidence from which we can gather any agreement that they should have such a right.

Macpherson and *Kirkpatrick*, for the respondents (the plaintiffs).—It is clear that the defendant agreed to keep the plaintiffs in funds. The plaintiffs only accepted the defendant's consignment on this condition. That condition was broken, and the defendant became largely indebted to the plaintiffs. The only remedy left to the plaintiffs living in England was to sell the goods in their hands. They claimed the right, and it was inferentially admitted by the defendant. The defendant in his letters does not deny the right to sell, but insists that there was no deficit to justify the sale. The goods were really a pledge in the plaintiffs' hands—*Murtunjoy* v. *Cockrane* (3).

The following authorities were cited and commented on:—*De Comas* v. *Prost* (4); *Brown* v. *McGran* (1); *Pothonier* v. *Dawson* (5); Story on Agency (9th Ed.), para, 371 and note; Story on Bailments, 308, 310; Coote on Mortgage (Ed. 1884), p. 615; Indian Contract Act (IX of 1872), ss. 202, 148, 172, 176.

JUDGMENT.

SARGENT, C. J.—The question in this appeal arises in taking the account between the parties to a consignment for sale of 435 packages of

---

(1) 14 Peters Rep. 479 (American Rep.).
(2) 3 C. B. 380=5 C.B. 895.
(3) 10 M.I.A. 229 (247).
(4) 3 M.P.C. (N. S.) 158.
(5) Holt. (N. P.) 383.

1893
MARCH 18.
ORIGINAL CIVIL.
17 B. 520.

cloves by the defendant, who is a merchant in Bombay, to the plaintiffs, who are a firm of merchants and commission agents in London.

The defendant had done consignment business with the plaintiffs previous to the 7th January, 1889, on which day the plaintiff Charlesworth, who was then in Bombay, wrote to the defendant a letter, the object of which was to state the result of a verbal arrangement come to between the parties with a view to the increase of the consignment business, and was in the following terms:—(His Lordship read the letter *supra*, pp. 522, 523.) This letter, it is to be observed, is silent on the subject of advances to be made by the plaintiffs on consignments, and it is therefore, to be inferred that in that respect the consignment business was to be carried on as it had been previously to the **[542]** new arrangement. There is no documentary evidence in the case as to what had been the course of business between the parties on this subject, and it has therefore to be gathered from the statements of the parties and the correspondence between them following upon the consignment in question. We may also add that there was no evidence as to any custom of the trade between Bombay and London; and the rights of the parties have therefore to be determined by the general principle of commercial law applicable to the case.

The general law applicable to commission agents as laid down in English authourities, on which the Courts of this country mainly rely in deciding commercial questions, was stated in *Smart* v. *Sandars* (1). In that case the advances were made subsequent to the consignment, and it was held that such advances conferred a lien on the factor for sale who made them, but that they did not confer upon him the right to sell, *invito domino*.

During the argument it was suggested that there might be a distinction between advances subsequent to and advances made contemporaneously with the acceptance of the consignment.

In *De Comas* v. *Prost*(2), the Privy Council say that the doctrine of *Smart* v. *Sandars* is that "mere" advances made by a factor whether at the time of his employment as such or subsequently cannot have the effect of altering the revocable nature of the authorities to sell, unless there was an agreement, and in that case they hold that the Court in Australia was right in granting a new trial moved for on behalf of the factor under the circumstances of the advances and the conversation and letters which preceded and followed them.

The result of these authorities is, I think, to show that where the factor for sale, who has made advances, claims the right to sell *invito domino*, the question is whether there was an agreement between the parties—either express or to be inferred from the general course of business or from the circumstances attending the particular consignment—that the factor should under any and what circumstances have the power to sell against the will of the owner of the goods, the *onus* of proving which lies **[543]** on the factor who has made the advances. Counsel for the respondent referred to s. 202 of the Contract Act and illus. (*b*) accompanying it. But these assume that the factor has an interest in the goods expressly given him by the consignor at the time of the consignment and have no bearing on the present question.

Passing to the evidence I entirely agree with Mr. Justice Farran that the correspondence can leave no doubt that the plaintiff accepted the

(1) 5 C. B. 895.

(2) 3 Moore P.C. (N.S.) 158 (179).

consignment in question with the restriction as to the minimum price at which the cloves were to be sold upon the understanding that they should be kept in funds by the defendant to meet any deficit arising from a falling market.

The market, it is not disputed, was a falling market from the date of the consignment, and the correspondence from first to last between the parties proceeds on the above assumption. The letters and telegrams are taken up with urgent demands by the plaintiffs for payments to cover the deficits, met by objections on the part of the defendant which are directed exclusively to the amount of such deficits and to the unreasonableness of the plaintiffs in asking for further cover than the defendant had already furnished. The correspondence continues to be exclusively of this character until 23rd August, when the plaintiffs, apparently despairing of inducing the defendant to comply with their demands that he should square the account, threaten to sell the cloves "at the best price obtainable" if the defendant refuses to pay them a deficiency of £883-2-9. The defendant's answer of the 10th September to this letter is an important one and is in the following terms. (His Lordship read the letter: see *supra* p. 529.)

It is to be remarked that throughout this letter the ground taken by the defendant is that the plaintiffs had not credited the defendant with the actual ruling rate, and that they had made exorbitant charges, and that, if the account were properly made out, "no material sum would be due from him," and it is on this ground alone that the defendent claims the right "to hold the plaintiffs responsible if they sell under 7*d.* per lb., the price to which he consents to reduce the limit. The plaintiffs **[544]** did not sell, nor did they forego their comminssion and transfer their business to another house as proposed by the defendant. An acrimonious correspondence then commenced and continued until the beginning of the following year whilst the price of cloves was dull and declining, having gone down to $5\frac{3}{8}d.$ on 1st November. At last, on 28th October, the plaintiffs telegraph to the defendant that they would sell unless they cabled a margin of £800, stating that the market price put at $5\frac{3}{4}$, and again, on 30th October, they telegraphed: "Limit if we can sell at $5\frac{1}{2}$. If you wish us to continue holding, cable a margin of 800, otherwise selling." On the 31st defendant replies: "Limit for cloves 6*d.*" On 15th November the price had fallen to 5*d.*, and the plantiffs telegraphed an account showing a deficit of £1,192-3-10. On the 15th December Mr. Charlesworth having come out to Bombay informs the defendant he will telegraph to his firm to sell "at the best price obtainable" since he refuses to give them a margin to cover the heavy deficiency, and on 30th January 1890 informs the defendant that the goods were being sold on that day without reserve to the highest bidder.

Now, although no express admission by the defendant of the plaintiffs' right to sell in case of default of payment of deficiencies is to be found in the defendant's letters, they all tacitly proceed on the assumption that, according to the course of business between them, the plaintiffs would be justified in taking the course they threatened to take if the defendant committed default in remitting so as to cover any material amount of deficiency, and having regard to the nature of this business, which necessarily required that the factor for sale in England, who accepted the consignor's bills, should look mainly to the proceeds of the goods for payment of his advances, the inference from the above correspondence is, I think, that this consignment business was conducted between the parties

1893
MARCH 18.
ORIGINAL CIVIL.
17 B. 520.

on the basis of the plaintiffs being entitled to sell in a falling maket if the consignor failed to cover the deficit, if exceeding 20 p. c. This conclusion is strengthened by the conduct of the defendant, who never went into the witness box to deny that such was the course of business.

As no attempt has been made by the defendant, in taking the account, to show that there was not a material deficit at the [545] time the goods were sold, or that he was ready to meet it, I am of opinion that Mr. Justice Farran was right in holding that, under the circumstances disclosed by the evidence and according to the course of business, the plaintiffs' right to sell arose notwithstanding the 6*d*. limit imposed by the defendant, and that the exception to the Commissioner's report, which raises the question as to the defendant's claim to be credited with the price of the cloves at 6*d*. per lb., was properly disallowed, and that the appeal should be dismissed with costs.

STARLING, J.—In this case the question to be decided is whether the plaintiff as consignee of certain produce was entitled to sell the same against the orders of the defendant, the consignor, in order to recoup himself the advances he made when he accepted the consignments. The cases of *Smart* v. *Sandars* (1), taken together with *De Comas* v. *Prost* (2), decide that a factor, to whom goods have been delivered for sale, has no right to sell those goods against the orders of the owner in order to repay himself the amount he may have advanced upon them, whether the advance be made at the time the goods are handed to him or subsequently unless it be proved that an agreement to that effect was made at the time of the advance, or may be inferred from the course of business between the parties. The case of *Brown* v. *McGran* (3) and illustration (*b*) to s. 202 of the Contract Act do not afford any assistance, as in the American case a *general* authority was given at the time of the advance being made, and the illustration assumes that such authority has been given, and it will be seen that no such authority was given in this case.

From the evidence it appears that previous to January, 1889, the plaintiff and defendant had been doing business together, but the full details of the terms on which such business was carried on do not appear. At the beginning of that month some conversation took place between them as to an increase of business, &c. A letter was written by the plaintiff to the defendant referring to that conversation, but evidently containing only part of the terms on which such business was to be carried on. [546] On the 25th January, 1889, the defendant consigned 435 packages of cloves to the plaintiff, and drew against them £2,100 and fixed the limit of price at which they were to be sold at 9½*d*. (that limit was eventually reduced to 6*d*). By the time the bill arrived in England cloves had fallen in price, and the plaintiff refused to accept the bill unless cover was provided for the deficiency. That cover was provided by the defendant with very little demur, and the plaintiff accepted the bill, but with the knowledge that his orders did not permit him to sell under a certain limit. On this occasion the defendant by his acts showed that he was bound to keep the plaintiff guaranteed against any deficiency, and his letters of 15th February 1889, 15th March 1889, and 10th September 1889 distinctly show that he never alleged that he was not bound to remit cover whenever it was needed by the fall in the market, but all he does allege is that no cover was necessary at the time the letters were written.

---

(1) 3 C. B. 380=5 C. B. 895.
(2) 3 Moore's P. C. (N. S.) 158.
(3) 14 Peters, 479 (American Rep.)

Clearly, then, the Court is justified in holding that this was part of the terms on which business was to be conducted between the defendant and the plaintiff. It is now admitted that the defendant did not remit sufficient cover in respect of this parcel of cloves. What, then, is the remedy which the plaintiff has in such a case? The plaintiff says that he was under the circumstances entitled to sell the cloves for the best price he could obtain, and in his letter of 23rd August 1889 he threatens to sell them unless margin is provided. The answer to that is contained in the defendant's letter of the 10th September, above referred to, in which no objection is taken to the power of the plaintiffs to sell under fitting circumstances, but it is alleged that those circumstances have no existence, as there would at that time be no deficiency.

On the 28th October sale was again threatened by telegram unless a remittance was sent, and the only reply the defendant made was to lower the limit to 6*d*. Sale was again threatened by the telegram of the 31st October and letter of 1st November, but these do not seem to have been replied to. Early in November the plaintiff started for Bombay, and after his arrival the letters of 11th and 13th December were written to the defendant again threatening sale, and from the evidence of the **[547]** plaintiff it appears that the defendant never set up the case that the plaintiff could not, in any event, sell below the limit fixed, but adopted a policy of procrastination, alleging at first that he had not time to examine the accounts, and subsequently refusing to discuss the matter until the plaintiff settled some counter claim he brought forward. If, according to the course of business, it was not open to the plaintiff under any circumstances to sell below the defendant's limit, that is the very first thing which would have been put forward by the defendant, but at no time does he allege that, and as he has refrained from tendering himself as a witness to prove such a condition, or to contradict the plaintiff when he says he had the right to sell if cover was not provided, the only inference that can be drawn is that, according to the established course of business between the plaintiff and the defendant, the plaintiff was entitled to sell the cloves at the best price he could obtain and against the wish of the defendant in the event of his not providing the plaintiff with sufficient cover as cloves fell in value. Consequently this appeal must fail.

Appeal dismissed.

Attorneys for the appellant (defendant) :—Messrs. *Thakurdas, Dharamsi and Cama.*

Attorneys for the respondents (plaintiffs) :—Messrs. *Payne, Gilbert and Sayani.*

1892
AUG. 15.

APPEL-
LATE
CIVIL.

17 B. 547.

17 B. 547.

APPELLATE CIVIL.

Before Mr. Justice Bayley, Chief Justice (Acting), and Mr. Justice Candy.

AMINABI AND ANOTHER (*Original Plaintiffs*), *Appellants v.*
SIDU AND ANOTHER (*Original Defendants*), *Respondents.**
[15th August, 1892.]

Decree—Execution—Execution pending appeal—Landlord and tenant—Enhancement of rent—Decree for enhanced rent, and in default possession to be given—Appeal by defendants—Execution of decree by plaintiff—Possession taken pending appeal—Decree confirmed on appeal—Time for complying with decree not enlarged by filing appeal—Application by defendants to be restored to possession on payment of amount ordered by appellate decree—Practice—Procedure.

On the 13th February, 1889, the plaintiffs obtained in the District Court of Satara a decree, on appeal, against the defendants, who were their tenants, ordering [548] them to pay Rs. 34 as the rent of certain land for the year 1882-83, and Rs. 50 a year as rent from the 5th April 1883, on which date the plaintiffs had given them notice of enhancement. In default of payment by the defendants the plaintiffs were to take possession of the land. The plaintiffs were to give the defendants credit for any sums which they had paid as rent since the year 1882-83.

Both parties appealed to the High Court from this decree. While these appeals were still pending, the plaintiffs on the 13th February 1890 applied for execution of the decree. They prayed for immediate possession and for Rs. 334 alleged to be the rent due under the decree, *viz*, Rs. 34 for 1882-83 and Rs. 50 for each of the six years from 1883-84 to 1888-89 inclusive. The application was granted by the Subordinate Judge, and the plaintiffs obtained possession on the 19th February 1890.

On the 20th March 1890 the defendants applied to be restored to possession stating that they had appealed to the High Court against the decree of the District Court, which had fixed their rent at the enhanced rate of Rs. 50, and that their appeal was still pending; that the sum of Rs. 334 was not due to the plaintiffs, inasmuch as they (the defendants) had continued to pay the rent at the old rate (*viz*. Rs. 34) to the village officers together with the local fund cess Rs. 2-2, being a total of Rs. 36 2 for each of the six years. They contended that the plaintiffs were thus entitled only to Rs. 83-4, and not Rs. 334, and they claimed to get back the land on the ground that the plaintiffs had obtained possession on an illegal application.

While this application of the 20th March 1890 was still pending, the appeals against the District Court's decree of the 13th February 1889 came on for hearing before the High Court, which confirmed that decree on the 17th July 1890. Thereupon the defendants on the 1st August 1890 brought into Court Rs. 98 (being the difference between the old rent which they had paid and the enhanced rent payable under the confirmed decree), and applied to be restored to possession. On the 6th February 1891 the defendants' application of the 20th March 1890 came on for hearing, and was rejected by the Subordinate Judge on the ground that the defendants had not obeyed the District Court's decree. The defendants thereupon appealed to the District Court, which reversed that decision and ordered that possession should be given to the defendants on the ground that the time for payment of the amount due under the decree should be reckoned from the date of the confirmation of the decree by the High Court, *viz*. 17th July 1890, and that by their payments made to the village officers and their payment into Court on the 1st August 1890, the defendants had obeyed the decree and were entitled to be put back into possession. The plaintiffs appealed to the High Court.

Held (reversing the order of the District Court and restoring that of the Subordinate Judge) that the defendants could not recover possession. The fact that they had appealed to the High Court could not prevent the decree of the District Court from being executed, or enlarge the time for payment of the rent as decreed by that Court. No stay of execution was asked for, and all that the Subordinate Judge had to see in February 1890 was whether payment of rent had been made

* Second Appeal, No. 214 of 1892.

1892
AUG. 15.

APPELLATE CIVIL.

17 B. 547.

in accordance with the terms of the decree of the District Court made on the 13th February 1889. The defendants had not paid that rent when the **[549]** plaintiffs executed the decree on the 19th February, 1890. The decree was legally executed before the High Court's decree was passed on the 17th July, 1890, and that execution could not be afterwards cancelled. because, of the High Court's decree. When the decree of the Dfstrict Court was passed, the defendant should at once have paid to the village officers the balance of the rent due according to that decree, or. on the second appeal to the High Court being made, they should have applied for stay of execution. They followed neither course, and the decree was legally executed. The claim in the plaintiffs' application for execution may have been excessive but the defendants had never attempted to pay anything beyond the old rent.

[Expl., 16 Bom. L,R. 778 ; **R.**, 16 A. 65 (69) ; 17 C.L.J. 120=17 C.W.N. 457 (459)= 18 Ind. Cas. 747 ; L.B.R. (1893—1900) 174 ; L,B.R. (1893—1900) 420.]

SECOND appeal from the order of J. W. Walker, District Judge of Satara, passed in execution of a decree.

The defendants were tenants of the plaintiffs at an annual rent of Rs. 34. On the 5th April, 1883, the plaintiffs gave the defendants notice of enhancement of rent to Rs. 50. They afterwards sued the defendants claiming rent at the old rate up to the date of the notice of enhancement and at the higher rate for the period subsequent to the notice.

The suit came on appeal to the District Court, which, on the 13th February, 1889, passed a decree for the plaintiffs, ordering the defendants to pay Rs. 34 as rent for the year 1882-83 and Rs. 50 per year as rent from the date of the plaintiffs' notice of 5th April, 1883. In default of payment by the defendants, the plaintiffs were to take possession of the land. The plaintiffs were to give the defendants credit for any sum which they had paid as rent since the year 1882-83.

Both parties appealed from this decree to the High Court. On the 13th February, 1890, while these appeals were pending, the plaintiffs applied for execution of the decree. They prayed for immediate possession of the land and for Rs. 334 alleged to be the amount of rent due under the decree, *viz.*, Rs. 34 for 1882-83 and Rs. 50 for each of the six years from 1883-84 to 1888-89 inclusive. The application was granted by the Subordinate Judge, and possession of the land was given to the plaintiff on the 19th February, 1890.

On the 20th March, 1890, the defendants applied to be restored to possession. They stated that they had appealed to the High Court against the decree of the District Court, which fixed their rent at the enhanced rate of Rs. 50, and that their appeal was **[550]** still pending. They alleged that the sum of Rs. 334 was not due to the plaintiffs, as they (the defendants) had continued to pay the rent at the old rate, *viz.*, Rs. 34, to the village officers together with the local fund cess Rs. 2-2, being a total of Rs. 36-2 for each of the six years. They had therefore paid a sum of Rs. 250-12 including Rs. 34 for the year 1882-83 and the plaintiffs were thus only entitled to Rs. 83-4 and not Rs. 334. They claimed to get back the land on the ground that the plaintiffs had obtained possession thereof with the crops standing thereon on an illegal application.

While this application of the 20th March 1890 was pending the appeals against the decree of the 13th February 1889 came on before the High Court, which, on the 17th July 1890, confirmed the decree of the District Court. Thereupon the defendants on the 1st August 1890 brought into Court Rs. 98 (being the difference between the old rent which they had paid, and the enhanced rent payable under the decree confirmed by the High Court), and applied to be restored to possession.

1892
AUG. 15.

APPELLATE CIVIL.

17 B. 547.

On the 6th February 1891 the defendants' application of the 20th March 1890 came on for hearing, and was rejected by the Subordinate Judge on the ground that the defendants had not obeyed the District Court's decree. The defendants appealed to the District Court, which reversed the decision of the lower Court and ordered that possession should be given to the defendants, on the ground that the time for payment of the amount due under the decree should be reckoned from the date of the confirmation of the decree by the High Court, *viz.*, 17th July 1890, and that by their payments made to the village officers, and the sum paid into Court on 1st August 1890, the defendants had obeyed the decree and were entitled to be put back into possession.

From this order the plaintiffs filed a second appeal to the High Court.

Manekshah J. Taleyarkhan, for the appellants (plaintiffs):—The defendants did not comply with the decree of the District Court within a year, and pay the rent as ordered, and accordingly the plaintiffs took out execution and obtained possession. The fact [551] that the defendants had appealed, did not enlarge the time allowed them for obeying the decree and paying the money. This is not a redemption decree—*Mahant Ishwargar* v. *Chudasama Manabhai* (1). When the defendants preferred their second appeal, they ought to have applied for stay of execution of the lower Court's decree, but instead of doing that they, in defiance of the decree, deliberately waited till the disposal of their second appeal and then proposed to pay the amount due. The decree has been legally executed, and the defendants cannot cancel the execution, because of the subsequent decision in appeal.

Mahadeo Chimnaji Apte, for the respondents (defendants):—The only question here is whether the time allowed to the defendants for paying the enhanced rent should not be computed from the date of the High Court's decree. The cases show that where there is an appeal against a decree, the decree is suspended—*Daulat* v. *Bhukandas* (2); *Noor Ali* v. *Koni Meah* (3); *Sakharam Mahadev* v. *Hari Krishna* (4). The decree of the High Court being the final decree, it is that decree, which ought to be executed, and not the decree of the District Court—*Shohrat Singh* v. *Bridgman* (5); *Muhammad Sulaiman Khan* v. *Muhammad Yar Khan* (6). Prior to the High Court's decree the plaintiffs had no doubt, applied for execution of the District Court's decree, but that application and the order thereon were *ex parte*, and subsequently the defendants made an application under s. 583 of the Civil Procedure Code (XIV of 1882). When a decree is executed pending appeal, the execution must be considered to be subject to the final order in the appeal. In this case the plaintiffs appealed as well as the defendants against the District Court's decree, but, although they appealed against it and while their appeal was pending, they applied for and obtained execution.

After the passing of the High Court's decree the defendants paid the amount of the enhanced rent into Court; the plaintiffs have taken it, and also recovered possession, which they ought not to have done.

JUDGMENT.

[552] CANDY, J.—The plaintiffs in this case on 13th February 1889 obtained a decree of the District Judge that "defendants do pay to plaintiffs Rs. 34 as rent for 1882-83 and Rs. 50 as annual rent from the date of

(1) 13 B. 106. (2) 11 B. 172. (3) 13 C. 13.
(4) 6 B. 113. (5) 4 A. 376. (6) 11 A. 267.

plaintiffs' notice of 5th April 1883; in default of payment the plaintiffs are to take possession of the land from defendants; any sums which defendants have paid since the year 1882-83 as rent for the land are to be credited to them, and only the balance to be recovered by the plaintiffs."

On 13th February 1890 plaintiffs applied to the Subordinate Court to execute this decree by praying for immediate possession of the land and for the rent due, which was given as Rs. 334. This sum was apparently arrived at by adding the rent for 1882, 83 (Rs. 34) to the rent at Rs. 50 for six years, *viz.*, 1883-84 to 1888-89 inclusive. The defendants had all along continued to pay the old rent only (Rs. 34) through the village officers s. 85. Land Revenue Code, Bom. Act V of 1879).

The Subordinate Judge at once ordered immediate possession to be given to the plaintiffs, which was done on 19th February 1890.

On 20th March 1890 defendants made an application to the Subordinate Judge objecting to being ousted from possession, alleging that plaintiffs should have demanded Rs. 83-4 only; that they (defendants) had preferred a second appeal to the High Court against the decree of the District Court fixing the rent at Rs. 50; that credit should be given for the sums paid to the village officers, *i.e.*, Rs. 34 rent, and Rs. 2-2 local fund cess, total Rs. 36-2 each year; and demanding restoration of the land on the ground that plaintiffs had obtained possession with the crops on the strength of an illegal application. This application of the defendants was not finally disposed of by the Subordinate Judge till 6th February 1891.

In the meanwhile both parties had filed second appeals in the High Court against the District Court's decree, which, however, was confirmed on 17th July 1890, no written judgment being delivered.

Defendants then on 1st August 1890 made an application to the Subordinate Judge, producing Rs. 98, which they apparently **[553]** calculated as the difference (Rs. 14) for seven years between the rent confirmed by the High Court (Rs. 50) and what they had hitherto paid (put by defendants as Rs. 36). This of course was an error in calculation, for defendants apparently included local fund cess, whereas it is evident that the District Judge intended the Rs. 50 to be in place of the Rs. 34, exclusive of any local fund cess.

Eventually, as noted above, on 6th February, 1891, the Subordinate Judge disposed of the defendants' application claiming to be restored to possession. He refused their prayer, holding that they had defaulted in complying with the terms of the decree.

On appeal to the District Court the Judge reversed the order of the Subordinate Judge, holding on the authority of *Patloji* v. *Ganu* (1) that the time fixed for payment of the rent due must be reckoned from the date of the decree of the High Court; that defendants had since 1885-86 paid to the village officers Rs. 170 in addition to the Rs. 98 paid into Court; and that, therefore, defendants were entitled to be put back into possession.

We are unable to agree with the conclusions of the District Judge. There is apparently some mistake in regard to the case quoted by him. The ruling in *Patloji* v. *Ganu* is simply that the order of the High Court, allowing the withdrawal of a second appeal, is not a decree from which a fresh period can be computed for payment of redemption money. But there are expressions in the judgments of the learned Judges which tell strongly against the view taken by the District Judge. Thus Parsons, J.,

(1) 15 B. 370.

1892
AUG. 15.

APPEL-
LATE
CIVIL.

17 B. 547.

said: "The mere fact that an appeal has been preferred does not stay execution of the decree appealed against, *or prevent its being executed, or enlarge the time for its performance*.....The plaintiffs have only themselves to blame if they did not within the prescribed time pay the money they were ordered to pay. They waited the result of the defendant's appeal at their own risk." So here: both plaintiffs and defendants appealed to the High Court: but that fact could not prevent the decree of the District Court being executed, or enlarge the time for payment of the rent as decreed by the District Court. Even if the [554] Subordinate Judge had the power to enlarge the time for payment in the course of execution, the mere fact that an appeal had been lodged would afford no special ground for enlarging the time (*Mahant Ishwargar* v. *Chudasama Manabhai* (1). No stay of execution was asked for: therefore all that the Subordinate Judge had to see in February 1890 was whether payment of rent had been made in accordance with the terms of the District Court's decree of the 13th February, 1889.

The Subordinate Judge was wrong in supposing that nothing had been paid since 1882-83: strictly speaking, the subsequent payments to the village officers were the only payments which the Courts could recognize. But assuming that the District Court's decree allowed, and could allow, payment either to the village officers or into Court, it is a fact that in February 1890 nothing had been paid beyond the old rent of Rs. 34, and not a pie in excess of that rent was tendered by defendants till August 1890. It is unnecessary therefore to enquire whether the District Judge in the present case was justified in assuming that, though the District Court's decree directed defendants to pay "Rs. 50 as annual rent from the date of plaintiffs' notice of 5th April 1883," yet defendants were justified in paying the old rent only (Rs. 34) for 1883-84 and 1884-85. In any case, defendants had not paid their due rent from 1885-86 to 1888-89 when the plaintiffs executed the decree. Nor did they tender it, or pay it to the village officers, when they objected (March 1890) to being ousted from possession.

Ought, then, the Subordinate Judge to have subsequently cancelled the execution of the decree, and restored the defendants to possession, because on 17th July 1890 the High Court confirmed the decree of the District Court, which directed defendants to pay the enhanced rent, and ordered that in default of payment the plaintiffs were to take possession of the land from defendants? We think not. It may be a hard case for defendants, but they have only themselves to blame. When the District Court's decree was passed, they should at once have paid to the village officers the balance of the rent due according to that decree, or they should, [555] on second appeal being made, have applied for stay of execution. They followed neither course, and the decree was, therefore, legally executed before the High Court's decision was passed. The claim in the plaintiffs' application for execution may have been excessive in regard to the amount of rent claimed; but the fact remains that defendants had never made any attempt to pay anything beyond the old rent. Under these circumstances, we must discharge the order of the District Judge and restore that of the Subordinate Judge. All costs on defendants.

Order discharged.

(1) 13 B. 106 (109).

APPELLATE CIVIL.

Before Mr. Justice Bayley, Chief Justice (Acting) and Mr. Justice Candy.

BALAJI GANESH (*Original Plaintiff*), *Appellant v.* SAKHARAM PARASHRAM ANGAL AND ANOTHER (*Original Defendants*), *Respondents.** [18th August, 1892.]

Instalments—Decree on mortgage for payment of Rs. 1,800 *by instalments, and in default execution for whole amount to issue—Default in payment of instalments—Waiver by plaintiff of right to execute decree—Receipt by plaintiff of overdue instalments is no waiver—Practice—Procedure—Different rulings of different High Courts—Judge to follow the ruling of the High Court to which he is subordinate.*

By a consent decree passed in a mortgage suit the defendant was ordered to pay to the plaintiff the sum of Rs. 1,800 by yearly instalments of Rs. 50 payable on the 30th April in each year, and in case of default in payment of any instalment the plaintiff was to be at liberty to execute the decree by sale of the mortgaged property. The defendants failed to pay the first instalment, which fell due on the 30th April, 1888, and the plaintiff applied for execution and obtained an order for the sale of the property. In order to prevent the sale the defendants on the 13th November, 1888, paid Rs. 60 out of Court, and the application for execution thereupon was allowed to drop. The defendants subsequently made the following payments, *viz.*, Rs. 15 on the 5th June, 1889, Rs. 25 on the 12th June, 1889. Rs. 15 on the 1st January, 1890. and Rs. 50 in the Nazir's office on the 2nd June, 1890, which was the day on which the Court opened after the summer vacation, which had begun on the 30th April, 1890. On the 6th June, 1890, the plaintiff again applied for execution of the decree, which was granted by the Subordinate Judge. On appeal, the District Judge reversed the order, holding that the plaintiff by accepting the above payments had waived his right to execute the decree. On appeal to the High Court,

[556] *Held* that the plaintiff was entitled to execution. The acceptance of the payments did not prove a waiver. They were not accepted on account of the specific instalments in arrears, but on account of the whole decree; and even if they were taken as payments of overdue instalments, they could not by themselves prove a waiver.

A Judge should follow the ruling of the High Court of his own Presidency.

[**R.**, 31 C. 83=8 C.W.N. 66 (68); 12 Ind. Cas. 741 (743)=7 N.L.R. 147; **Cons.**, 27 B. 1 (12).]

THIS was a second appeal from an order passed by J. W. Walker, District Judge of Satara, in an execution proceeding.

By a consent decree for Rs. 1, 800 passed in a mortgage suit it was ordered (*inter alia*) that the defendants should pay off the amount by annual instalments of Rs. 50, to be paid on the 30th April every year, and on their failure to pay any of the instalments within the stipulated period, the plaintiff should recover the balance of the decretal amount by the sale of the mortgaged property and from the defendants personally.

The first instalment of Rs. 50 became due on the 30th April 1888, and the defendants having made default in payment, the plaintiff applied for the execution of the decree, and obtained an order for the sale of the property and payment of the whole amount. In order to prevent the sale, the defendant on the 13th November 1888 paid Rs. 60 out of Court, and the application for execution thereupon dropped. The defendants made several subsequent payments, *viz.*, Rs. 15 on the 5th June 1889, Rs. 25 on the 12th June 1889, Rs. 15 on the 1st January 1890, and Rs. 50 in the Nazir's office on the 2nd June 1890, which was the day on which the

* Second Appeal No. 189 of 1892.

1892
AUG. 18.

APPELLATE CIVIL.

17 B. 555.

Court re-opened after the summer vacation which had begun on the 30th April, 1890.

On the 6th June 1890 the plaintiff again applied for the execution of the decree and to recover the balance due under it by the sale of the mortgaged property and from the defendants personally.

The Subordinate Judge granted the application.

The defendants appealed, and the District Judge reversed the order. In his judgment he said :—

"This was a consent decree under which the judgment-debtor was required to pay instalments of Rs. 50 annually on the 30th [557] April, the first instalment being due on the 30th April, 1888, and on failure to pay any instalment the whole amount became due. The first instalment was not paid on the due date, and the decree-holder applied for execution of the whole decree, and a sale of the property was ordered, but that order was set aside on an endorsement of the decree-holder that he had received Rs. 60. It is clear that the decree-holder has waived his right, and cannot claim to execute the whole decree as to the first default.

"The second instalment was also not paid on the proper date, but before the date of the third instalment the decree-holder received Rs. 55, or Rs. 5 more than the amount of the overdue instalment, and gave a receipt. He did not make an application to execute the whole decree till after the date of the third instalment. According to the decision in *Hiralal* v. *Budho* (1), the receipt of the overdue instalment did not constitute a waiver ; but the contrary has been held by the Calcutta High Court in a more recent case—*Ram Culpo* v. *Ram Chunder* (2), and for the reasons there given, I think it must be held that there has been a waiver, as the decree-holder did, in fact, receive payment and did not apply for payment of the whole amount due.

"As to the third instalment, the Court was closed on the proper date for payment, and the judgment-debtor paid in the amount on the first day the Court re-opened. There has, therefore, been no default. As the judgment-debtor could not, as a fact, pay into Court the amount on the due date, he cannot be said to have made default in payment."

The plaintiff filed a second appeal.

Shamrav Vithal, for the appellant (plaintiff).—It is admitted that there was default made in the payment of the first two instalments. The terms of the decree are peremptory, and empowers the plaintiff to recover the whole of the amount due under the decree if default be made in the payment of any instalment. There was no waiver by the plaintiff. When he made the first application for execution an order was passed directing execution of the decree by the sale of the mortgaged property. The defendants then [558] paid him Rs. 60 and suggested a compromise. The plaintiff thereupon acknowledged the receipt of Rs. 60, and applied to the Court to postpone the proceedings ; but the Court, instead of postponing the proceedings, passed an order disposing of the *darkhast*. That was not a waiver—*Firm at Ravor* v. *Sadashiv* (3). The payment of Rs. 60 was made, not on account of the first instalment, but on account of the whole decree. This appears from the receipt given by the plaintiff. So also with regard to the other payments.

Mahadeo Chimnaji Apte, for the respondents (defendants).—The very fact that the appellant received Rs. 60,—that is Rs. 50 the amount of the first instalment *plus* Rs. 10,—and allowed the *darkhast* to be struck

(1) P. J. 1883, p. 172. (2) 14 C. 352. (3) P.J. 1883, p. 381.

off, shows that there was a waiver on his part. A man who does not enforce his right must be considered to have waived it—*Buddhu Lal* v. *Rekkab Das* (1); *Nagappa* v. *Ismail* (2). There would have been no waiver on the appellant's part if he had declined to accept Rs. 60 and asked the Court to continue the proceedings. Waiver is an indulgence shown to the debtor, and having once shown it, the judgment-creditor cannot insist upon his right to have the whole decree executed. Although default was made in the payment of the first two instalments, the third instalment was paid into Court in time. The time for the payment of that instalment, no doubt, expired during the vacation, but as the plaintiff made the payment on the day the Court reopened, it was in time.

JUDGMENT.

CANDY, J.—The District Judge was not justified in preferring the ruling of the Calcutta High Court to that of the High Court of his own Presidency. Where they differ he should follow the latter (see *Swamirao* v. *Kashinath* (3)). He was also in error in remarking that the order for execution obtained by the decree-holder was set aside. The sum of Rs. 50 due as the first instalment was not paid, and so the decree-holder applied to execute the whole decree by the sale of defendant's property. To prevent that sale defendant paid Rs. 60, and the application for execution dropped, and was thus disposed of. The payment of **[559]** Rs. 60 was apparently on account of the whole decree, for at that time Rs. 50 only were due on account of the instalment. So, too, with the payments in 1889-90: long after the instalment of Rs. 50 was due (30th April, 1889) defendant paid small sums amounting altogether to Rs. 55, which, as the receipts show, were paid on account of the sums due under the decree. There is no mention in these receipts of the word instalment, which would have amounted to Rs. 50 only. The payment into Court by defendant of Rs. 50 on 2nd June, 1890, could not affect plaintiff, who on 6th June, 1890, applied to execute the balance of the whole sum due under the decree, after giving credit for part-payments.

It is admitted that there are no other facts but the above payments showing waiver on the part of the decree-holder. These, on the face of them, were not accepted on account of the specific instalments in arrears, as contradistinguished from part-payments on account of the whole debt; so they could not be sufficient evidence of a waiver—*Nagappa* v. *Ismail*(2). And even if they be taken as payments of over-due instalments, they cannot by themselves prove waiver. This is the principle laid down in *Hiralal* v. *Budho* (4), which has been followed in subsequent cases—see *Firm at Raver* v. *Sadashiv*(5). As there are admittedly no other facts on which we could ask the District Judge to consider whether he found waiver or not, we must reverse his order and restore that of the Subordinate Judge. All costs on defendant.

Order reversed.

(1) 11 A. 482. (2) 12 M. 192. (3) 15 B. 419.
(4) P.J. for 1883, p. 172. (5) P.J. for 1888, p. 381.

1892
AUG. 31.

APPELLATE CIVIL.

17 B. 560.

17 B. 560.

[560] APPELLATE CIVIL.

Before Mr. Justice Bayley, Chief Justice (Acting), and Mr. Justice Candy.

SAYAD SHAHU (*Original Opponent*), *Appellant v.* HAPIJA BEGAM (*Original Applicant*), *Respondent.** [31st August, 1892.]

Minor—Guardian—Appointment of guardian by will—Application for certificate of guardianship—Practice—Procedure—Guardians and Wards Act (VIII of 1890), *ss.* 7, (*Cl.* 3), 13 *and* 48 (1).

When a person alleges that he has been appointed guardian of a minor under a will, no one else can be appointed guardian under s. 7 (3) of Act VIII of 1890 until it is found after due investigation that there is no valid will.

The procedure under Act VIII of 1890 is not intended to be summary.

[R., 15 C.W.N. 457=7 Ind. Cas. 702 (703).]

THIS was a first appeal from an order passed by C. G. W. Macpherson, District Judge of Belgaum.

The facts of the case were as follows :—

One Hapija Begam, widow of Gouskhan Desai, applied under Act VIII of 1890 for a certificate of guardianship to the persons of her minor sons and grandsons, and asked the Court to appoint a manager of the property of her deceased husband.

[561] The opponent, Sayad Shahu *alias* Mahomed Saheb, objected on the ground that he had been appointed guardian of the minors and of their property under a will made by the deceased Gouskhan on the 15th June, 1890.

The District Judge after recording some evidence declined to take further evidence, on the ground that the proceedings were summary, and that it was open to the opponent to establish his position in a regular suit. He accordingly granted to the applicant the certificate of guardianship of the minor children, and requested the Collector to nominate a manager of the property.

The opponent appealed.

Phirozshah M. Mehta (with *Mahadeo Bhaskar Chaubal*), for the appellant.—The Judge has disposed of this matter summarily according to the procedure under Act XX of 1864; but that Act has been repealed

---

* Appeal No. 2 of 1892.

(1) Sections 7, 13, and 48 of Act VIII of 1890 are as follows :—

Section 7.—(1) Where the Court is satisfied that it is for the welfare of a minor that an order should be made—

(*a*) appointing a guardian of his person, or property, or both ; or

(*b*) declaring a person to be such a guardian.

the Court may make an order accordingly.

(2) An order under this section shall imply the removal of any guardian who has not been appointed by will or other instrument or appointed or declared by the Court.

(3) Where a guardian has been appointed by will or other instrument or appointed or declared by the Court, an order under this section appointing or declaring another person to be guardian in his stead shall not be made until the powers of the guardian appointed or declared as aforesaid have ceased under the provisions of this Act.

Section 13.—On the day fixed for the hearing of the application, or as soon after as may be, the Court shall hear such evidence as may be adduced in support of or in opposition to the application.

Section 48.—Save as provided by the last foregoing section and by s. 622 of the Code of Civil Procedure, an order made under this Act shall be final, and shall not be liable to be construed by suit or otherwise.

by Act VIII of 1890, which contemplates full inquiry into the allegations of the contending parties—ss. 13 and 48.

Section 7 (3) of the Act lays down that when a person is appointed guardian under a will or other instrument, no other person shall be appointed as guardian until the powers of the appointed guardian have ceased.

Jardine (with *Ghanasham N. Nadkarni*), for the respondent.—The case of a guardian appointed under a will is governed by s. 5 of Act VIII of 1890, and that section applies only to European British subjects.

Section 6 relates to the appointment of a guardian generally. But when a guardian is appointed under a will, s. 5 only is applicable.

[CANDY, J., referred to s. 7.]

We do not contend that the Act does not apply to persons other than European British subjects. We say that it applies to all persons, but what we contend is that when a guardian is appointed under a will, there is special provision made by s. 5 which relates only to European British subjects. The other sections of the Act do relate to the appointment of a guardian, but they do not relate to the appointment of a guardian under a will or other instrument.

[562] Next, the Judge was not satisfied as to the genuineness of the will and therefore he was right in not appointing the appellant. The Judge was also justified in rejecting the appellant's application for producing evidence, because the application was made only the day before the final order was passed.

The respondent is the grandmother of the minors, and therefore she is the proper person to be their guardian.

JUDGMENT.

CANDY, J.—The District Judge was apparently misled by his recollection of the old Act (XX of 1864), which directed that the proceedings under that Act should be summary. Sections 13 and 48 of Act VIII of 1890 show that the procedure under the later Act is not intended to be summary.

Opponent opposed the application on the ground that he had been appointed by will. We think that under s. 7 (3), the District Judge could not appoint any one else as guardian until he found, after due investigation, that there was no valid will as alleged by opponent. The District Judge declined to hear the evidence referred to in the application of opponent, dated 26th October 1891, not because the evidence was adduced too late, but because "the proceedings are summary, and the Courts are open for a regular trial." Under these circumstances, we must reverse the order of the District Judge, and remand the case to him for investigation according to law. All costs to be dealt with in the Court below.

Order reversed.

1892
SEP. 7.

APPEL-
LATE
CIVIL.

17 B. 562.

17 B. 562.

APPELLATE CIVIL.

Before Mr. Justice Bayley, Chief Justice (Acting), and Mr. Justice Candy.

BHUKHANDAS VIJBHUKANDAS (*Original Plaintiff*), *Appellant v.* LALLUBHAI KASHIDAS AND ANOTHER (*Original Defendants*), *Respondents.** [7th September, 1892.]

Res judicata—*Suit on a mortgage against several defendants—Dismissal of suit as against some of the defendants for want of jurisdiction—Subsequent suit on the mortgage against same defendants in another Court—Civil Procedure Code (XIV of 1882), ss. 42, 43.*

The plaintiff brought a suit in the High Court of Bombay (No. 169 of 1887) against three defendants on a mortgage executed at Surat of certain property [563] situated there. The covenant for repayment was joint and several. The second and third defendants in that suit (the defendants in the present suit), who were inhabitants of Surat, pleaded that as against them the Court had no jurisdiction. The suit was accordingly dismissed as against them for want of jurisdiction, but as against the first defendant, who resided in Bombay, the Court passed a decree for the plaintiff. The plaintiff then brought the present suit against the defendants in the Surat Court to enforce their liability under the mortgage. The defendants pleaded that the claim against them was barred by the dismissal of the former suit.

Held, that the suit was not barred. In the former suit there had been, as against these defendants, no decision on the merits, and the proceedings against them were a nullity.

[R., 22 A. 307 (310); 24 B. 77 (83) = 1 Bom. L.R. 534.]

SECOND appeal from the decision of C.G.W. Macpherson, District Judge of Surat.

In this suit the plaintiff sought to recover Rs. 4,165 alleged to be due on a mortgage executed in his favour by the defendants and one Jekisondas Purshotamdas.

The plaint stated that the plaintiff had already brought a suit (No. 169 of 1887) on the mortgage against all the mortgagors on the original side of the High Court. In that suit the defendants pleaded that the Court had no jurisdiction, in as much as the mortgaged property was situated at Surat, where they resided and where the mortgage was executed. The High Court thereupon dismissed the suit as against them for want of jurisdiction, but passed a decree against their co-defendant, Jekisondas Purshotamdas, who resided in Bombay.

The defendants now pleaded that this suit against them was barred by the dismissal of suit No. 169 of 1887.

The First Class Subordinate Judge passed a decree for the plaintiff.

On appeal by the defendants the District Judge reversed the decree. In his judgment, after referring to ss. 42, 43, 16 and 17 of the Civil Procedure Code (Act XIV of 1882), he said :—

"Now it seems to me that all these provisions are aimed against a plaintiff bringing two or more suits where the matter in litigation can be disposed of in one, and against defendants being troubled unnecessarily, and they point at a suit being as a rule brought in the Court within the local limits of whose jurisdiction the property in dispute is situate or the cause of action [564] arose; it can be brought in a Court within whose local limits the defendant or one of the defendants resides, but only under certain conditions.

---

* Second Appeal No. 12 of 1891.

"In the present case a bond executed in Surat by Jekisondas and the present defendants mortgaged to plaintiff a house situate in Surat. Plaintiff, however, elected to sue the mortgagors in Bombay, and obtained in the High Court a decree for the full amount of the bond against Jekisondas, who resides in Bombay, while his claim as against the present defendants was rejected for want of jurisdiction. The plaintiff then brought a second suit against them in the Court of the First Class Subordinate Judge of Surat, and has obtained a second decree for the full amount of his bond, and the question is, whether this second decree can be confirmed. I think it cannot.

"In the words of s. 42 of the Civil Procedure Code, it was practicable by bringing the suit in Surat to obtain a final decision against all the mortgagors, and thus to prevent further litigation, and I am of opinion that when plaintiff elected to bring his suit in a Court which had jurisdiction in respect only of one defendant, he, in effect, waived his claim against the others. No doubt, if he had different causes of action against the different defendants, he might bring different suits, but I think when a house is mortgaged for a lump sum of money by its co-owners, the mortgagee has only one cause of action. He may sue one or two or more or all of them, but he can't bring more than one suit, and I do not think that a clause in the bond making the mortgagors jointly and severally liable (as in this case) over-rides the provisions of the law against a multiplicity of suits when, as a matter of fact, the whole of the property is mortgaged by all its owners."

The plaintiff preferred a second appeal.

Lang, Acting Advocate-General, for the appellant.—The liability here was a joint and several liability. The dismissal of the former suit against the defendants for want of jurisdiction without any decision on the merits cannot operate as *res judicata* in a subsequent proceeding against them. If the liability under the bond had been joint, and not several, then the dismissal of the **[565]** suit might have operated as *res judicata*—*Kendall* v. *Hamilton* (1); *Hemendro Coomar* v. *Rajendrolall* (2); *King* v. *Hoare* (3); *Dhunput Singh* v. *Sham Soonder Mitter* (4).

Jardine (with *Manekshah J. Taleyarkhan*), for the respondents—The plaint in the former suit in the High Court alleged that the money was to be paid by the respondents at Bombay, and hence the cause of action was alleged to have arisen in Bombay. Under these circumstances the appellant ought to have appealed against the order of the High Court dismissing the suit for want of jurisdiction, and that order ought to have been set aside. Not having been set aside, it operates as a bar to the present suit.

Lang in reply.—The respondents themselves had raised the plea of want of jurisdiction in the High Court. Therefore it cannot now be open to them to urge that the order of dismissal ought to have been set aside in appeal. The mortgage-bond does not say that the money was to be paid at Bombay. The bond having been executed at Surat, the presumption would be that the money was to be paid at Surat, unless there was a special provision to the contrary.

JUDGMENT.

BAYLEY, C. J. (Acting).—We are of opinion that the decision of the District Judge cannot be sustained. He has evidently not appreciated the difference between a joint liability and a joint and several liability.

(1) 4 Ap. Ca. 504. (2) 3 C. 353. (3) 13 M. and W. 494. (4) 5 C. 291.

1892
SEP. 7.
APPEL-
LATE
CIVIL.
17 B. 562.

Defendants 2 and 3 in the suit No. 169 of 1887 on the original side of the High Court pleaded in their written statement that as against them the Court had no jurisdiction. That Court so decided and dismissed the suit against them. There was no decision on the merits, and the proceedings against them in that Court were a nullity. The case of *King* v. *Hoare* (1), which was treated as a binding authority in the case in the House of Lords of *Kendall* v. *Hamilton* (2), does not appear to have been cited, or to have been present to the mind of the District Judge when he was preparing his judgment. [566] The sections of the Civil Procedure Code quoted by the District Judge have, in our opinion, no application.

We therefore reverse the decree of the District Judge and restore that of the Subordinate Judge. All costs on defendants.

Decree reversed.

---

17 B. 566.

APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Telang.

VALLABDAS HIRA CHAND (*Original Opponent*) *v.* KRISHNABAI (*Original Applicant*), *Opponent.** [27th September, 1892.]

Guardians and Wards Act (VIII of 1890), *s.* 41, *cl.* 3, *and s.* 51—*Its applicability to guardians who had ceased to be such before the Act came into force—Guardian and ward.*

The Guardians and Wards Act (VIII of 1890) does not apply to guardians whose powers had ceased by reason of their wards having attained majority or otherwise, prior to the passing of the Act.

The word 'guardian' in s. 51 of the Act means a guardian who was such at the time the Act came into force.

A was appointed a guardian of *B*'s property under the Bombay Minors Act, XX of 1864. *B* attained majority in 1886. In 1892 *B* applied to the District Judge for an order directing *A* to deliver to B his property, together with the accounts relating thereto. The District Judge made the order, as asked for, under s. 41, cl. 3 of Act VIII of 1890.

Held, that the District Judge had no jurisdiction under Act VIII of 1890 to make the order in question, as *A* had ceased to be a guardian before the Act came into force.

THIS was an application under s. 622 of the Code of Civil Procedure (Act XIV of 1882).

On the 30th January 1879 the applicant was appointed administrator of the estate of the opponent Krishnabai, then a minor, under s. 6 of the Bombay Minors Act, XX of 1864.

Krishnabai attained majority in 1886.

Krishnabai adopted a son, and an arrangement was made between her and the administrator of the estate, under which she was to be paid Rs. 50,000 in cash, and the rest of her estate was to be held by the administrator in trust for the benefit of the adopted son.

[567] On 25th March, 1892, she applied to the District Judge under Act VIII of 1890, praying that the applicant should be ordered to deliver up all the property in his hands belonging to her, together with the accounts and other papers relating thereto.

---

* Application No. 108 of 1892 under Extraordinary Jurisdiction.

(1) 13 M. and W. 494.

(2) 4 Ap. Ca. 504.

The District Judge granted this application under s. 41, cl. 3 of Act VIII of 1890, holding that, by s. 51, the present Act was applicable to guardians appointed under Bombay Act XX of 1864.

Against this decision the present application was made to the High Court under its revisional jurisdiction.

Branson (with him Rao Saheb *Vasudev J. Kirtikar*), showed cause.—The applicant was appointed guardian under Bombay Act XX of 1864. He is still in possession of his wards' property. Act VIII of 1890, therefore, governs the present case—*Shri Umabai* v, *Shri Vasudev Pandit* (1); *Ramchandra* v. *Yamunabai* (2) ; *Chimaji* v. *The Nazir of the District Court of Poona* (3).

Inverarity (with him *Mahadev Chimnaji Apte*), *contra*.—Section 51 of Act VIII of 1890 should be read with s. 4. Section 4 defines a guardian to be one who was acting as such at the time the Act came into force. Section 51, therefore, does not apply to a guardian who had become *functus officio* before the date of the new Act. In the present case the ward attained majority in 1886, and thereupon the guardian's powers ceased. That being the case, the lower Court had no jurisdiction to make an order under s. 41, cl. (3) of the new Act for the restoration of the property to the opponent. The present case is governed by Act XX of 1864. And under that Act the Court had no power to pass such an order—*Shri Umabai* v. *Shri Vasudev Pandit* (1) ; *Ram Dyal* v. *Amrit Lall* (4) ; *Doolun Singh* v. *Torul Narain Singh* (5).

JUDGMENT.

TELANG, J.—The Judge in the Court below has expressed an opinion that, under the provisions of Act XX of 1864, it would not have been competent to him to make any such order as he [568] has made in this case, but that it was open to him to make such order under the Guardians and Wards Act, 1890, s. 41, cl. (3). Having regard to such cases as those of *Ramchandra* v. *Yamunabai* (2), and *Chimaji* v. *The Nazir of the District Court of Poona* (3), and also on general grounds, I am not prepared to say that the Judge's opinion as regards Act XX of 1864 is right. And the decision he refers to, of *Shri Umabai* v. *Shri Vasudev* (1), does not seem to be necessarily applicable to this case. On the other hand, it must be admitted to be at least open to doubt whether the new Act applies, and I am inclined to hold that Mr. Inverarity is right in his argument, that s. 51, when compared with the definition of guardian in the Act, cannot have the force which the District Judge has given to it. But I do not think it necessary to consider either of these points further. It appears from the judgment of the District Judge, that the applicant before us relied upon a "specific arrangement" come to between him and the opponent after the latter came of age, in pursuance of which a sum of Rs. 50,000 was paid by the applicant to the opponent, and the applicant undertook to hold the residue of the property in his hands for the benefit of the son adopted by the opponent. The District Judge declined to go into this point altogether. But I am of opinion that whether the guardian could under ordinary circumstances have set up a *jus tertii* or not as to which see *Stone* v. *Godfrey* (6) and *Newsome* v. *Flowers* (7), it was the duty of the Court, before making an order for the

(1) P.J. for 1885, p. 189. (2) *Ibid*, 1879, p. 15. (3) P.J. for 1880, p. 104.
(4) 9 W.R. 555. (5) 4 W.R. 3 (Mis. App.). (6) 5 De Gex M. and G. 76.
(7) 30 Beav. 461.

1892
SEP. 27.
APPELLATE CIVIL.
17 B. 566.

restoration of property, to inquire into such allegations as were made in this case relating to a "specific arrangement" between the guardian and his *quondam* ward, whereby the old trust was, to all intents and purposes, satisfied, and a fresh trust created for the adopted son. The order made by the Judge is quite incompatible with the alleged, "arrangement" and yet even the factum of that "arrangement" has not been inquired into at all. On this ground I agree to reverse the order of the District Court, leaving the parties to take such steps as they may be advised for enforcing their rights, whatever they may be.

[569] PARSONS, J.—In January, 1879, the applicant was appointed the guardian of the property of the opponent under Act XX of 1864. The opponent came of age in 1886, and in March, 1892, asked the District Judge of Poona to make an order directing the applicant to deliver to her her property, with all accounts relating thereto. The District Judge, after hearing the applicant made the order asked for, and the applicant has now applied to this Court to exercise its extraordinary jurisdiction and set aside the order.

The District Judge says that "under the old law, Act XX of 1864, no power to make any such order existed," and he has made his order under the provisions of s. 41 of the Gurdians and Wards Act, 1890, which he holds applies to the case by virtue of s. 51. The question is, whether the Act of 1890 applies to guardians whose powers had ceased by reason of their wards having attained majority, or otherwise, prior to the passing of the Act. This question I determine in the negative.

The words in s. 51 "a guardian appointed by or holding a certificate of administration from a Civil Court" when read with the definition in s. 4 (2) can only mean a guardian who is such at the time the Act comes into force. They cannot mean a guardian who had been appointed or who had held a certificate, but who was no longer a guardian, his ward having come of age and his powers having ceased before the passing of the Act. I am confirmed in this view by the words in s. 41 itself. Clause 3 of this section says: "When for any cause the powers of a guardian cease, etc." The word "cease" must here mean cease after the Act comes into operation. I cannot construe it as equivalent to "have ceased," or read the words "or have ceased" after it. On this construction of the Act, I decide that the District Judge had no jurisdiction under the Act of 1890 to make the order in question. Act XX of 1864 must govern the case.

I must also rule that the District Judge was wrong in refusing to enquire into the allegation of the applicant that the opponent had adopted a son and had, after she attained majority, constituted him the trustee of that son in respect of the property in **[570]** question. Clearly, if that allegation was proved, and if the applicant had validly been created the trustee of the son, no order could have been passed directing the applicant to hand over property to the creator of the trust in breach of that trust. I would make the rule absolute, but as my learned colleague differs from the view taken by the District Judge as to his power to make the order under Act XX of 1864, in which view I am inclined to concur, this Court simply reverses the order of the District Judge as made without jurisdiction under the Guardians and Wards Act, 1890, leaving it open to the opponent to move the District Court under Act XX of 1864, if so advised. The opponent must pay the applicant's costs that have been incurred in this and the District Court.

Order reversed.

17 B. 570.

1892
OCT. 5.

APPELLATE CIVIL.

APPELLATE CIVIL.

17 B. 570.

Before Mr. Justice Parsons and Mr. Justice Telang.

VITHALRAO (*Original Defendant No.* 5), *Appellant v.* VAGHOJI, (*Original Plaintiff*), *Respondent.** [5th October, 1892.]

Civil Procedure Code (*Act XIV of* 1882), *s* 16—*Suit to recover mortgage-debt by sale of mortgaged property out of jurisdiction—Jurisdiction.*

A suit by a mortgagee to recover the mortgage-debt from the mortgagors personally, as well as by sale of the mortgaged property, is one falling within cls. (*c*) or (*d*) of s. 16 of the Code of Civil Procedure (Act XIV of 1882), and can only be instituted in that Court within the local limits of whose jurisdiction the mortgaged property is situate.

A Court has no jurisdiction to entertain such a suit relating to property situate outside the local limits of its jurisdiction.

[R., 23 B. 22 (31) ; 27 M. 118 (120).]

APPEAL from the decree of Rao Bahadur Chunilal Maneklal, First Class Subordinate Judge of Poona, in suit No. 84 of 1889.

The plaintiff sued to recover Rs. 7,886-2-9 on a mortgage-bond executed by defendants Nos. 1 and 2 on 28th May 1874.

[571] Subsequently to the date of the mortgage a money decree was obtained by a third person against defendant No. 1, and in execution of that decree the mortgaged property was put up to sale and purchased by defendant No 5.

The plaintiff prayed for a decree against the defendants personally and for sale of the mortgaged property.

The property was situate in the Sachin State outside British India. The defendants 1 and 2 (the mortgagors) were also residents of the Sachin State. But as defendant No. 5, the auction purchaser of the equity of redemption, was a resident of Poona, the suit was filed in the Court of the First Class Subordinate Judge at Poona.

The defendants pleaded (*inter alia*) that the Court had no jurisdiction to entertain the suit.

The Subordinate Judge, following the ruling in *Yenkoba* v. *Rambhaji* (1), held that the suit would lie, as one of the defendants resided within the jurisdiction of the Court. He awarded the plaintiff's claim for Rs. 7,000 against the mortgaged property only.

Against this decision the defendant No. 5 appealed to the High Court.

Jardine (with him *Mahadeo, Chimnaji Apte*), for appellant :—This is a suit by a mortgagee to enforce his mortgage lien by sale of the mortgaged property. The mortgaged property is situate in a foreign State. The Court below had, therefore, no jurisdiction to entertain this suit. Such a suit can only be brought in that Court within whose local jurisdiction the property is situate. The words of s. 16 of the Code of Civil Procedure (Act XIV of 1882) are clear. This section of the Code differs from s. 5 of Act VIII of 1859 under which *Yenkoba* v. *Rambhaji* (1) was decided. That decision has no application to the present case.

Branson (with him Rao Saheb *Vasudev J. Kirtikar*), for respondents—The decree is a mere declaratory decree. It does not pass any order for

* Appeal No. 37 of 1891.

(1) 9 B. H. C. R. 12.

1892
OCT. 5.

APPELLATE CIVIL.

17 B. 570.

sale of the property mortgaged. Refers to *Deo Chand Sahoo* v. *Teeluck Singh* (1).

JUDGMENT.

[572] PARSONS, J.—This suit was brought on a mortgage, executed by the defendant No. 1, to recover the mortgage-debt by the sale of the mortgaged property which had passed into the possession of the defendant No. 5 by purchase. The defendant No. 1 was a resident of a Native State, and the mortgage was executed, and the property was situated, in the same Native State. As, however, the defendant No. 5 was a resident of Poona, the Subordinate Judge, on the strength of the decision in *Yenkoba* v. *Rambhaji* (2), held that he had jurisdiction, and awarded the claim for Rs. 7,000 and costs against the mortgaged property.

We think that he had no jurisdiction. The language of s. 5 of Act VIII of 1859 is not the same as that of s. 16 of the Code of Civil Procedure, 1882. The former mentioned only "suits for land or other immoveable property." The latter enumerates six different descriptions of suits, and among them are suits, (*c*) for the foreclosure or redemption of a mortgage of immoveable property, and suits (*d*) for the determination of any other right to, or interest in, immoveable property. We think that this suit falls within one or other of these descriptions, and can therefore be instituted only in the Court within the local limits of whose jurisdiction the property is situate. We are supported in this view by the decision of the Allahabad High Court in *Gudri Lal* v. *Jagannath Ram* (3). In the present case the property is not even situate in British India. Moreover, the relief sought can in no way be obtained by the personal obedience of the defendant No. 5, since he is not personally liable for the claim. The relief sought can only be had by proceeding against the property.

We reverse the decree of the Subordinate Judge, and order that the plaintiff's suit be dismissed as against the appellant with costs throughout.

Decree reversed.

17 B. 573.

[573] CRIMINAL REFERENCE.

Before Mr. Justice Telang and Mr. Justice Fulton.

QUEEN-EMPRESS *v.* BALKRISHNA VITHAL.* [17th January, 1893.]

Defamation—Penal Code (Act XLV of 1860). s. 499—Statement by a witness—Privilege—Witness.

A witness cannot be prosecuted for defamation on account of statements made when giving evidence in the witness-box.

[**Diss.**, 32 C. 756=2 C.L.J. 105=9 C.W.N. 111=2 Cr. L.J. 459; **F.**, 27 C. 262 (263); **R.**, 22 A. 234 (235); 29 A. 685=4 A.L.J. 605=27 A.W.N. 235=6 Cr. L.J. 197; 19 B. 51 (62); 19 B. 340 (347); 13 Cr. L.J. 494=15 Ind. Cas. 494=244 P.L.R. 1912=31 P.W.R. 1912 Cr=5 P.R. 1913; 1 L.B.R. 84 (85); 3 L.B.R. 268 (270); **D.**, 19 B. 717 (723).]

THIS was a reference under s. 438 of the Code of Criminal Procedure (Act X of 1882).

* Criminal Reference, No. 41 of 1892.

(1) 14 W. R. 238. (2) 9 B. H. C. R. 12. (3) 8 A. 117.

1893
JAN. 17.
CRIMINAL REFERENCE.
17 B. 573.

The facts of this case were as follows:—The complainant had filed a suit in a Civil Court against the accused. In that suit the accused in the course of his examination as a witness for the plaintiff made the following statement:—

"The plaintiff has brought this false suit against me. He has undergone imprisonment in the Thana Jail, and he is a man of damaged character."

After the decision of the civil suit the complainant prosecuted the accused on a charge of defamation under s. 500 of the Indian Penal Code.

The trying Magistrate found the accused guilty of the offence charged and sentenced him to a fine of Rs. 50.

The Sessions Judge of Ratnagiri, being of opinion that the conviction was illegal, and opposed to the ruling in *Queen-Empress* v. *Babaji*(1), referred the case to the High Court under s. 438 of the Code of Criminal Procedure.

Ghanasham Nilkanth, as *amicus curiæ*, for the accused:—A witness is absolutely protected in respect of defamatory expressions used by him in the witness-box—*Queen Empress* v. *Babaji*(1). If he makes a false statement, he is liable to a prosecution for perjury. But he cannot be prosecuted for defamation. The English law gives the fullest privilege to parties and witnesses for words spoken in giving evidence —*Seaman* v. *Netherclift* (2). The expression "words either spoken," &c., in s. 499 of the Indian Penal Code does not apply to words **[574]** spoken in the witness-box. Refers to *Bhikumber* v. *Becharam* (3); *Manjaya* v. *Sesha Shetti* (4); *Dawan Singh* v. *Mahip Singh* (5). I further contend that the alleged defamatory statement was made in good faith. The trying Magistrate has omitted to consider this point.

Rao Saheb *Vasudev J. Kirthikar*, Government Pleader, for the Crown:—The mere fact that the defamatory statement was made by the accused while giving evidence in a judicial proceeding is no defence. The words of s. 499 of the Penal Code are clear. They must be read in their plain grammatical sense. There is nothing to show that the Legislature intended to except from the provisions of that section defamatory words used by a witness in the witness-box. Had this been the intention of the Legislature, it would have been expressed in clear language. The wording of s. 499 is wide enough to cover a case like the present. It does not fall within any one of the exceptions mentioned in that section. Considerations of public policy cannot control the express provisions of a penal statute. Refers to *Crawford* v. *Spooner* (6); *Eastern Counties Railway Companies* v. *Marriage* (7); *Moonshee Buzloor Ruheem* v. *Shamsoonnissa Begum*(8); *Annaji* v. *Bapuchand* (9). Under s. 105 of the Evidence Act (I of 1872) it is incumbent on the accused to prove good faith—*Queen-Empress* v. *Slater* (10); *Nathji Muleshvar* v. *Lalbhai*(11); *Queen-Empress* v. *Dhum Singh* (12); *Hayes* v. *Christian* (13). This he has failed to do.

JUDGMENT.

TELANG, J.—I confess that if the point which arises in this case had been *res integra*, I should have been of opinion that the conviction should be affirmed. I am unable to adopt the view that on any

(1) 17 B. 127. (2) 1 C. P. D. 540. (3) 15 C. 264.
(4) 11 M. 477. (5) 10 A. 425. (6) 4 M.I. A. 179 (187).
(7) 9 H.L.C. 36. (8) 11 M.I.A. 551 (604). (9) 7 B. 520.
(10) 15 B. 351. (11) 14 B 97 (100). (12) 6 A. 220.
(13) 15 M. 414.

1893
JAN. 17.

CRIMINAL REFERENCE.

17 B. 573.

correct principles of construction we should limit the meaning of the words of the section of the Indian Penal Code, defining defamation, so as to exclude therefrom any evidence given by a witness before a Court of Justice. It is admitted that the words are wide enough to include such evidence, and I do not think that judicial interpretation can [575] properly limit their scope either in view of general considerations about the policy of protecting witnesses from being harassed, or of the absence of any prosecutions being hitherto instituted in such cases. It is true, no doubt, that there is an anomaly in holding that a certain act, not recognised as a test by the civil law, should nevertheless be punishable as an offence by the criminal law. That anomaly, however, whatever weight it might have been entitled to on the question of construction in other cases, cannot weigh much in this, for it certainly exists on another point in the law of defamation. According to the explanation to s. 499, a prosecution may be maintained for defamation of a deceased person. But, on the other hand, it has been ruled in *Luckumsey Rowji* v. *Hurbun Nursey* (1) that no suit for damages will lie in such a case. It seems also to result from illustrations to which I drew attention during the argument that the rule of the civil law is not in entire harmony with that of the criminal law. Under these circumstances I should have been disposed to give their ordinary signification to the words of the Indian Penal Code, and not to limit them as suggested by Mr. Nadkarni in his argument. This Court, however, has already decided the contrary (2), and it has done so, following the opinion expressed by the High Court of Madras. I am, therefore, content to follow such decision, especially as my brother Fulton concurs in it. And I agree to reverse the conviction and order the fine, if paid, to be refunded.

FULTON, J.—The accused has been convicted of the offence of defamation. The Sessions Judge has referred the case to this Court for orders on the ground (amongst others) that the imputation complained of was made in the course of evidence in a judicial proceeding. It appears that the complainant instituted a suit against the accused, who, while giving evidence on the plaintiff's behalf, was asked whether he had been criminally prosecuted, and is alleged to have replied to the effect that the plaintiff had been in the Thana Jail. The statement has not been proved as regularly as it ought to have been, for as it was spoken in evidence its terms ought to have been proved by the production of a certified copy of the deposition. [576] However as the accused himself has admitted having made it, it is unnecessary to dwell further on this technical irregularity.

For the accused, Mr. Ghanasham Nilkant, who has argued the case as *amicus curiæ*, has drawn our attention to two cases in which it has been expressly held that a witness cannot be prosecuted for defamation in respect of statements made in the witness-box. In the first of these (*Manjaya* v. *Sesha Shetti* (3)), Collins, C. J., after referring to the observations of Cockburn, C,J., in *Seaman* v. *Netherclift* (4), and of Field, J., in *Goffin* v. *Donnelly* (5), and the judgment of the Madras High Court in *Hinde* v. *Baudry* (6). continued as follows:—"The Judges there (in *Hinde* v. *Baudry*) said that the *principle* of public policy guards the statements of a witness against an action, whether the statements were malicious or not. I think the same observations will apply if the criminal law is set in motion and proceedings are taken under s. 500 of the Indian

(1) 5 B. 580. (2) 17 B. 127. (3) 11 M. 477 (479).
(4) 2 C. P. D. 53. (5) 6 Q.B. D. 307. (6) 2 M. 13.

Penal Code ;" and Shephard, J., drew attention to the opinion strongly expressed by the Judicial Committee in *Baboo Gunnesh* v. *Magneeran* (1) that witnesses are free from any other consequences with respect to statements made by them as such, except that of indictment for perjury. The second case was that of *Queen-Empress* v. *Babaji* (2), in which Birdwood and Parsons, JJ., followed the Madras decision above referred to.

On the other hand, it was contended by the Government Pleader, on behalf of the prosecution, that unless circumstances could be proved such as to bring the case within one of the exceptions to s. 499, Indian Penal Code, the making of defamatory statements, whether in the witness-box or elsewhere, undoubtedly fell within the definition of defamation given in that section. It was urged that considerations of public policy could not override the express words of the Penal Code, and our attention was called to the remarks of the Privy Council and of this Court in the following cases:—*Crawford* v. *Spooner* (3) ; *Moonshee Buzloor Ruheem* v. *Shamsoonnissa Begum* (4) ; and *Annaji* **[577]** v. *Bapuchand* (5) ; and of Lord Bramwell in *Hill* v. *East and West India Dock Company* reported in 9 App. Cas. at p. 464.

Allusion was also made to Mr. Mayne's note on the 9th exception to s. 499, Indian Penal Code. For the accused it was not seriously contended that the case fell within any of the exceptions. It did not come under the 1st, as the allegation was not proved to be true, nor under the 9th, inasmuch as it was not proved to have been made in good faith. The following cases—*Nathji Muleshvar* v. *Lalbhai* (6), *Queen-Empress* v. *Slater* (7), *Queen-Empress* v. *Dhum Singh* (8) and *Hayes* v. *Christian* (9)—were quoted by the Government Pleader to show that the burden of proof of good faith lay on the accused, and s. 105 of the Evidence Act leaves no doubt on this point. But Mr. Ghanasham argued that s. 499 was wholly inapplicable, on the ground that it was not the intention of the Legislature to bring statements made in the witness-box within the definition of defamation. The words of the section are: "Whoever by words either spoken or intended to be read, or by signs or by visible representations, makes or publishes any imputation concerning any person intending to harm or knowing or having reason to believe that such imputation will harm the reputation of such person, is said, except in the cases hereinafter excepted, to defame that person." It is urged that although the language of this section is comprehensive enough to include words wherever spoken, it ought not to be applied to words spoken in evidence, as they were not within the contemplation of the Legislature.

It, therefore, becomes necessary for us to determine what was the intention meant to be expressed; for, as pointed out in Maxwell on the Interpretation of Statutes, p. 24 it is an elementary rule of construction that a thing, which is within the letter of a statute, is not within the statute, unless it be also within the meaning of the Legislature. To ascertain such meaning is sometimes a task of much difficulty. The primary canon of construction is, that the Legislature must be intended **[578]** to mean what it has plainly expressed, and that when the words admit of but one meaning, a Court is not at liberty to speculate on the intention or to construe an Act according to its own notions of what ought to have been enacted. In *Moonshee Buzloor Ruheem* v. *Shamsoonnissa Begum* (4), the Judicial Committee of the Privy Council remarked that if the

(1) 11 B.L.R. 321. (2) 17 B. 127. (3) 4 M.I.A. 179 (187).
(4) 11 M.I.A. 551 (604). (5) 7 B. 520. (6) 14 B. 97.
(7) 15 B. 351. (8) 6 A. 220. (9) 15 M. 414.

1893
JAN. 17.

CRIMINAL REFERENCE.

17 B. 573.

words of a law are clear and positive, they cannot be controlled by any consideration of the motives of the party to whom it is applied, nor limited by what the Judges who apply it may suppose to have been the reasons for enacting it. But many cases may be quoted in which, in order to avoid injustice or absurdity, words of general import have been restricted to particular meanings. An instance of such restriction will be found in the decision of the House of Lords in *Hill* v. *East and West India Dock Company* (1), in which the majority of their Lordships found it necessary to limit the meaning of s. 23 of the Bankruptcy Act so as to confine its effect within the purposes of the Act. Other instances will be found in many cases in which it has been held that, where an enactment would prejudicially affect vested rights, retrospective effect will not be given to its language unless such effect is clearly intended.

The precise extent to which in certain cases it is permissible to restrict the meaning of general words in a statute is always a question of much nicety. It is undoubtedly a serious measure to limit the meaning of words in such a carefully drawn Act as the Indian Penal Code, and it is one which no Court would attempt, unless it were practically certain that the matter to be eliminated was not within the contemplation of the Legislature. There seems, however, to be such certainty in the present case. In civil suits it has been laid down on such high authority as to be no longer open to doubt that in India an action will not lie for damages on account of defamatory words spoken in the witness-box. The latest reported decision of this Court on the subject is the case of *Nathji* v. *Lalbhai* (2), in which the learned Chief Justice remarked as follows :—" We doubt whether there is any thing in the circumstances of this country which makes it [579] less desirable from the point of view of public policy as concerning the public and the administration of justice, as it is expressed by the Privy Council in the case above cited (*Baboo Gunnesh* v. *Magneeram*), that such statements, though false and malicious, should, in no case, be made the subject of civil action quite independently of the question as to their being criminally punishable." In the case of *Baboo Gunnesh* v. *Magneeram* (3) the Privy Council held that (in India) witnesses cannot be sued in a Civil Court for damages in respect of evidence given by them upon oath in a judicial proceeding. The ground of it is this : that it concerns the public and the administration of justice that witnesses giving their evidence on oath in Court should not have before their eyes the fear of being harassed by suits for damages ; but that the only penalty which they should incur, if they give evidence falsely, should be an indictment for perjury.

If, then, it be admitted, as I think it must be, that public policy requires that witnesses shall not be harassed by the fear of suits for damages, it must, I think, be conceded that it is equally undesirable that they should be liable to be prosecuted for defamation. The intention of the Legislature to protect witnesses from the fear of improper prosecutions is shown by s. 195 of the Criminal Procedure Code, which forbids their prosecution for perjury without the express sanction of a Court cognizant with the facts of the case in which the false evidence is said to have been given. But all this solicitude for their protection would be wholly unavailing if it were open to any private individual to prosecute for defamation any witness who made a statement which he considered

(1) 9 Ap. Ca. 448. (2) 14 B. 97. (3) 11 B.L.R. 321 (329) (P.C.).

injurious to his reputation. In a prosecution for giving false evidence the burden of proof lies on the prosecution to establish that the evidence is false, but in a prosecution for defamation it would usually be otherwise, and (assuming the words to be *prima facie* defamatory) it would be incumbent on the accused to prove either that his statement was actually true, or that he believed in good faith that it was so in order to entitle him to the benefit of s. 79 or of exception 1 or 9 to s. 499, Indian Penal Code. Under **[580]** these circumstances the position of a witness would be a very precarious one, and the reason for his protection in the Civil Courts, when exposed in this manner to risks in the criminal Courts, would be unintelligible. It could not even be argued that whereas it was desirable to protect him from civil suits at the interest of private persons who might be actuated by personal malice, the interests of the public required that he should remain liable to criminal prosecution for defamation, for the right of prosecution in such cases is expressly limited by s. 198, Criminal Procedure Code, to the person aggrieved.

These considerations incline me strongly to the belief that s. 499 was not intended to include statements made in the witness-box. But there is one further reason for thinking so, which is that since the enactment of the Indian Penal Code there seems to have been a general impression amongst those whose duty it has been to administer the law that such a charge as the one now under consideration will not lie. No Indian case has been brought to our notice in which it has been held that such a prosecution is maintainable. Had it been maintainable, there can be little doubt that the reports would have contained many cases of the kind, for it is obvious that a prosecution for defamation would be, if it were allowable, a much more easy remedy for a person aggrieved by the evidence of a witness than a prosecution for giving false evidence. If, however, it be correct that Judges and Magistrates and legal practitioners have been hitherto of opinion that s. 499 was not intended to refer to statements made in the witness-box, it seems not unreasonable to believe that there was no intention on the part of the Legislature to refer to them. *Optima est legum interpres consuetudo* is an ancient maxim, the validity of which has long been recognized.

Under these circumstances, I think we may safely follow the decisions of the Madras High Court and of this Court, above adverted to, and hold that a witness cannot be punished for defamation on account of statements made when giving evidence in the witness-box. Our attention was called to the reference to a Judge in the illustration to the 7th exception to s. **[581]** 499, as suggesting that all statements made in the course of judicial proceedings were not privileged; but it would seem hardly correct to infer from an illustration stating that a Judge, censuring in good faith the conduct of a witness, was within the 7th exception, that if he failed to prove good faith he would be liable to punishment, for he would appear to be expressly protected by s. 77 of the Code, and at any rate, even if it could be held that the case of a Judge might come within the intention of s. 499, notwithstanding the provisions of s. 77, it would not follow that the definition of defamation should be equally applicable to a witness to whom other considerations would apply. It may, perhaps, be said that although s. 499 is not intended to apply to witnesses giving relevant evidence, it may include the case of a witness volunteering statements wholly irrelevant to the proceedings. On this point it is unnecessary to express an opinion, for in the present case, as the

1893
JAN. 17.

CRIMINAL REFERENCE.

17 B. 573.

proceedings have not been put in evidence, it is impossible to hold it proved that the accused's statement was in fact irrelevant. For the foregoing reasons I would set aside the conviction and direct that the fine be refunded.

Conviction set aside.

17 B. 581.

ORIGINAL CIVIL.

Before Mr. Justice Starling.

VINAYAKRAO DHUNDIRAJ (*Plaintiff*) *v.* NAROTAM ANANDJI (*Defendant*).* [28th March, 1893.]

Inspection—Discovery—Production—Documents of title—Refusal to produce—Ejectment—Practice.

The plaintiff sued to eject the defendant from certain pieces of land belonging to him, being portions of a passage upon which the defendant had encroached. In his written statement the defendant denied the plaintiff's title and stated that he would rely on certain deeds set forth in a schedule annexed thereto. In his affidavit of documents subsequently filed he objected to produce the deeds for the plaintiff's inspection on the ground that they related solely to his own title to the land in dispute, and did not in any way tend to prove or support the title of the plaintiff thereto.

Held, that the defendant was entitled to refuse production of the deeds. The Court could not go behind the defendant's affidavit of documents.

[582] IN chambers. The plaintiff sued the defendant, alleging that he had encroached upon a certain passage which belonged to the plaintiff by building thereon two *otlas*. He prayed that the defendant might be ordered to give up possession of the two pieces of ground encroached upon, and remove the said *otlas*. In the alternative he prayed that he might be declared entitled to a right of way over the said passage, and that the defendant might be ordered to remove the encroachments.

The defendant denied the plaintiff's title and (*inter alia*) pleaded limitation. In his written statement he stated that he would rely on certain deeds set forth in the schedule annexed.

The defendant subsequently made an affidavit of documents in his possession relating to the matter in question in the suit. He objected in this affidavit to produce these documents for the plaintiff's inspection, on the ground that they related solely to his own title to the land in dispute and did not in any way tend to prove or support the title of the plaintiff thereto.

In the schedule annexed to the affidavit he set forth (*inter alia*) the deeds referred to in his written statement.

The plaintiff took out a summons calling upon the defendant to show cause why he should not give inspection of the said documents.

Kirkpatrick, for the defendant, showed cause.

Lang (Acting Advocate-General), for the plaintiff in support of the summons.

* Suit No. 182 of 1891.

The following authorities were cited :— *Morris* v. *Edwards* (1); *Lyell* v. *Kennedy* (2) ; *Roberts* v. *Oppenheim* (3).

JUDGMENT.

STARLING, J. —This is a suit in ejectment brought by the plaintiff against the defendant in respect of two pieces of land in a passage claimed by the plaintiff as his own, on which, it is alleged, the defendant has trespassed, within twelve years before suit brought, by building thereon two *otlas*. There is an alternative prayer that, in the event of the plaintiff not being found **[583]** to be the owner of the land in question, he may be declared to be entitled to a right of way over the same.

The defendant in his written statement denies the plaintiff's title, and says further that, if the plaintiff or his predecessor in title were entitled to the said two pieces of land, their claim thereto has become barred by limitation. Further, in his written statement the defendant says he will rely in support of his case upon certain deeds set forth in the schedule thereto annexed.

On the 9th day of February, 1890, the defendant made his affidavit of documents, in a schedule whereto he set forth these deeds, but claimed to be entitled to refuse to produce them on the ground that they related exclusively to his own title ; thereupon the plaintiff on the 13th March, 1893, took out a summons for inspection of these documents ; and the question I have to decide is whether the defendant is entitled to refuse production.

In support of the defendant's contention, I was referred to the cases of *Morris* v. *Edwards* (1), *Lyell* v. *Kennedy* (2), and *Roberts* v. *Oppenheim* (3). The decision in the second case is on a wider point than I have to determine here, and does not seem to me to be applicable. It was, moreover, reversed by the House of Lords in 8 Ap. Ca. 217 ; I shall, therefore, not further refer to it. In the first case, as reported in 23 Q. B. D., the Judge in chambers and the two Judges of the Division Court were of one opinion, and the three Judges of the Court of appeal of the opposite opinion ; consequently I should not have felt myself bound under all circumstances to follow it, but the case was subsequently carried to the House of Lords, and the five Lords who decided the matter affirmed the judgment of the Court of appeal. The case will be found reported in 15 Ap. Ca., 309. The judgment of the House of Lords distinctly lays down that where, in an action of ejectment, either party claims to refuse production of documents on the ground that they relate solely to his own title, and do not in any way tend to prove or support the title of the opposite party, the Court cannot go behind **[584]** his affidavit to that effect, and enquire whether his statement be true or not, but that he is entitled to the privilege claimed.

The case of *Roberts* v. *Oppenheim* further shows that the privilege is not affected by the fact that the documents for which it is claimed are referred to in the pleadings, and that the only result of such reference is that, if the party referring to them fails to produce them for inspection to the other side on notice, he cannot use them in evidence at the trial, unless he satisfies the Court that the documents relate only to his own title, or that he had some other sufficient causes for not complying with the notice— s. 131, Civil Procedure Code (XIV of 1882).

Under these circumstances, I must hold that I cannot in this case go behind the defendant's affidavit of documents, and that I must allow the

(1) 23 Q.B.D. 287. (2) 20 Ch. D. 484. (3) 26 Ch. D. 724.

1893
MARCH 28.

ORIGINAL CIVIL.

claim of the defendant to refuse production. Consequently this summons must be dismissed with costs.

Attorneys for the plaintiff :—Messrs. *Roughton and Byrne.*
Attorneys for the defendant :—Messrs. *Payne, Gilbert and Sayani.*

17 B. 581.

17 B. 534.

ORIGINAL CIVIL.

Before Sir Charles Sargent Kt., Chief Justice, and Mr. Justice Starling.

BADISCHE ANILINE AND SODA FABRIK (*Original Plaintiffs*), *Appellants* *v.* MANECKJI SHAPURJI KATRAK (*Original Defendant*), *Respondent.**

[24th March, 1893.]

Trade mark—Infringement—Label—Details different, but general similarity likely to deceive—Injunction.

The plaintiffs sued the defendant for an infringement of their label used on tins of aniline dye which they imported into Bombay. The label covered the top of the tin, and bore upon it the picture of an elephant in the centre of a curved band : the rest of the label being a combination in green, red and gold; representations, for the most part, of coins, medals and tracing. The defendant was the agent in Bombay of Cassella & Co., of Frankfort. Prior to 1892, Cassella & Co. had imported aniline dye into Bombay in tins bearing a label, the chief feature of which was an elephant. Of that label, however, the plaintiffs did not complain. But in January 1892 Cassella & Co. adopted a new label, also bearing the picture of an elephant, different in some respects from the picture on the plaintiffs' label and with new surroundings, to none of which, taken separately, did the plaintiffs [585] object, but they complained that in its general effect this new label was so similar to their trade mark as to amount to a colourable imitation thereof, and to be likely to deceive purchasers.

Held, that the plaintiffs were entitled to an injunction against the defendant.

Per SARGENT, C.J.—The question in a case of this description is not what would be the effect on brokers or even dealers in Bombay, but how the label would be likely to strike incautious or unwary purchasers, such as are to be found more particularly in the Mofussil. After a careful examination I cannot feel any doubt that the attention of such purchasers would be arrested by the general effect of the label, and that, notwithstanding such differences as undoubtedly exist in respect to the colour and size of the elephant and in some other respects, would regard the labels as symbolical of the plaintiffs' goods.

The remarks of Lord Selborne in *Johnston* v. *Orr Ewing* (1) relied on.

Per STARLING, J. —It is quite possible for a label no part of which is a copy of another label to be a colourable imitation of that othsr label, and to be so like it in general appearance as to be likely to deceive purchasers.

[F., 1 Bom. L.R. 291 (294); 15 Ind. Cas. 116 (118)=1912, P.L.R. Supp. No. 5=166 P.W.R. 1912; 15 M.L.J. 45; R., 25 B. 433 (468)=3 Bom. L. R. 1; 55 P. R. 1902=98 P. L.R. 1902.]

SUIT for the infringement of a trade mark.

The plaint stated that the plaintiffs were manufacturers of aniline dye and had for some years imported large quantities of their dyes into Bombay in tins bearing a label (marked Ex. A) which had been in the exclusive use of the plaintiffs, and which they claimed to be their trade mark. The label covered the top of the tin and had upon it the picture of an elephant as the central figure surrounded by certain printed words : the rest of the label being a combination in green, red and gold : representations, for the most part, of coins, medals and tracing. The

* Suit No. 342 of 1892 ; Appeal No. 779.

(1) 7 Ap. Ca. 219.

said trade mark had been registered by the plaintiffs in Germany and in England. The dyes of the plaintiffs had acquired a high reputation in the eastern market, and the plaintiffs' label as the distinguishing mark of their goods had become well known.

The plaintiffs complained that the defendant had recently been importing into, and selling in, Bombay aniline dyes in tins bearing labels which were a colourable imitation and infringement of the said trade mark. The defendant's tins contained dyes inferior to the plaintiffs' and were sold at a lower price. The plaintiffs prayed for a declaration that the defendant's label, marked Ex. B, was a colourable imitation, and for an injunction, &c.

[586] The defendant denied all the above allegations of the plaintiffs, and further stated that he did not himself deal in aniline dyes, but was merely a commission agent for his indentors.

From the evidence, it appeared that the plaintiffs had been importing the aniline dye into Bombay since 1883, and that it was not until January 1892 that the defendant began to sell this dye with the labels complained of as the agent of Messrs. Leopold Cassella & Co. of Frankfort. This firm had, in a few instances prior to that time, imported aniline dye bearing a label (Ex. No. 6), the chief feature of which was an elephant. Of that label, however, the plaintiffs did not complain. In his evidence the defendant stated that he visited Messrs. Cassella & Co. at Frankfort at the end of 1891 with a view to doing dye business for them in Bombay. He said:—

"They showed me tins of scarlet dye, and asked me to push the business of it in Bombay. This was the first time I saw the label B. It was on the tins they showed me at that time. I had never heard of or seen the label A. I had left Frankfort and was at Basle when the letter of 22nd January 1892 arrived. My assistant in Bombay received the letter and samples mentioned therein. I saw them when I arrived here at the end of March. They were like the Ex. B with tickets at the ends, with ½ lb. on them and labels like B. All the tins subsequently imported by me had tickets and labels like B."

A correspondence between the defendant and Cassella & Co. relating (*inter alia*) to the label in question was put in evidence. After some preliminary negotiations the defendant had, on the 20th February 1892, given to Leopold Cassella & Co. a small trial order for 30 cases of the aniline dye. On March 11th, 1892, Cassella & Co., wrote as follows to the defendant:—

"We have your favours of February 13th and 20th, and in reply we are glad to receive your trial order for 30 cases scarlet as per indent No. 1, which will have our prompt attention, and we hope to be able to forward the first shipment shortly.

"With regard to the elephant ticket, we beg to inform you that Messrs. Ernthausen of Calcutta, in a letter addressed to our friends Messrs. Diail & Co., there, pretend to have a right to forbid its future use by us. We do not know on what this pretension is based, and have written to India accordingly, but would say that, if Messrs. Ernthausen are justified in their claim, we cannot of course undertake to deliver this ticket any more. As soon as this matter is cleared up, we shall not fail to inform you thereof.

"In any case, it might be as well for you to select another ticket which we would substitute in case of need."

1893

MARCH 24.

ORIGINAL CIVIL.

17 B. 584.

[587] In reply to this the defendant wrote on the 2nd April, 1892 :—

"We carefully read all you write about the elephant ticket by Messrs. Ernthausen & Co. of Calcutta and Messrs. Ostermeyer & Co. of this place, who are the agents of Messrs. B.A. and Soda Fabrik.

"So far as our information goes, we believe you have a prior right to the use of the ticket, as some such ticket was used by you before the Soda Fabrik made use of same, or at least you have an equal right for its use. We are quite sanguine that, if you have a free use of this ticket, it will help us to drive out of the market Soda Fabrik's scarlet, and fearing same they have taken the step to stop same being used by you. You will of course not easily give way to their pretensions, but will thoroughly sift the question of right. We are anxious to hear the result of your correspondence on this subject.

"As to your suggestion to select another ticket in place of the elephant one, it will of course take a long time to introduce same in the market, and thus throw unnecessary hindrance in the way."

With reference to this last letter the defendant in his evidence said :—

"I was in Bombay on 2nd April (letter read). I was anxious to secure monopoly of the scarlet dye bearing the label B. It was not one of my special objects to drive the Soda Fabrik scarlet out of the market by the use of this label. I meant what I wrote when I wrote the paragraph 'If you have a free use in market, &c.' I had been told by Jiwa Chuttoo that the Soda Fabrik was in the market, selling scarlet Rs. under Ex. A. I had not seen A. Jiwa did not tell me what quality they were selling. He said they were selling under similar tickets only ; similar, that is, to Ex. B. I mentioned Soda Fabrik only because I was told by the dealer that they had a similar ticket. It was my own opinion that, if we could use the label B, we could drive the Soda Fabrik out of the market. I can't swear he (Jiwa Chuttoo) did not tell me that the Soda Fabrik were the largest sellers and had the highest reputation. I did attach some importance to the label B when I wrote this letter. I did so because it was like A as described to me by Jiwa Chuttoo. I think Jiwa attached importance for the same reason. I meant what I wrote as to its taking a long time to introduce a new ticket, &c. B was a new ticket and had not been introduced into the market.....I know B to be similar to A and that plaintiffs had used A since 1882. It did not occur to me that it would be right to advise Cassella to discontinue the use of B ; on the contrary I went on pressing Cassella to give me monopoly of sale of B.....The monopoly was for Jiwa Chuttoo. I was to give him all I imported. He told me Cassella's dye was a little cheaper than plaintiffs'. That was one reason why we hoped to oust plaintiffs from the market. The label B was another reason."

In a letter written to the defendant by Messrs. Leopold Cassella & Co. on the 1st December 1892, they stated :—

"We had seen the plaintiffs' label before we got up ours registered in Germany in 1892, and as our lithographer had also seen the same label before, we at the time gave special orders to have the design drawn up in such a manner that no part thereof could be considered an imitation of the plaintiffs' label."

[588] At the hearing, the material issue raised was whether the defendant's label (marked Ex. B) was a colourable imitation or infringement of the plaintiffs' trade mark.

Macpherson and *Melsheimer*, for the plaintiffs.

Lang (Acting Advocate-General) and *Inverarity*, for the defendant.

1893
MARCH 24.
ORIGINAL CIVIL.
17 B. 584.

29*th January* 1893. PARSONS, J.—The law of the case is clear, and the point to be decided, in order to determine the second issue, is one of fact only, *viz.*, whether label B is so close an imitation of the label A as to be calculated to mislead ordinary purchasers and to lead them to mistake the defendant's dye for the dye of the plaintiffs. Now there can be no doubt that there is a certain resemblance or similarity between the tin B and the tin A. They are of the same size and share. Both are done up in red glazed paper stamped with a large R in gold at the back and closed with round tickets at the ends. Both have large glazed labels and are resplendent with red and green medallions, while both bear the word and letter "Scarlet R" prominent in large letters on a white ground and the figure of an elephant in the centre. If, however, we eliminate from them such of the above things as are the common property of the trade, namely the red glazed paper covering with the R on it, the closing tickets, the scarlet R on a white ground, and the elephant, I think that very little similarity remains. The elephants decidedly bear no resemblance to each other. They are different in size, colour, position and shape, and while one is barebacked, the other has a bright red *jhool* or saddle cloth. There is no question but that the elephants belong to the respective parties, and that each has a right to the use of the elephant he has used. The defendant, therefore, has a right to surround his elephant with any framework or setting that he chooses, provided only that the framework or setting chosen by him does not infringe upon or copy the framework or setting that had previously been chosen and used by the plaintiffs. He has no right to combine his elephant with his medals and trade marks so as to imitate the plaintiffs' combination, and thus cause his label to present an appearance similar to the plaintiffs' label.

[589] The question is whether he has done this. Upon this point the evidence of the plaintiffs' agent, Ostermeyer, appears to me very important. He admits that, though he would consider the frame-work of the defendant's label an infringement so long as it is round an elephant or any animal like an elephant, he would not object to it if it were made to surround some other animal; but surely if the framework is such that the defendant could lawfully place it round any animal except an elephant, he could place it round the elephant, for he has a right to the use of that animal. It seems to me that either the framework must be an unlawful imitation in every case and whatever animal be in its midst, or it can be no unlawful imitation at all, for I can hardly conceive of one and the same framework being lawful with one lawful centre, but unlawful with another lawful centre.

Irrespective, however, of this admission of Ostermeyer's, I must hold, on the whole case, that there has been no imitation which amounts to an infringement. The evidence on the point is very unsatisfactory, almost worthless; indeed, the only witness who seems to be of any use at all is Kalikhan, who is himself a dyer. He says he would not be deceived by the resemblance, and I think he is quite right in this, for I cannot imagine any one being deceived by the apparent resemblance between the tins by reason of the labels alone. In the first place, the difference between the elephants is, as I have said, most marked; no one could fail to notice this, or be induced to mistake the defendant's elephant for the plaintiffs'. Then the broad white line round the plaintiffs' label is eminently distinctive. Green is the predominant colour in the plaintiffs' label, red in the defendant's. The broad straight lines at the foot of the

1893
MARCH 24.
ORIGINAL CIVIL.
17 B. 584.

defendant's label, in which occur the words "Scarlet R" and "manufactured in Germany," are in marked opposition to the curved line in which "Scarlet R" is printed in the plaintiffs' label. The broad maroon oval, surrounding the elephant on which the manufacturers' name is printed on plaintiffs' label, is wholly different from the circular band broken at two points, black above and white below, which surrounds the elephant on the defendant's label. The plaintiffs' trade mark and the medal, which break the circle, have no counterpart in the defendant's label. Plaintiffs' label has small medals at its four corners; defendant's has his [590] trade mark in large circles at the top corners of his labels. These, silver on a green ground surrounded by a broad red band, are very distinctive of his label, and there is nothing on the plaintiffs' label which at all corresponds to them. Below these on each side come a wreath of flowers, two medals and a bouquet of flowers, all of which are unlike anything on the plaintiffs' label. Moreover, there are perforated figures on the plaintiffs' labels and embossed letters on his tins which are absent on the defendant's.

For all these reasons it seems to me to be impossible to hold that the defendant's label is a colourable imitation or infringement of the plaintiffs' label.

As to the correspondence between defendant and Cassella, on which so much has been said, it seems to me that the defendant only wanted to have a label with an elephant upon it, so that the dye might keep its place in the market under the name of elephant brand. This he was entitled to do, since Cassella had the right to use an elephant. The case would have been quite different if the plaintiff had the exclusive right to put an elephant on his labels, or to call his dye the elephant brand. He has neither of these rights, and, therefore, has had to fall back upon an allegation of general imitation or copying, and in that I think he fails, for I can see no trace of similarity which would lead me to suppose that the one was copied from the other; I do not think the one is so like the other that even the most ignorant purchaser would be deceived.

While finding, therefore, the first issue in the affirmative, I find the second and third in the negative, and dismiss the suit with costs.

The plaintiffs appealed.

Macpherson, *Melsheimer* and *Lowndes*, for the appellants:—The defendant on the record here is a commission agent. The real offender and the real defendant is Cassella & Co. of Frankfort. The plaintiffs have imported aniline dye into Bombay under label A since 1882, and these goods have a high reputation in the Bombay market. The defendant first introduced aniline dyes under label B into the Bombay market in March or April 1892. There is a picture of an elephant on both labels [591] of that we do not complain. In a few instances Cassella & Co. had previously imported aniline dye into Bombay with a label (Ex. 6) which had a picture of an elephant in it, but we did not object to that label. The first question, then, that arises is why was the old label (Ex. 6) given up and the new label (Ex. B) adopted? It was adopted in order to oust the plaintiffs from the Bombay market. It is of this label that the plaintiffs complain. It was adopted for the purpose of deceiving the purchaser, and it is calculated to deceive him. The Judge in the lower Court analysed label A and label B and catalogued the differences between them. We submit that is not the way to deal with such a case as this. We do not complain of any particular thing in label B. We complain of it as a whole, and contend that as a whole the likeness is such as to deceive. Parsons, J., had both labels before him when he ascertained their differences. The purchaser

in the market has not that advantage. The test is, are they sufficiently alike to enable a fraudulent dealer to give the defendant's dye to a purchaser who intends to buy the plaintiffs' dye? The correspondence shows that the object of introducing label B into Bombay was to obtain the benefit of A's reputation and to drive A out of the market, and that the artist who designed B had A before him. It is clear that the design was to deceive, and that fact is cogent evidence that the label would deceive. It is not necessary that there should be an intention to deceive—*Reddaway & Co.* v. *Bentham Hemp Spinning Co.* (1); but the case is stronger where that intention is proved—*Taylor* v. *Taylor* (2); *Taylor* v. *Virasami* (3); *Ralli* v. *Fleming* (4); *Wotherspoon* v. *Currie* (5); *Johnston* v. *Orr Ewing* (6); *Abbott* v. *Bakers' and Confectioners' Tea Association* (7); *Hugh Balfour & Co.* v. *Kilburn & Co.* (8).

Lang (Acting Advocate-General) and *Inverarity*, for the respondent (defendant):—We are justified in trying to oust the plaintiffs' goods by introducing a cheaper dye—Sebastian on Trade Marks, (3rd Ed.), p. 142. We say an ordinary purchaser buying with ordinary prudence would not be deceived. **[592]** The elephant is the chief feature of both the labels; but the elephant in the defendant's label is quite different from that in the plaintiffs'. The plaintiffs know they cannot directly claim an exclusive right to the elephant, but they are endeavouring to get that right indirectly. It is really the elephant that attracts the attention of the buyer, and by which he is guided in selecting goods. The intention to imitate a trade mark is not material—*Woolum* v. *Ratcliff* (9). But the defendant did not intend to imitate the plaintiffs' mark. All he wanted was a label with an elephant on it, and to that he had a right. The argument is that the accessories make the principal features of the labels like one another, which, taken by themselves, are quite unlike. But if the chief feature is unlike, how can it be contended that the whole is like? We say that not merely is the elephant different, but the surroundings are different. There is no evidence of deception. The evidence is all interested evidence of brokers and others who wish to push the sale of the plaintiffs' goods.

Macpherson in reply:—It is not necessary to prove deception. Probability of deception is enough. Why did the defendant substitute label B for his previous label, which also had an elephant on it?—*In re Worthington & Co.'s trade mark* (10); *Civil Service Supply Association* v. *Dean* (11). We do not object to the elephant or to the surroundings. It is to the ticket as a whole we object. If the defendant gives up the elephant, he may keep the surroundings, or he may give up the surroundings and keep the elephant. We do not care which. It is to the similarity of the general effect that we object.

JUDGMENT.

SARGENT, C.J.—The plaintiffs are manufacturers of aniline dyes in Germany, and since 1882 have been importing these dyes into this country in small tin boxes with coloured glazed coverings, on which labels are impressed. Their scarlet dye, by the evidence of all the witnesses, had acquired a high reputation amongst dealers, and continued to command a large sale, when the defendant, early in 1892, began to import scarlet

(1) 8 Times Rep. 734. (2) 23 L. J. Ch. 225. (3) 6 M. 108.
(4) 3 C. 417 (424). (5) L.R. 5 H.L. 508. (6) 7 Ap. Ca. 219 (223).
(7) Weekly Notes for 1872, p. 31. (8) 1 Hyde, 270.
(9) 1 H &. M. 259. (10) 14 Ch. D. 8. (11) 13 Ch. D. 512.

1893

MARCH 24.

ORIGINAL CIVIL

17 B. 584.

dye, manufactured by Cassella & Co. in Germany, in tin boxes of the same size, with coverings and labels which the plaintiffs [593] complain of as being a colourable imitation of their own coverings and label, and likely to injure them in their trade.

The principal object on the plaintiffs' label (Ex. A) is the figure of an elephant, but this is admittedly common—in varying postures as with different accessories—to all the labels used by other importers of these dyes, and indeed it is not in dispute that all the dyes imported were generally known as elephant brands.

It will be convenient to state, at the outset, that the plaintiffs do not,—whatever they may appear to have done in their solicitors' first letter,—lay claim to the exclusive use of the figure of an elephant on their labels, nor do they rely on their goods being known in the market by any name, devise or mark associated with anything to be found on their label so as to bring their cause of complaint within the decisions in the Glenfield starch case (*Wotherspoon* v. *Currie* (1)) or the well-known Bhei Hathi case of *Johnston* v. *Orr Ewing* (2). Their case is that the general aspect or get-up of the label arising from the combination of the elephant with its accessories and surroundings, &c., is an important feature in it, and that the defendant's label is a colourable imitation of their label in this respect, and likely to deceive purchasers of the defendant's scarlet dyes into supposing that they are really purchasing the plaintiffs' goods.

The principles on which the Court gives relief in cases of this description have been often stated by learned Judges in the English Courts of Equity, and I cannot do better perhaps than refer to the judgments of Lord Kingsdown in the *Leather Cloth Company* v. *American Leather Cloth Company* (3) and of Lord Langdale in *Perry* v. *Truefit* (4), which were accepted by Lord Blackburn as "the true guide" in delivering judgment in *Johnston* v. *Orr Ewing*. Lord Kingsdown in the former case says: "The fundamental rule is that one man has no right to put off his goods for sale as the goods of a rival trader." Lord Langdale says "he cannot be allowed to use names, marks, letters and other indicia, by which he may induce purchasers to believe that the goods which he is selling are the manufacture of another person;" and [594] further on, proceeding to consider whether the defendant had infringed the plaintiffs' rights, he adds: "That depends upon the question how far the defendant's trade mark bears such a resemblance to that of the plaintiffs' as to be calculated to mislead incautious purchasers."

Proceeding to an examination of the tin boxes in which the parties pack their dyes, we find that they are of the same size and shape, covered with red glazed paper having a large R in gold at the back and round tickets at the ends, and that the plaintiffs' labels have the word "Scarlet" in red colour with one, two, or three 'Rs' according to quality on a white ground forming the lower part of a circular band round the elephant, whilst in the defendant's label the word and letter "Scarlet R" are the same, but on a straight white band, below the figure of the elephant which has a red *jhool* on it, of lighter colour than that of the plaintiffs' elephant. The elephant in both cases is in the centre of a curved band, which in the plaintiffs' label is circular and in the defendant's elliptical; the elephant in its curved band being in both cases surrounded by small medallions placed at the corners of the labels and arranged on either side of the figure of the

(1) L. R. 5 H. L. 508.
(2) 7 Ap. Ca. 219 (223).
(3) 11 H.L.C. 538.
(4) 6 Beav. 66.

elephant. The plaintiffs' box has also a narrow bluish-coloured band running round the four sides which is wanting in the defendant's label, the ground of which is red throughout, outside the figure of the elephant. In both cases there is a square label at each end of the box.

The general effect on looking at either label, without paying attention to detail, is undoubtedly that of an elephant in the centre of a curved band surrounded by small medallions, with a white band below the elephant on which "Scarlet" in red colour is written; and the plaintiffs' case, as stated by their agent, Mr. Ostermeyer, and by their principal witness, Mr. Brandenburgh, who has had large experience in the trade, is that the purchaser's eye would be arrested by the similarity of the general effect, *i.e.*, by the similar combination of the elephant and its accessories and surroundings, and would disregard the differences between them in matter of detail. The Judge of the Division Court did not accept this view, being of opinion, having regard to the points **[595]** of difference, that no one could be deceived by the apparent resemblance between the tins by reason of the labels alone. I can scarcely doubt that this would be so in the case of Bombay brokers, who are described as a sharp set of men and likely to examine the labels in detail, and remark the differences between them; but the question in a case of this description is not what would be the effect on brokers, or even dealers, in Bombay, but how the labels would be likely to strike the incautious, or (as Lord Chelmsford describes them in *Wotherspoon* v. *Currie*) unwary purchasers, such as are to be found more particularly in the Mofussil. If people of that class, whether small up-country dealers or dyers, would be likely so to be deceived, it is plain that a great opportunity would be afforded to the brokers and large dealers to push the defendant's scarlet dye in the market to the detriment of the sale of the plaintiffs' dye; and it is from this point of view, which the Judge of the Divisional Court has, I think, lost sight of, that the question as to colourable imitation ought to be considered.

As to this, the evidence of the Bombay brokers and dealers is, I think, of little value, except so far as it explains the course of business in Bombay, and, having reference to that, it can leave no doubt that the labels have a distinct importance in the trade, and that the brokers and large dealers must have great facilities in inducing the up-country dealers, and, through them, the smaller customers and dyers up-country, to accept such brands as they may desire to push in the market. This Court has, therefore, to say, on a comparison of the labels, whether it is likely that the class of persons I have referred to would be deceived.

After a careful examination of them I cannot feel any doubt that the attention of such purchasers would be arrested by the general effect of the label, and that such differences in detail as the colour or size of elephant and the colour and shape of curve, which they are capable of remarking, (for it is to be remembered that they cannot read what is on the medallions and would not be able to discriminate intelligently between them) would probably be regarded by them as having been made by the plaintiffs themselves from motives of their own as explained **[596]** by Lort Selborne in *Johnston* v. *Orr Ewing* (1). In other words, they would, notwithstanding such differences, regard the labels as symbolical of the plaintiffs' goods. In coming to this conclusion, it is impossible not to be influenced by the conduct both of defendant and Cassella & Co., and the correspondence between them in the early part of 1892 with reference to

(1) 7 Ap. Ca. 219.

1893
MARCH 24.
ORIGINAL CIVIL.
17 B. 584.

the introduction of Cassella & Co.'s scarlet dye into the Bombay market—a description of evidence to which great importance was attached by Lord Blackburn in *Johnston* v. *Orr Ewing*, as showing that this resemblance was likely to deceive. Cassella & Co. had already registered an elephant label in 1883 in Germany, and had used it in Germany and Japan. Why, then, did they not use it when they determined to place their scarlet dye on the Indian market? The evidence also goes to show that they had at first used Ex. No. 6 as an elephant label. Why then did they not continue to use it, but instead place the plaintiffs' label (Ex. A) with their engraver with the view to preparing Ex. B? They say they instructed him to draw up their label, so that no part would be considered to be an imitation of the plaintiffs' label; but how came it that whilst no part is exactly the same on both labels, the general similarity between the labels is so striking, if their real intention was to avoid a colourable imitation? That both defendant and Cassella & Co. attached the greatest importance to the get-up of the label cannot be doubted. In his letter of 2nd April, the defendant writing to Cassella & Co. is jubilant over it and says: "We are sanguine that if you have a free use of this ticket it will help us to drive out of the market Soda Fabrik scarlet, and fearing the same they have taken the steps to stop the same being used by you." In his deposition the defendant no doubt explains that he had not then seen Ex. A, and only intended to refer to the elephant. It is almost impossible to believe this statement of the defendant, who was taking a keen interest in the approaching rivalry between the two manufacturers; but at any rate he admits that Jiwa had explained to him what plaintiffs' label was, and knowing, as the defendant must have done, that the figure of an elephant was common to the labels of several importers, his exultation over Cassella & Co.'s label can only [597] be reasonably accounted for by his conviction that it would by its general resemblance to the plaintiffs' label afford the most valuable assistance in ousting the plaintiffs' scarlet in favour of the defendant's dye.

For these reasons I have come to the conclusion that the plaintiffs have satisfactorily established that the defendant's label is likely to deceive unwary purchasers to the detriment of their trade, and that they are entitled to the injunction as prayed for. The decree must, therefore, be reversed and a decree made in terms of the plaint. Appellant to have his costs here and in the Court below.

STARLING, J.—The plaintiffs in this case, The Badische Aniline and Soda Fabrik, seek to have it declared that the defendant's label (Ex. B) is a colourable imitation of their label (Ex. A), and to have the defendant restrained by injunction from selling packets of scarlet aniline dye with Ex. B affixed to them.

The defendant is a Parsi inhabitant in Bombay who has been since January, 1892, importing into Bombay scarlet aniline dyes manfactured by Cassella & Co., of Frankfort, on the packets containing which the label B was affixed.

From the evidence it appears that the plaintiffs have been importing into and selling in Bombay scarlet aniline dyes with the label (Ex. A) on the outside of the packet in which it was contained, ever since 1882. The dye so imported is appreciated and the sale has been an increasing one. Since that date there have been three other elephant tickets (Exs. 1, 12, and 6), besides Ex. B, imported into Bombay in connection with scarlet aniline dye, but to a comparatively small extent, and they cannot in any way be said to be colurable imitations of the plaintiff's ticket. Exhibit 6 was

a ticket of Cassella & Co., who are the persons really interested in the result of this suit, but they seem after a short time to have dropped the use of that ticket altogether, possibly because they did not find it take in the market. Thus up to 1892 there was no label attached to scarlet aniline dye which was at all like the plaintiffs' or likely to be mistaken for theirs. In 1892, or shortly before the commencement of that year, Cassella & Co. had Ex. B designed and the circumstances under which that **[598]** was done are described in their letter to the defendant of the first December, 1892, (1) and in that they say: "We had seen the plaintiffs' label before we got up ours registered in Germany in 1892, and as our lithographer had also seen the same label before, we at the time gave special orders to have the design drawn up in such a manner that *no part* thereof could be considered an imitation of the plaintiff's label." Now it is quite possible for a label, no part of which is a copy of another label, to be a colourable imitation of that other label, and to be so like it in general appearance as to be likely to deceive purchasers. Such was the case in Orr Ewing's case (2), and it seems to me the special orders given by Cassella & Co. might have been, and were probably, coupled with orders to make their label have the same general appearance as the plaintiffs'. Then for what purpose were these labels prepared? The defendant in his evidence says that he went to Cassella & Co., in Frankfort to get a monopoly of magenta dye from them. This he could not get, as they had already given it to some one else, but they showed him tins of scarlet dye with label B on it and asked him to push the business of it in Bombay. Clearly, then, label B was prepared for the express purpose of being put on tin of scarlet dye which were to be sent to Bombay for sale, where their former elephant label (No. 6) had failed to secure markets. What the defendant thought of in using the ticket appears from his letter of 2nd April 1892, to Cassella & Co.:—"We are quite sanguine that if you have a free use of the ticket it will help us to drive out of the market Soda Fabrik's scarlet * * *. As to your suggestion to select another ticket in place of the elephant one, it will of course take a long time to introduce same in the market and thus throw unnecessary hindrance in the way." If B were quite unlike A, and not likely to be mistaken for it, it would be a new ticket, and it would be a long time before that could be introduced in the market and the difference between using B and some other ticket can only be that B, was so like some other ticket which has already a hold on the market, as to make it possible to slip it in and get the benefit of the reputation of that other ticket. The only ticket then in the market **[599]** resembling B was the plaintiffs'. To my mind the only conclusion to be drawn from this evidence is that Cassella & Co. had B designed in order to pass off their scarlet dye in Bombay as the plaintiffs' and that the defendant, being of opinion such a course was possible, took the goods with the same object. In such a case the Court will, without further enquiry, restrain a defendant—*Cope* v. *Evans* (3).

Further, against the defendant his own conduct is evidence, and I think his conduct is such as to prove against him that the resemblance between the tickets was calculated to deceive (see per Lord Blackburn, 7 Ap. Ca., at p. 230). Then as to the appearance of the tickets themselves. It is quite true that no one portion of B is a copy of a similar portion of A, and that no one, taking the two into his hands and comparing the one with the other, could mistake B for A. But purchasers do not so look

(1) 17 B. 587. (2) 7 Ap. Ca. 219. 3) L.R. 18 Eq. 138.

1893
MARCH 24.
ORIGINAL CIVIL.
17 B. 584.

at the labels. What they look at is the general appearance and effect of the label, and all that is necessary in order that the Court should stop the use of a label is that its general appearance and effect is such as would render it likely to make purchasers suppose they are purchasing an article of a party who is complaining of the use of the defendant's label (see Orr Ewing's case (1)). In my opinion, the general effect of the two labels is practically the same, and the only difference which could possibly strike the eye at first sight is the *jhool* on the defendant's elephant ; but I very much doubt whether an ordinary purchaser would ordinarily notice this, or if he did, that he would remember whether there was or was not a *jhool* on the plaintiffs' label which he had seen before. If he did notice and remember, I am of opinion that in all probability he would put it down to some change or variation made by the plaintiffs' themselves (see the judgment in Orr Evings' case). On the whole, I have come to the conclusion on my own view of the labels, and taking into account the character of the elephant labels already in the markets other than A and B, and from the conduct of the defendant, that his label is calculated to deceive a purchaser into the belief that his goods were those of the plaintiffs and, from the conduct of **[600]** Cassella & Co. and the defendant, that the label was introduced with that intention. This is sufficient to decide the case, and I am, therefore, of opinion that the decree of Parsons, J., should be reversed and a decree passed for the plaintiffs.

I may add, with regard to one of the arguments used in behalf of the defendant, that it seems to me that it was practically impossible for the plaintiffs to get any evidence of purchasers having been actually deceived. The first shipment of Cassella's goods was only made in the end of January 1892, and by the beginning of March the plaintiffs had interfered and objected to the use of Cassella's ticket, and by the beginning of July the present suit was filed ; and after the plaintiffs had interfered, it would have been almost impossible, and certainly exceedingly damaging to their case, for the defendant to have attempted to pass Cassella's goods off as the plaintiffs'. If they had succeeded in doing so, they would have been making most cogent evidence for their adversaries.

Decree reversed.

Attorneys for the appellants :—Messrs. *Payne, Gilbert and Sayani.*

Attorneys for the respondent:—Messrs. *Pestonji Rustomji and Kolha.*

(1) 7 Ap. Ca. 219.

17 B. 600.

1893
JUNE 12.

ORIGINAL CIVIL.

ORIGINAL CIVIL.

17 B. 600.

Before Mr. Justice Bayley.

GOSWAMI SHRI GIRDHARJI MAHARAJ SHRI GOVINDRAIJI MAHARAJ TIKAIT (*Plaintiff*) *v.* MADHOWDAS PREMJI *and* GOSWAMI SHRI GOVARDHANLALJI GIRDHARJI MAHARAJ (*Defendants.*)*

[28th and 29th March, 4th April and 12th June, 1893.]

Idol—Property bequeathed to an idol—Owner of shrine—Act of State—Deposition of owner from his position by an act of State of foreign power—Effect of deposition on right to property in Bombay—Trustee—Will—Power of appointment.

Under a power given to her by the will of her husband, one Custur had the right to bequeath a certain house situate in Bombay. She died in 1873, and by her will she bequeathed the house in question to trustees, their heirs, &c., in trust to pay and apply the rents thereof to the shrine or *gadi* of Shri Nathji for ever, and she gave the trustees and their heirs, &c., the right to reside for life in the first [601] storey of the said house free of rent. The shrine of Shri Nathji is situate at Nathdwara in the territory of H. H. the Maharana of Oodeypore. It is held in great veneration by the Vaishnava sect of Hindus and is extremely wealthy. The plaintiff held the position of Maharaja of Nathdwara (Tikait Maharaja) up to the year 1876, and as such sat on the *gadi* and managed the property of the said shrine. In that year, however, he was deposed from his position by the principal authorities of Oodeypore and deported from Nathdwara, and his son the second defendant was raised to the *gadi* in his place. Since that time the plaintiff had never been permitted to go back, nor had he had anything to do with the shrine. The second defendant (his son) had since his elevation performed the worship and managed the property belonging to the shrine. The plaintiff, however, claimed in this suit to be still the legal owner and representative of the shrine, and as such entitled to the house in question and to the rents and profits thereof since the death of Custur. The first defendant was one of the trustees named in the will of Custur to whom the house was bequeathed in trust. The plaintiff in his plaint also contended that the clause in Custur's will giving the said trustees a right to reside in the house free of rent was *ultra vires* of the power of appointment given to her by the will of her husband.

The defendants denied that since his deposition the plaintiff was the legal owner and representative of the shrine of Shri Nathji. They contended that having been deposed and deported from Nathdwara he could no longer apply the rents to the support of the shrine, and that if the house were given to him, the trusts of Custur's will would be defeated. They contended that the second defendant in virtue of his position was entitled to receive the rents, and that this suit should be dismissed.

Held, that the plaintiff was entitled to the said house. The house was validly bequeathed to the *gadi*. At the date of the bequest the plaintiff was *de facto* as well as *de jure* in possession of the shrine and of its property. His deposition from the *gadi* was an act of a foreign State and did not affect his right to property in Bombay. If he was regarded as owner of that property he had not lost his right as such to the said property in consequence of his deposition, and if he was merely a trustee he had not been removed from his office by any competent tribunal.

Held, also, that under the will of Custur the first defendant was entitled to reside rent free in the first storey of the house in question during his life-time.

IN this suit the plaintiff alleged that he was the legal owner and representative of the *gadi* or shrine of Shri Nathji at Nathdwara in the territory of H. H. the Maharana of Oodeypore—a shrine held in great veneration by the Vaishnava sect of Hindus—and as such he claimed a house situate in Bombay, which had been bequeathed in 1873 to the

* Suit No. 348 of 1891.

1893
JUNE 12.

ORIGINAL CIVIL.

17 B. 600.

gadi. On the other hand, the defendants (the second defendant being the plaintiff's son) denied that the plaintiff was now the legal owner or representative of the shrine. They stated that he had been deposed from that office in 1876 by the political authorities of Oodeypore and had been [602] deported from Nathdwara and was in consequence no longer competent to discharge the duties of the office: that on his deposition his son (the second defendant) had been raised to the *gadi* in his place and had ever since managed the property of the shrine: that he could not now apply the rent to the *gadi*, and that, if the house were given to the plaintiff, the trusts created by the above bequest would be wholly defeated. The following were the facts of the case.

One Bhanji Bhimji, of Bombay, died in 1864. By his will he devised a certain house situate in Narayan Dhooroo Street to two wives and the survivor of them for life and after the death of the survivor to such person or persons as they or the survivor of them should appoint, and in default of such appointment he directed that the house should be held by the heirs, executors or administrators of the survivor in trust to pay and apply the rents thereof to the *gadi* or throne of Shri Nathji for ever. The words of the will were as follows:—

"I give, devise and bequeath, the dwelling-house in which I now reside situate at the corner of Narayan Dhooroo Street, otherwise called Barhboy Moholla, on the Mandvi Road, assessed under No. 31, unto my said wives Vajibai and Custur otherwise Navibai and to the survivor of them for and during their respective lives, and direct that my said wives and the survivor of them may reside in the said house and receive the rents and profits thereof and apply the same to their own use and benefit; and direct that from and after the decease of the survivor of them, my said wives, the said dwelling-house and premises shall go to such person or persons as they, my said wives, shall by writing under their own hands jointly appoint or as the survivor of them shall by deed or will appoint, and in default of any such appointment I direct that the said house and premises shall be held by the heirs, executors or administrators of the survivor of them, my said wives, upon and subject to the trust aforesaid (1); and I further will and declare that the person or persons in whom the said house and premises may, on the death of the survivor of them, my said wives, become vested, shall stand possessed thereof in trust to collect and get in the monthly rent, issues and profits thereof, and to pay and apply the same (after payment of all expenses of repairing the said premises and paying all ground-rent, assessment and other bills payable in respect thereof), to the *gadi* or throne of Shri Nathji for ever, and I hereby declare that the said house and premises shall not at any time hereafter be sold, mortgaged, charged or otherwise encumbered, and I declare that if the [603] said house and premises shall be sold, mortgaged, or charged, such sale, mortgage or charge shall be null and void."

Of the two wives above mentioned, Custur was the survivor. She died on the 31st May, 1873, leaving a will dated 4th January, 1871, which was duly proved by two of the executors named therein, *viz.*, the first defendant Madhowdas Premji and one Purbhudas Tulsidas. By her will she left the said house to trustees in trust to collect the rents and to pay the same to the throne or *gadi* of Shri Nathji for ever and she gave the

(1) The word "aforesaid' was probably a mistake, the testator meaning "hereinafter mentioned." See *infra* 17 B. 615.

trustees and their heirs, &c., the right to reside in the first storey of the said house free of rent. The will ran as follows :—

"I give, devise and bequeath the dwelling-house in which I reside, situate at the corner of Narayan Dhooroo Street, otherwise called Barbhoy Moholla, on the Mandvi Road, assessed under No. 31, unto the said Sha Tulsidas Premji, Sha Madhowdas Premji and Sha Purbhudas Tulsidas, their heirs and assigns, upon trust to let the same and to collect and receive the monthly rent, issues and profits thereof, and to pay the same (after payment of all taxes and expenses in repairing or rebuilding the said premises) to the throne or *gadi* of Shri Nathji for ever ; but I direct that it shall be lawful for my said trustees and trustee or survivors or survivor of them, or their or his heirs, legal personal representatives or assigns during their lives, to reside in the first storey of the said house and premises hereinafter lastly given and devised free of rent. I hereby declare that the said Sha Tulsidas Premji, Sha Madhowdas Premji and Sha Purbhudas Tulsidas or survivors or the survivor of them or the heirs, executors or administrators of such survivor or other the trustees or trustee for the time being of this my will shall not sell, mortgage, charge or in any wise incumber the said hereditaments and premises hereinbefore given and devised or intended so to be or any part thereof, and any sale or mortgage thereof or any part thereof shall be absolutely null and void."

Purbhudas Tulsidas, the second executor of the said will, subsequently died. The first defendant (also an executor) was at the date of this suit, and had been since Custur's death, in possession of the house and in receipt of the rents and profits thereof.

The plaintiff in his plaint alleged that he was the legal owner and representative of the *gadi* of Shri Nathji, and, as such, he claimed to be entitled under Custur's will to the house in question and to the rents or profits thereof since her death. He further contended that the direction contained in her will, to the effect that it should be lawful for her trustees or trustee or the **[604]** survivors or survivor of them, their or his heirs, legal personal representatives or assigns, during their lives to reside in the first storey of the said house free of rent, was *ultra vires* of the said Custur. He prayed for a declaration that as owner and representative of the shrine and *gadi* of Shri Nathji he was absolutely entitled to the said dwelling-house ; that it might be made over to him by the first defendant, and that an account might be taken of the rents and profits of the said house since the death of Custur, and that such rents and profits might be paid over to him by the first defendant.

The first defendant filed a written statement. He did not admit that the plaintiff was the present legal owner and representative of the *gadi* of Shri Nathji, and alleged as follows :—

3. "The defendant says that there have been disputes and differences for years between the plaintiff and his son as to who is entitled to sit on the *gadi* and manage the property of Shri Nathji. The plaintiff's said son has now for many years sat on the *gadi* of Shri Nathji at Nathdwara and is in charge of, and manages the property of the shrine. The defendant submits that the plaintiff's said son ought to have been made a party to the present suit.

4. "The defendant says that under the wills in the plaint referred to he has a right to reside in the house in the plaint referred to in the manner in which he is residing there, and that the plaintiff is not entitled to eject him therefrom.

1893
JUNE 12.

ORIGINAL CIVIL.

17 B. 600.

5. "The defendant says that the net rents are, under the provision of the said wills, to be paid to the shrine of *gadi* of Shri Nathji to be used for defraying the expenses of worship, and not to be appropriated for the personal benefit of any manager of the shrine or other person."

The plaintiff's son was subsequently made the second defendant to this suit.

He filed a written statement in which he said that he and not the plaintiff was the owner and representative of the *gadi* of Shri Nathji. The following clauses of his written statement set forth his case :—

2. "This defendant says that, independently of the question of ownership of the said *gadi* of Shri Nathji, the plaintiff is not entitled to the relief claimed in this suit. Ever since the year 1876, when the plaintiff was deposed from his position of Maharaja of Nathdwara by the authorities at Meywar and by the British Government, he has had nothing to do with the said *gadi* of Shri Nathji or with Shri Nathji, and he has not been since that date nor is he now or ever can be in a position to receive or to expend the rents of the premises in the plaint mentioned as the representative of the *gadi* of Shri Nathji.

[605] 3. "This defendant since the date aforesaid has been the *de facto* representative of the said *gadi* of Shri Nathji and in possession thereof, and this defendant says that he has also been since the date aforesaid the *de jure* representative of such *gadi* and that the rents of the premises in the plaint mentioned ought to be paid to this defendant for the use of the said *gadi* of Shri Nathji.

4. "This defendant says that, if the premises in the plaint mentioned are made over to the plaintiff, the same will be wholly lost to the *gadi* of Shri Nathji, and the trusts created by the will of the said Bhanji Bhimji in favour of the said *gadi* will be wholly defeated."

At the hearing it was contended that the house belonged to the *gadi* and that the plaintiff was not entitled to sue. The following issues were raised :—

(1) Whether the plaintiff is the present owner and representative of the *gadi* of Shri Nathji ?

(2) If not, whether he is entitled to the house claimed in the plaint and the rents and profits thereof ?

(3) Whether, having regard to the fact that the plaintiff has been deposed from his position of holder of the *gadi* and has been deported from Nathdwara, as in the written statement of the second defendant alleged, he is entitled to the possession of the house claimed and to the rents and profits thereof ?

(4) Whether the house has been validly bequeathed to the *gadi* of Shri Nathji ?

(5) Whether, having regard to the circumstances in the written statement of the second defendant alleged, the plaintiff has any claim to the house or to the management thereof ?

(6) Whether under the terms of the wills, in the plaint referred to, the first defendant has any legal right to reside in a portion of the house as he is now doing ?

(7) Whether, if he has not, the plaintiff has any right to eject him ?

(8) (Raised by plaintiff). Whether issue No. 1 is not *res judicata* ?

A witness (Chatturbhuj Morarji) was called for the defence, who stated that he belonged to the Vaishnava community and had been twice to Nathdwara. He said :—

"I went there after plaintiff was deported. I went to pay my homage to the idol and to see the Maharaja, the second defendant. The idol is still there. The second defendant performs the worship. He has done so since the plaintiff was deported. **[606]** He manages all the affairs of the idol and the property. The treasury of the God is in charge of the second defendant. The *gadi* of Shri Nathji is at Nathdwara. Nothing is sent now by plaintiff for the worship of the idol. He has not contributed anything towards the worship since he was deported. He does not take any part in the worship or the management. He does not go there at all, and has no agents there. It would not be possible for him to carry on the worship or manage the affairs of the idol unless he went there. I have seen plaintiff in Bombay, since he was deported, frequently. I went to see him as Maharaja. He is not the Tikait Maharaja. He who is on the *gadi* is the Tikait Maharaja. He who performs the worship of Shri Nathji is called the Tikait. All the Maharajas—there are 50 or 52 in the world—are called Acharias. It was an unjustact removing him from Nathdwara. We still hold him in veneration. But the Tikait is the only man who performs the worship . . . . I was one of the persons that disapproved of the deportation. I would have been glad if he had been allowed to go back to Nathdwara to manage the *gadi*. Since he has not been allowed to go back, I have recognized his son as the Tikait Maharaja . . . . The worship of the idol by the Tikait Maharaja is eight times a day. The Tikait goes to the idol and performs the worship of the idol himself. The idol is fixed in the temple and never removed. The Tikait Maharaja, if well, is bound to worship the idol eight times a day. If unwell, some of his servants worship for him."

Macpherson, *Russell* and *Sethna*, for plaintiff :—The plaintiff is entitled to the property. He has, no doubt, been deposed from his position of Tikait Maharaja, but that was the act of a foregin state which cannot be recognized by this Court. His title to property within the jurisdiction remains unaffected by the act of a foreign power. That point has been already decided. See *Shriman Goswami* v. *Goswami Shri Girdharlalji* (1) and *Nanabhai* v. *Shriman Goswami Girdhariji* (2); *Gossamee Sree Greedhareejee* v. *Rumanlolljee* (3). By these decisions the plaintiff's right to the property is *res judicata*.

We contend that Custur had no power to give a right of residence in this house. The power conferred on her was merely a power of nominating trustees or persons to receive rents, and nothing more. A gift of the rents and profits, to the *gadi* of Shri Nathji for ever is a gift to the person who has a right to the *gadi*, and that person is the plaintiff, although, no doubt, he has been deposed by a foreign State. It is like a gift to the Crown. See Wharton's Law Dictionary, title "Crown." They cited Tagore Law Lectures for 1887, p. 216.

[607] *Lang*, (Acting Advocate General), *Kirkpatrick* and *Inverarity*, for the defendants :—The trustees appointed by Custur's will are trustees to send the rents and profits of the house to the shrine at Nathdwara. The bequest is to the *gadi* of Shri Nathji. That *gadi* is at Nathdwara, where the idol is. The trustees have no authority to send the rents and profits to the plaintiff, who is elsewhere. This is a gift to an idol and not

(1) 17 B. 620. (2) 12 B. 331. (3) 16 I. A. 137.

1893

JUNE 12.

ORIGINAL CIVIL.

17 B. 600

to any person—Mayne's Hindu Law, para. 395 (5th Ed.); *Rupa Jagshet* v. *Krishnaji Govind* (1). The plaintiff is not in a position to apply the money in the proper manner, and is therefore not entitled to the rents. He is, in any case, only a trustee for the idol, and since 1876 he has been disqualified by his deposition. In the cases which have been cited, the plaintiff had had possession, but here he has never had possession. It is admitted that the first defendant has been in possession ever since Custur's death. This is a gift to the *gadi*, which the plaintiff does not now represent. As to the will of Custur, she was given a power of appointment which she has properly exercised.

Cur. adv. vult.

12*th June*, 1893. BAYLEY, J.—In this suit, which was brought in the first instance against the defendant Madhowdas Premji, the plaintiff prays for a declaration that he, as the owner and representative of the shrine or *gadi* of Shri Nathji in the territories of the Rana of Oodeypore, is absolutely entitled to a certain dwelling-house situated in Barbhoy Moholla on the Mandvi Road in the native town of Bombay; that the defendant may be directed to convey and make over the same to the plaintiff, and to do and execute all acts, deeds and assurances necessary for completing and effectually vesting the same in the plaintiff; that accounts may be taken of the rents and profits of the said house since the death of one Custur *alias* Navibai, on the 31st May, 1873, and the defendant ordered to pay over the same to the plaintiff after deducting all necessary and proper outgoings, and that the plaintiff's costs of the suit may be provided for. He also prays for such further and other relief as the nature of the case may require.

[608] Madhowdas Premji, by his written statement, denied that the plaintiff was entitled to the relief prayed, or any part thereof. He did not admit that the plaintiff is the present legal owner and representative of the *gadi* of Shri Nathji as alleged. He stated that there had been disputes and differences for years between the plaintiff and his son as to who is entitled to sit on the *gadi* and manage the property of Shri Nathji; that the plaintiff's said son had for many years sat on the *gadi* of Shri Nathji at Nathdwara and was in charge of and managed the property of the shrine, and he submitted that the plaintiff's said son ought to have been made a party to the present suit. The defendant further said that, under the will of Bhanji Bhimji, who died on or about the 22nd September, 1864, and the will of the said Custur *alias* Navibai, in the plaint referred to, he had a right to reside in the house in question, in which he was then residing, and that the plaintiff was not entitled to eject him therefrom. He contended that the net rents, were, under the provisions of the said will, to be paid to the shrine or *gadi* of Shri Nathji to be used for defraying the expenses of worship, and not to be appropriated for the personal benefit of any manager of the shrine or other person, and he submitted that, under the foregoing circumstances, this suit should be dismissed with costs.

Pursuant to a Judge's order, the plaint was, on the 7th April, 1892, amended, and the plaintiff's son was made a defendant. On the 15th July, 1892, he declared at Nathdwara a written statement, which was filed on the 3rd August following. In it he said that he was the owner and representative of the *gadi* of Shri Nathji; that, independently of

(1) 9 B. 169.

the question of the ownership of the said *gadi*, the plaintiff was not entitled to the relief claimed; that ever since the year 1876, when the plaintiff was deposed from his position of Maharaja of Nathdwara by the authorities at Meywar and by the British Government, he had had nothing to do with the said *gadi* of Shri Nathji or with Shri Nathji, and he has not been since that date, nor was he then, nor ever can be, in a position to receive or to expend the rents of the premises as the representative of the *gadi*; that the second defendant since the date aforesaid has been the *de facto* representative of the said *gadi* and in possession thereof, and **[609]** also the *de jure* representative of such *gadi*, and that the rents of the premises ought to be paid to him (the second defendant) for the use of the said *gadi*. He lastly said that, if the premises were made over to the plaintiff, the same would be wholly lost to the *gadi* of Shri Nathji, and the trusts created by the will of Bhanji Bhimji in favour of the *gadi* would be wholly defeated.

The suit came on for hearing on the 28th March last, Mr. Russell, with others, appearing for the plaintiff, and the Advocate-General, with others, appearing for both the defendants. The following issues were raised on behalf of both defendants (His Lordship stated the issues as above (1) and continued)—

The conflicting claims of the plaintiff and of his son, the second defendant, to property belonging to the shrine and *gadi* of Shri Nathji at Nathdwara, but situate outside the territory of the Rana of Oodeypore, have been considered and decided by the High Court of Bombay in two suits, in which the plaintiff and his son were parties. The first suit (*Shriman Goswami* v. *Goswami Shri Girdharlalji*) (2) was brought on the original side of this Court by the present plaintiff's son (the present second defendant) against his father, and he alleged in his plaint that he was high-priest of the shrine of Shri Nathji at Nathdwara and was entitled to all the property dedicated to the shrine, and he prayed that he might be declared entitled to all the moneys and moveable property of the firm of Navnitdas Purshotamdas in the town of Bombay, and that the then defendant might be directed to pay the same to him. In para. 5 of the plaint in that case it was stated that up to the year 1876 the then defendant was the high-priest of the shrine and the manager of all its property; that on the 8th May, 1876, the defendant, in consequence of misconduct in his office, was deposed and deported from Nathdwara by order of the Political Agent of Meywar and the Rana of Oodeypore; that the plaintiff, his son, was thereupon placed on the *gadi* as high-priest; that he had taken possession of the shrine and had ever since been recognised by the Vaishnava sect as their high-priest.

[610] On the day the plaint in that suit was presented, *viz.*, on the 22nd April, 1878, a rule *nisi* for an injunction and receiver was obtained. Very numerous and voluminous affidavits were filed on both sides, and the whole history of the shrine, from its foundation in the reign of the Emperor Aurungzebe, was fully set forth. The plaintiff in that suit had ample time to produce all documents relevant to his case, and affidavits in reply were made on his behalf by the prime minister and by several of the members of the Privy Council of the Oodeypore Darbar, and by others, and copies of translations of grants by former Ranas of Oodeypore and of other documents were annexed to some of such affidavits. It was stated in the affidavits that the annual revenue of the shrine from the

(1) 17 B. 605.

(2) 17 B. 620.

1893
JUNE 12.

ORIGINAL CIVIL.

17 B. 600.

rents of villages, the offerings of the faithful in the various parts of Rajputana, and in India, and from other sources, exceeded seven lakhs of rupees.

On the 5th December, 1878, cause was shown against the rule before me, and the arguments extended over eight days. Council stated that the suit presented questions which had never previously come before a Court in India. The Court on the 29th April, 1879, gave its decision, and held that the plaintiff, having brought his suit in the High Court to recover property situated in Bombay, must take the law as he found it there, and that whatever might be his rights as to property situated within the territories of Oodeypore, he must, before he could oust the defendant from the possession of property in Bombay by means of the then present suit, show that, according to the principles of law or equity administered in this Court, he had a better title thereto than the defendant: that, if the deposition was to be regarded as an act of State, no case had been cited to show that an act of State could be the groundwork of such an action in an English Court of law or equity: that such deposition could not be looked at as or at all analogous to a foreign judgment: that the parties were not the same there as in the suit then before the Court, such suit being brought by a son against his father, by the then alleged possessor of the *gadi* against the former possessor, who had been forcibly turned out by the Darbar with the sanction of the Political Agent of the Government of India: that there was no Court which had given any decision at Oodeypore: that the **[611]** Darbar was a party to the suit, if what took place there could be looked on as a suit, and that the decision, if there had been a decision, was wanting in natural justice, as the Darbar had made itself a judge in its own cause: that the documents annexed to the affidavits tended to show that the allegation, that the defendant was deposed in consequence of misconduct in his office, was disproved: that the deposition was not in accordance with the usage of the family, and that he was really deposed and banished for not acknowledging the jurisdiction of the Darbar, which rightly or wrongly he contested, relying in support of such contention upon various grants and *sanads* executed to his predecessors on the *gadi* by previous Ranas of Oodeypore; that the Political Agent suggested to the Darbar (the Rana of Oodeypore being then a minor) that it should depose the defendant, and it did so, and, taking troops necessary for that purpose, and having taken the plaintiff out of his father's *palki* it banished the latter from Oodeypore, and so holding, the Court being of opinion that the plaintiff could not recover if the case went to trial, discharged the rule with costs.

The plaintiff in that suit appealed against the above order on the grounds: (1) that the Judge ought to have held that the plaintiff had made out his claim to a receiver and injunction; (2) that he ought to have held that the plaintiff had made out a *prima facie* title to the property, the subject-matter of the suit; (3) that he ought to have held that there was danger of the property being wasted, expended or removed by the defendant from the jurisdiction of the Court before the hearing of the suit; (4) that the Judge erred both in law and in fact in discharging the rule *nisi*, with costs; that, (5) at all events, the costs of defendant ought to have been made costs in the cause and ought not to have been ordered to be paid by the plaintiff. The appeal came on for hearing on the 2nd August, 1879, before Sir M. Westropp, C. J., and Sir Charles Sargent, when they

confirmed the order of the 29th April, 1879, and dismissed the appeal with costs.

The second suit, in which similar points arose, was brought by the present plaintiff in the Court of the Subordinate Judge at Poona, in respect of certain property belonging to the Oodeypore [612] shrine of Shri Nathji, which was situated at Poona, which the first four defendants in that suit had been employed by the present plaintiff to manage, to receive the rents, and transmit them to him at Nathdwara. After the deposition and banishment of the plaintiff in 1876, they had ceased to pay over the rents of the Poona property to him, and in 1880 he filed the suit against them to recover possession of the property (suit No. 1216 of 1880). The claim was valued at Rs. 10,000. The plaintiff's son, Shri Goverdhanlalji, was made a co-defendant on his own application and denied the plaintiff's right to recover, on the ground that he had been deposed and banished by the Rana of Oodeypore, who had made over the property to him (the fifth defendant). The Subordinate Judge of Poona having, on the 21st January, 1885, made a decree in favour of the plaintiff with costs. the defendants appealed to the High Court. The appeal (No. 27 of 1885) was heard in 1888 by Nanabhoy Haridas and Jardine, JJ., who confirmed the decree and dismissed the appeal with costs—*Nanabhai* v. *Shriman Goswami Girdhariji*(1). The Court of appeal, in delivering its judgment, which was a written one, say (His Lordship read the judgment, page 333, and continued) :

Although the learned Judges who decided that case in the High Court did not refer in their judgment to the previous suit on the original side (*Shriman Goswami* v. *Goswami Shri Girdharlali* (2),) Mr. M. N. Nanavati, the Subordinate Judge of Poona, stated at the commencement of his judgment that he was greatly influenced by the decision of the Court of first instance in the previous suit, confirmed as it was on appeal.

Now, the deposition of the plaintiff having been based purely upon political and administrative grounds, as was proved by the affidavits and exhibits annexed thereto, filed in *Shriman Goswami* v. *Goswami Shri Girdharlalji* (2), this Court has no power or desire to enquire into the expediency or propriety of such action on the part of the Oodeypore Darbar. I may, however, remark that it appears, from the evidence given in the present suit, that the deposition and banishment of the plaintiff were not regarded with approval by many of the Vaishnavas, who [613] venerated the shrine of Shri Nathji and its occupant. The only witness called on behalf of the defendants at the recent hearing before me was Mr. Chutturbhuj Murarji, a well-known merchant in Bombay, and who belongs to the Vaishnava community. He stated, in cross-examination, that it was an unjust act removing the plaintiff from Nathdwara, and that he and the Vaishnava community still hold him in veneration.

An affidavit had been made by Mr. Chutturbhuj Murarji and others in suit No. 218 of 1878, and on its being shown to him he said that the statements made in such affidavit were correct. The affidavit was put in evidence at the hearing and marked as Ex. F. In paragraph 3 of that affidavit is the following passage :—"And we say that notwithstanding the forcible removal of the said defendant from Nathdwara, which most of the Vaishnavas, as we are informed and verily believe, consider to be most unjust, arbitrary, and unwarranted, they as well as almost all the

(1) 12 B. 331.

(2) 17 B. 620.

1893
JUNE 12.
ORIGINAL CIVIL.
17 B. 600.

followers of Shri Vullubhacharya, including the Gossains at Bombay, still pay the defendant the same respect and hold him in the same veneration as before his said removal, and, as we believe, still consider and treat him as the acharya or high-priest and entitled to their respect as the representative of Shri Vullubhacharya."

In the present case, it was argued on behalf of the second defendant that the plaintiff was only a trustee, and that, owing to the action of the Oodeypore State, he could no longer carry on the duties of a trustee. The same point was urged in the Poona case, but the High Court disposed of such contention by saying that, if the plaintiff was merely a trustee, he had not yet been removed from his office by any competent tribunal. I may here remark that at the time of the death of the two devisors in the present case, *i.e.*, on the 22nd September, 1864, and 31st May, 1873, the plaintiff was *de facto* as well as *de jure* in possession of the shrine and property of Shri Nathji, as he was not deposed and deported until the 8th May, 1876. The learned Advocate General suggested that the Poona case differed from the present one, as there the plaintiff had been in possession of the Poona property before his deposition and was in possession by his managers, the first four defendants in that suit. That no **[614]** doubt was so, but such fact formed no ground of the Court's decision, which was that the plaintiff, if regarded as the owner of the property at Poona, had not, in law, lost his right as such in consequence of the act of the Rana of Oodeypore, and that, if he was merely a trustee, he had not been removed from his office by any competent tribunal.

The main point raised in the present case in the written statements of the two defendants, *viz.*, that in regard to property of the shrine situate in the Presidency of Bombay the plaintiff's rights as Tikait Maharaja of the *gadi* of Shri Nathji had since his deposition in May, 1876, been transferred to and vested in his son, was directly and substantially in issue in the two former suits between the plaintiff and his son, and was heard and finally decided by the High Court in each of them. I may here mention that the records of this Court show that after the decision of the Court of appeal on the second August, 1879 (1), *viz.*, on the 20th November, 1879, Mr. Starling, counsel for the then plaintiff, moved before the late Mr. Justice Green to withdraw the suit with liberty to the plaintiff to bring a fresh suit for the same matter; and on hearing Mr. Latham, counsel for the defendant, who opposed the same, the Court ordered that the plaintiff be, and he was thereby, permitted to withdraw from the suit, and it was further ordered that the plaintiff do pay to the defendant all his costs of the suit so far as the same had not been already ordered to be paid. No permission was given, under s. 373 of the Civil Procedure Code then in force (Act X of 1877), to bring a fresh suit for the same subject-matter, and consequently he was by that section precluded from bringing a fresh suit for the same matter.

I will next consider the point raised by the fourth issue whether the said house has been validly bequeathed to the *gadi* of Shri Nathji. The will of Bhanji Bhimji, which was in the English language, executed on the 15th May, 1858, more than six years before his death and attested by the late Mr. C. E. Stanger Leathes, a solicitor of the Supreme Court, and by his clerk, and interpreted by the late Narayan Dinnanathji, one of the principal interpreters of that Court, after (*inter alia*) directing that his

(1) See 17 B. 620.

funeral ceremonies should be performed by Sha Naratam Parmanund, [615] the son of his cousin, bequeathed his dwelling-house, the one in dispute, to his two wives Vajibai and Custur, *alias* Navibai, and to the survivor of them during their respective lives, with liberty to reside in it, receive the rents and profits thereof, and apply the same to their own use and benefit. He then says: "And I direct that from and after the decease of the survivor of them, my asid wives, the said dwelling-house and premises shall go to such person or persons as they, my said wives, shall by writing under their hands jointly appoint, or as the survivor of them shall by deed or will appoint. And in default of any such appointment I direct that the said house and premises shall be held by the heirs' executors, or administrators of the survivor of them, my said wives, upon and subject to the trusts aforesaid." The word "aforesaid" would seem to be a mistake for "hereinafter mentioned." The word "aforesaid" has, so far as I can discover, little, if any meaning. Then follows a provision that after the death of the survivor of his wives, the rents and profits of the house are to be paid and applied (after payment of all expenses of repairing and the ground rent, assessment, and other bills in respect thereof) to the *gadi* (or throne) of Shri Nathji for ever.

The widows do not appear to have made any joint appointment, but the survivor Custur, *alias* Navibai, by her will, dated the 4th January, 1871, which was also in English, and was attested by Mr. Leslie Crawford, then a partner in the firm of Messrs. Leathes and Crawford, and their clerk, and duly interpreted, disposed of the house in dispute in the following words:—"I give, devise, and bequeath the dwelling-house in which I now reside (describing it) unto the said Sha Tulsidas Premji, Sha Madhowdas Premji, and Sha Purbhudas Tulsidas, their heirs and assigns upon trust to let the same and collect and receive the monthly rents, issues and profits thereof, and to pay the same (after payment of all taxes and expenses in repairing or rebuilding the said premises) to the throne or *gadi* of Shri Nathji for ever, but I direct that it shall be lawful for my said trustees and trustee or the survivors or survivor of them or their or his heirs, legal personal representatives or assigns during their lives to reside in the first storey of the said house and premises hereinbefore lastly given and [616] devised free of rent." She then declares that the above-named persons are not to sell, mortgage, charge, or in anywise incumber the said hereditaments and premises. The will of Bhanji Bhimji gives his two widows power to give the dwelling-house and premises to such person or persons as they should by writing under their hands jointly appoint, or as the survivor of them should by deed or will appoint. What Custur, the survivor of the two widows, did by her will was, in my opinion, in conformity with the power given her by her husband's will, and I, therefore, think that by the joint operation of those two wills the house, subject to the right of the three trustees to reside in the first storey, was validly bequeathed to the *gadi* of Shri Nathji. It was not denied that a devise of the income of an estate passes the fee—*Mannox* v. *Greener* (1). Such rule has been adopted in the Indian Succession Act (X of 1865), s. 159, illustration (*c*). "A bequeaths to B the rents of his lands at X. B is entitled to the lands."

Next as to right of the defendant Madhowdas Premji to reside in the house. It is suggested in paragraph 7 of the plaint that the direction in Custur's will, that it should be lawful for her three trustees or the

(1) L.R. 14 Eq. 456.

1893
JUNE 12.
ORIGINAL CIVIL.
17 B. 600.

survivor of them or their or his heirs, legal personal representatives or assigns during their lives to reside in the first storey of the house and premises free of rent, was *ultra vires* of the said Custur. As, however, in the events which happened, she had power under her husband's will to appoint by deed or will to any person or persons she thought fit, I think that the right to reside in the house is good during the lifetime of the three named persons and the survivor of them, and as Madhowdas Premji, the first defendant, is one of those three named persons, I think that he is entitled to reside during his life in the first storey of the house and premises rent free. I collect that the two other trustees are dead.

The operation and effect of a power of appointment in a Hindu will was considered in a recent case on the original side of this Court which came before the Court of appeal (*Javerbai* v. *Kablibai* (1)). There was a bequest to such person or persons as **[617]** the testator's brother Jamnadas should by deed or writing appoint. The learned Judge, who tried the suit, considered that it was impossible to find a place for power of appointment in the Hindu system of law (see p. 497). Sir Charles Sargent, C.J., in delivering the judgment of the Appeal Court said (p. 497): "But it remains to consider the more difficult question as to the validity and effect of such a devise, supposing the devise had been (as in the event it has become) to the ladies and the survivor of them, and after the death of the survivor of them to such person as Jamnadas should by deed or writing appoint. Such a devise has never, we believe, come under the consideration of any of the High Courts or of their Lordships of the Privy Council." Then after pointing out that the Hindu law recognizes the existence of "powers" over definite objects, as distinct from the ownership in them, such as powers of management, or *vahivat*, and the all-important power given to a widow to adopt, he proceeds: "There are also other powers such as those which experience shows are frequently found in Hindu wills. Can it then be said that there is any general principle of Hindu law which forbids a testamentary power to appoint the person to succeed in a certain event being recognized and effect being given to it according to its terms? Such powers are undoubtedly of great convenience in practice, a consideration which it is to be remarked distinctly weighed with the Privy Council in *Sreemutty Soorjeemoney Dossee* v. *Denobundoo Mullick* (2). After the best consideration we have been able to give to the question, we have arrived at the conclusion that there is no clear principle of Hindu law which forbids our construing such a bequest as the one under consideration according to its plain and literal terms, subject, however—and this is of importance—to the same restrictions as the Hindu testamentary law imposes on the testator himself, *viz.*, that the appointment should be made during the life of the tenant for life, so that the appointee may be ascertained when the event arises on which he is to take, and also that he should be a person who was alive at the death of the testator."

The three trustees of Custur's will, who are allowed by that will to reside in the first storey of the house in dispute during **[618]** their lives, are described in that will—Tulsidas Premji and Madhowdas Premji (the first defendant) as her brothers and Purbhudas Premji is described as her nephew. It was not suggested that they were not alive at the death of Bhanji Bhimji in September, 1861. I am, therefore, of opinion that the

(1) 16 B. 492.

(2) 9 M.I.A. 123 (135).

plaintiff is entitled to possession of the house and premises in dispute, whether as owner or as trustee it is unnecessary to decide, subject to the right of the first defendant to reside in the first storey during his life.

Upon the issues raised I record the following findings :—On issue 1, I find that the plaintiff is the present owner and representative of the *gadi* of Nathji so far as regards the property claimed in this suit. On issue 2—That, subject to the point decided on the sixth issue, the plaintiff is entitled to the house claimed and the rents and profits thereof. On issue 3—That notwithstanding the fact that the plaintiff has been deposed from his position of holder of the *gadi*, and has been deported from Nathdwara, as in the written statement of the second defendant alleged, he is entitled to possession of the house claimed and to the rents and profits thereof, subject to the point decided on the sixth issue. On issue 4—That the said house has been validly bequeathed to the *gadi* of Shri Nathji. On issue 5—That, having regard to the circumstances in the written statement of the second defendant alleged, the plaintiff has a valid claim to the said house, or to the management thereof, subject to the right of the first defendant to reside in the first storey during his life. On issue 6—That under the terms of the wills in the plaint referred to, the first defendant has a legal right to reside during his life in the first storey only in the said house, free of rent, but not in any other part thereof. On issue 7—That the plaintiff has a right to eject him from all portions of the said house other than the first storey. On issue 8—That issue No. 1 is *res judicata* so far as regards property of the *gadi* situate within the Presidency of Bombay. And I pass a decree for the plaintiff.

Declare that the plaintiff as the owner and representative of the shrine or *gadi* of Shri Nathji is entitled to the possession of the house claimed in the plaint, subject to the right of **[619]** Madhowdas Premji, the first defendant, to reside in the first storey thereof during his life, rent free. Order that the defendants do convey and make over to the plaintiff the said dwelling-house, other than the first storey thereof, and do and execute all acts, deeds, and assurances necessary for completely and effectually vesting the said house and premises in the plaintiff and also hand over all title-deeds, documents, and papers in their or either of their possession, power or control relating to the said dwelling-house, such deeds and assurances in the case of dispute to be settled by the sitting Judge in Chambers. Order that it be referred to the Commissioner of this Court to take an account of the rents and profits of the said house, other than the rents and profits of the first storey thereof, from the 31st May, 1873, after deducting all necessary and proper outgoings, and that when so ascertained, the defendants, or whichever of them has received the same, do pay over the same to the plaintiff.

As to costs. The plaintiff denied the right of the first defendant to reside in the first storey of the house during his life and has failed on that point. The first defendant, in his written statement, denied the right of the plaintiff to any relief whatever and asked that the suit should be dismissed with costs. As each of those parties has partly won and partly lost, it seems, I think, fair that as between those parties each should bear his own costs of this suit. With regard to the second defendant the main point at issue between him and the plaintiff had previously been decided against him twice and was *res judicata*. I order that the second defendant do pay the plaintiff his (the plaintiff's) costs of this suit, including any costs reserved as between the plaintiff and the second defendant, and that

1893
JUNE 12.
ORIGINAL CIVIL.
17 B. 600.

the second defendant do bear his own costs thereof. Further directions and further costs reserved. Leave to all the parties to apply as advised.

Attorney for the plaintiff :—Mr. *Khanderao Moroji.*

Attorneys for the first defendant :—Messrs. *Crawford, Burder & Co.*

Attorneys for the second defendant :—Messrs. *Bhaishankar and Kanga.*

17 B. 620 N.

[620] NOTE :—

ORIGINAL CIVIL.

Before Mr. Justice Bayley.

SHRIMAN GOSWAMI SHRI 108 SHRI GOVARDHONLALJI GIRDHARLALJI (*Plaintiff*) *v.* GOSWAMI SHRI GIRDHARLALJI GOVINDRAIJI (*Defendant*)*

[5th December, 1878 and 29th April, 1879..]

Act of State of foreign power—Effect of such act on title to property outside foreign State—Idol—Property of idol—High priest and manager of shrine—Deposition of high-priest by act of State—Appointment of new high-priest—Suit by latter for property belonging to shrine.

For thirty years prior to 1876 the defendant had been the high-priest of the shrine of Shri Natbji at Nathdwara in the territory of His Highness, the Maharana of Oodeypore, and as such was manager of the property of the shrine. This shrine is held in great veneration by the Vaisnava sect of Hindus, and large bequests and offerings of money, land, &c., are made to it by members of that sect. To facilitate the collection of such offerings and the employment of the funds belonging to the shrine, *pedhis* or firms are established in various parts of India, including Bombay. The firm in Bombay was carried on under the name of Navnitdas Purshottam, and the house in which it was carried on was built with monies belonging to the shrine. On the 8th May, 1876, by order of the Political Agent of Meywar and the Maharana of Oodeypore, he was deposed from that office for alleged misconduct and deported from Nathdwara. In his place his son, the plaintiff, was placed on the *gadi* as high-priest. In 1878 the plaintiff brought this suit praying for a declaration that as high-priest of the shrine he was entitled to the property in Bombay belonging thereto, and for delivery of the same to him, and for an injunction against the defendant, and for a receiver, &c. He obtained a rule *nisi* calling on the defendant to show cause why he should not be restrained from receiving or dealing with the monies of the said firm of Navnitdas Purshottam and from tampering with books, &c.

Held, discharging the rule, that the plaintiff had shown no title to the property in question. The defendant was in possession and had been for many years in possession of the property. His deposition by a foreign power and the election of the plaintiff to the *gadi* in the place of the defendant did not transfer the title to property in Bombay from the defendant to the plaintiff. As an act of State, it could not be made the basis of an action, and it could not be regarded as a foreign judgment.

[**R.**, 17 B. 600 ; **D.**, 20 B. 495 (500).]

THE plaintiff sued for a declaration that he was entitled to all the monies and moveable property of the firm of Navnitdas Purshottam, which carried on business in Bhoiwada in Bombay.

The plaintiff was the son of the defendant, and he claimed the possession and management of the property in question in right of his being high-priest of the shrine of Shri Nathji at Nathdwara in Meywar, in the territory of His Highness the Maharana of Oodeypore.

The plaint alleged that the said shrine was held in general esteem and veneration by the Vaishnava sect of Hindus, and large bequests and presents of land, money and other things were made from time to time to the said shrine by members of that sect in various parts of India and the adjoining countries ; and offerings called *logas* and *bheyts* were made by Hindus to the shrine. In order that the said *logas* and *bheyts* might be more easily collected and the said bequests and presents received, and in order that the funds of the shrine might be properly [621] employed, *pedhis* or firms were established in various parts of India including Bombay. The firm in Bombay was carried on

* Suit No. 218 of 1878.

under the name of Navnitdas Purshottam, and the house in which it was carried on was built with monies belonging to the shrine.

The plaint further alleged that up to the year 1876 the defendant had been the high-priest of the shrine and the manager of all the property attached to or belonging to it: that on the 8th May of that year the defendant was by order of the Political Agent of Meywar and the Rana of Oodeypore deposed from that office and deported from Nathdwara, and that the plaintiff (the son of the defendant) was then placed on the *gadi* of Nathdwara as high-priest in place of the defendant.

The plaintiff then took possession of the shrine and of its property and had been ever since recognized by the Vaishnava sect as high-priest, and had been duly acknowledged by the firm in Bombay as owner and master of the firm.

The plaintiff complained that the defendant had come to Bombay and had taken possession of the house in which the firm was carried on, and the monies, moveable property, books, papers, &c., of the firm, and had caused the books to be tampered with, &c. The plaintiff prayed for a declaration that he was entitled to the said property, and for delivery of the same to him, for an injunction against the defendant, and for a receiver, &c.

The defendant filed a written statement in which he alleged that he was the high-priest of the said shrine, and that as such he was the absolute owner and was entitled to the exclusive possession and management of all the property belonging to the shrine, and that the plaintiff had no title thereto.

The fifth and sixth paragraphs of the written statement were as follows :—

"5. The defendant believes that the plaintiff has not willingly brought this suit, but has been constrained to bring the same by the Darbar at Oodeypore aforesaid, who since the year 1876 have usurped, and still usurp, the conduct of all the affairs of the said shrine, including the custody of the treasury of the said shrine and the control of its finances.

"6. The Oodeypore Darbar acted in the manner described in the last preceding paragraph, because the defendant as such high-priest as aforesaid refused to acknowledge the temporal supremacy of the said Darbar in the territory of Nathdwara and to admit the right of the said Darbar to review and exercise appellate jurisdiction in the said territory, and the defendant will contend that he was justified in such refusal."

The plaintiff obtained a rule calling on defendant to show cause why he should not be restrained from receiving or dealing with the monies of the said firm and from tampering with the books, &c., and for receiver.

The rule came on for argument on the 5th December, 1878, and the hearing lasted for eight days.

Latham, *Macpherson* and *Inverarity*, for defendant, showed cause.

[622] They cited *Frankland* v. *M'Gusty* (1) ; *The Tanjore case* (2) ; Aitchison's Treatise, Vol. IV, pp. 4 to 7—21 ; *Sree Brijbhookunjee Muharaj* v. *Sree Gokoolotsaojee Muharaj* (3) ; Todd's Annals and Antiquities of Rajasthan, Vol. I, Chap. XIX, p. 474 (2nd Ed.) ; *Forester* v. *Secretary of State* (4) ; *Raja Saligram* v. *Secretary of State* (5) ; *Castrique* v. *Imrie* (6) ; *Godard* v. *Gray* (7) ; *Copin* v. *Adamson* (8) ; *Meyer* v. *Ralli* (9); *Messina* v. *Petrococchino* (10).

Gill, *Starling* and *Telang*, for plaintiff, in support of the rule.

They referred to *Talbot* v. *Hope Scott* (11) ; *Sirdar Bhagwan Singh* v. *Secretary of State for India* (12) ; *Ladkuvarbai* v. *Ghoel Shri Sarsangji* (13) ; *Forester* v. *Secretary of State* (4) ; Aitchison's Treatise, Vol. III, p. 10 ; Todd's Annals, &c., of Rajasthan, Vol. I, (3rd Ed.), p. 474 ; Vattel, p. 2, s. 4; Wheaton's International Law, ss. 20, 21, 23.

Cur. adv. vult.

JUDGMENT.

29*th April*, 1879. BAYLEY, J. *—In this case the plaintiff, who is now seventeen years of age, alleges that he is high-priest of the shrine of Shri Nathji at Nathdwara, and, as such, claims to be entitled to all the property dedicated to the shrine.

From the affidavits it appears that the shrine is in receipt of an annual revenue, arising from rents and offerings and other sources, of upwards of seven lakhs of rupees,

---

* NOTE.—The judgment delivered was not written. This report has been prepared from notes taken by counsel.

(1) 1 Knapp. 300. (2) 7 M I.A. 476 and 13 Moo. P.C.C. 22.
(3) 1 Borr. 202. (4) 12 B.L.R. 120. (5) 12 B.L.R. 167.
(6) L.R. 4 H.L. 414. (7) L.R. 6 Q.B. 139.
(8) L.R. 9 Ex. 345, and on appeal, 1 Ex. D. 17. (9) 1 C.P.D. 358.
(10) 8 Moo. P.C.C. (N.S.) 375. (11) 4 Kay and Johnson. 139.
(12) 2 I.A. 38 (43). (13) 7 B.H.C.R., (O.C.J.) 150.

1879

APRIL 29.

ORIGINAL CIVIL.

17 B. 620-N.

and that the daily expenses incurred in connection with the maintenance of the shrine and the worship there is about Rs. 2,000.

The defendant is the father of the plaintiff, and until the year 1876 he had been upon the *gadi* as high-priest of the shrine and the manager of all its property.

It appears that the office of high-priest is hereditary, and that the defendant occupied the position for thirty years. The affidavits show that he is a lineal descendant (through the eldest branch of the family) of the person who in consequence of the persecution of the Emperor Aurangzebe fled to Rajputana, settled there and ultimately founded at Nathdwara the shrine in question, placing in it the most sacred of all the images worshipped by the numerous and influential sect of Vaishnavas or Vallabha-Charyas.

On the 8th May, 1876, the defendant, for some alleged misconduct, was deposed and deported from Nathdwara by order of the Political Agent of Meywar and of the Rana of Oodeypore. The plaintiff, his son, was then placed upon the *gadi*, and, as high-priest took possession of the shrine, and as such has ever since been recognized by the Vaishnava sect. A copy of the certificate of Colonel Impey, the Political Agent at Meywar, was annexed to one of the affidavits, and is as follows:—

[623] "This is to certify that Girdharilalji was deposed from the office of the high-priest Maharaj of Nathdwara shrine in Meywar by the order of the Political Agent and the Darbar on the 8th day of May, 1876, and was deported from Nathdwara, and that Govardhanlal, son of the said Girdharilalji, was placed on the *gadi* of Nathdwara as the high-priest of the shrine, to enjoy all the revenue and emoluments pertaining thereto in the room of his father, the said *ex*-Maharaja Gosayee Girdharilalji, and is now Maharaja of Nathdwara."

It is to be presumed that the authorities of the State of Oodeypore considered that the conduct of the defendant justified his deposition. They granted him, however, out of the revenue of the shrine an allowance of Rs. 1,000 per mensem. Immediately upon the deposition of his father the officials placed the plaintiff upon the *gadi* as high-priest, and he has ever since held that position.

In the present suit the plaintiff seeks, as high-priest of the shrine, to recover property which is situate, not within the jurisdiction of the Darbar at Oodeypore, but in the town of Bombay and within the jurisdiction of this Court. The present rule *nisi* has been obtained by the plaintiff calling on the defendant to show cause why he should not be restrained from receiving or in any way dealing with the monies and the moveable property of the firm of Navnitdas Purshottamdas and from tampering with or altering the books of account and also why a receiver should not be appointed. It is of course clear that the plaintiff must show a title to the property which he claims, and that he is bound to the case which he has set forth in his plaint—*Eshenchunder Singh* v *Shamchurn Bhutto* (1).

Two main questions have been discussed: first, whether the defendant's removal from the *gadi* was valid, and, secondly, whether that removal by order of the authorities of Oodeypore affected the title of the defendant to the property in Bombay, of which he had long been in possession, and operated in any way to transfer the title of that property from him to the plaintiff.

These two questions lead us to consider what was the *status* of the defendant as high-priest and what was his relation to the Oodeypore Darbar. (His Lordship referred to the history and character of the shrine as described in Todd's History of Rajputana and in the works of Horace Hayman Wilson, and continued:—) The Bombay property was attached to the office of high-priest of Shri Nathji, which had existed long before the foundation of the shrine at Nathdwara. The evidence before the Court shows that the defendant's position, his sacerdotal character and the singular reverence which is paid to him arise from his descent, and that he is regarded by his followers or at least by many of them as an incarnation of the Deity. The defendant states, and the affidavits appear to corroborate him, that he and his ancestors were originally independent of all interference and control by the Darbar of Oodeypore. This appears to have been the state of things up to the year 1826. (His Lordship then referred at length to the affidavits with reference to the cause of the defendant's deposition, and continued:—) The defendant was not deposed for misconduct, but because he claimed rights which were distasteful to the Darbar and to the Political Agent. He was really deposed because he would not acknowledge the jurisdiction of the Darbar. I do not intend to give any opinion as to the legality or illegality of his deposition from the *gadi*, either regarding it as an act of State or [624] looking at it as analogous to a foreign judgment, because I consider that in any case the plaintiff is not entitled to have this rule made absolute. If it was an act of State, no authority has been cited to show that such an act can be the ground of an action in a Court of

(1) 11 M.I.A. 7.

law or equity. In all the cases in which an act of State has been before the Court in India, it has been the defendant who has set it up. The deposition cannot, in my opinion, be regarded as at all analogous to a foreign judgment. No Court has given any decision in the matter. We have only the decision of the Darbar, and as the dispute was one between the Darbar and the defendant, the Darbar assumed to be a judge in its own cause. Its decision, therefore, could not be regarded as analogous to a judgment. The case of *Godard* v. *Gray* (1) sets forth the principles to be regarded by a Court in enforcing a foreign judgment.

The plaintiff having brought his suit in Bombay must take the law as he finds it, and he must show that by the law as administered in this Court he has a better title to the property which he claims than the defendant who is in possession. He has shown no equity to have the rule made absolute, and I cannot find from the affidavits or exhibits annexed to them that he has any right to the property in Bombay, which he can enforce against the defendant. The rule must be discharged with costs.

Rule discharged.

The plaintiff appealed against the above decision, but on the 2nd August 1879 the appeal was dismissed with costs by Westropp, C. J., and Sargent, J., and the order of Bayley, J., confirmed.

Attorney for plaintiff :—Mr. *Bhaishanker Nanabhai.*

Attorneys for defendant :—Messrs. *Rimington, Hore and Conroy.*

1879
APRIL 29.
ORIGINAL CIVIL.
17 B. 620-N.

---

17 B. 624 (F.B.).

FULL BENCH.

Before Mr. Justice Bayley, Chief Justice (Acting),
Mr. Justice Jardine and Mr. Justice Candy.

BAI KANKU (*Petitioner*) *v.* SHIVA TOYA (*Respondent*).*

[21st July, 1892.]

Divorce—Husband and wife—Decree based merely on admissions and without recording evidence—Adultery—Collusion—Practice—Procedure—Indian Divorce Act (IV of 1869), s. 3, cls, 3, 14, and 17.

A decree for dissolution of marriage cannot be made merely on admissions and without recording any evidence.

[F., 2 L.B.R. 67 (70).]

THIS was a reference made by G. McCorkell, District Judge of Ahmedabad, under s. 17 of the Indian Divorce Act (IV of 1869).

The plaintiff, Bai Kanku, a Christian resident of Shahvada in the Ahmedabad District, filed a suit against her husband, Shiva **[625]** Toya, under the provisions of the Indian Divorce Act (IV of 1869) to obtain a decree for dissolution of marriage on the ground of his adultery and desertion. The plaintiff alleged that she was legally married to the defendant on the 14th January, 1875, that they had lived together as husband and wife for about ten years after the marriage, and that subsequently in 1886-87 the defendant eloped with a widow, and lived in adultery with her in a different village. The suit was filed in the year 1891.

The defendant, Shiva Toya, appeared and admitted the correctness of the allegations made against him in the plaint.

The plaintiff consequently did not produce any evidence on her behalf.

---

* Reference, No. 17 of 1891.

(1) L. R, 6 Q.B. 139.

1892
JULY 21.
—
FULL BENCH.
—
17 B. 624 (F.B.).

The District Judge pronounced a decree for dissolution of marriage, and forwarded it to the High Court for confirmation under s. 17 of the Indian Divorce Act (IV of 1869).

JUDGMENT.

JARDINE, J.—It is impossible to confirm this decree without violating the principles applied by the Courts to protect the bond of marriage. The decree is based entirely on admissions, no evidence having been recorded. To give the District Court jurisdiction there should have been some proof of the fact of the marriage—*Patrickson* v. *Patrickson*(1) and also that the petitioner is a Christian, and as to the residence under s. 3, cl. 3, of Act IV of 1869. The petition alleges adultery and desertion; but there is not even an averment that the desertion was an abandonment against the wish of the petitioner (see s. 3, cl. 9). It was, therefore, wrong of the District Court to decree dissolution of the marriage, especially as the essential facts have under s. 14 to be shown to the satisfaction of the Court by evidence. To hold the adultery of the husband proved on his mere admission would, under the circumstances of the case, be imprudent and contrary to practice—*Williams* v. *Williams and Padfield*(2). The danger of collusion between the parties must always be borne in mind, and especially when, as in the present case, there has been a delay of several years in applying to the Court for relief—*Williams* v. *Williams*(3).

[626] The case must be sent back to the District Court for further inquiry and evidence, as it lies on the petitioner to prove the marriage, the residence, and both the adultery and the desertion, and with reference to s. 17 to explain the delay in bringing the suit. The result should be certified to the High Court within four months.

Order accordingly.

---

17 B. 626.

CRIMINAL REFERENCE.

Before Mr. Justice Jardine and Mr. Justice Telang.

QUEEN-EMPRESS *v.* BOSTAN VALAD FUTTEKHAN.*

[18th August, 1892.]

Indian Penal Code (Act XLV of 1860) *s.* 81—*Act likely to cause harm done without a crminal intent and to prevent other harm.*

The accused was a sepoy in a native infantry regiment. On the occasion of a fire in the city of Ahmednagar, he and the rest of his company turned out to assist in extinguishing it. He with other sepoys was stationed by their officer with orders to keep clear a space in front of the burning house, and not to allow any one not in uniform to intrude on that space. The police under the city chief constable were also engaged at the fire, and on some of them coming round from the rear they were warned off by the sentries. A fracas between the soldiers and the police took place, and the chief constable was kicked by the accused. For this he was charged before the Magistrate, and fined for voluntarily causing hurt under s. 323 of the Penal Code. In evidence it appeared that the police attempted to force the military guard, which had been posted as above stated' and it was further proved that the chief constable was not in uniform, and that the accused did not know who he was. It was not alleged that the kick was unnecessarily violent.

---

* Criminal Reference, No. 82 of 1892.

(1) L. R. 1 P. 86. (2) L.R. 1 P. 20. (3) 3 C. 688.

1892
AUG. 18.

CRIMINAL REFERENCE.

17 B. 626.

Held, that the conviction was bad. The Magistrate having found that the chief constable was not in uniform, and that the accused did not know who he was, the kick was justifiable as given in good faith for the purpose of preventing much greater harm under s. 81 of the Indian Penal Code, and as a means of acting up to the military order.

THIS was a reference under s. 438 of the Code of Criminal Procedure (Act X of 1882) by the District Magistrate of Ahmednagar.

The reference was in the following terms :—

"The accused are sepoys of the 8th Regiment Bombay Infantry. On the night of the 1st April 1892, a fire occurred in the city of Ahmednagar, and a company of the regiment turned out to assist in extinguishing it. The accused with other sepoys were **[627]** stationed by their officer with orders to keep clear a space in front of the burning house. The orders received by them through the lance naique were not to allow any one not in uniform to intrude on that space. The police under the city chief constable were also engaged at the fire, and on some of them coming round from the rear to the front of the house they found themselves warned off by the sentries. A fracas between the soldiers and the police seems to have ensued, during which the chief constable is said to have received a kick from the accused Bostan.

"Rao Bahadur Moro Chintamon Joshi, First Class Magistrate, found the accused guilty of voluntarily causing hurt to the chief constable, and under s. 323 of the Indian Penal Code sentenced him to pay a fine of Rs. 5.

"I think that Bostan committed no offence. The Court wrongly came to the conclusion that a sentry placed in the position in which the accused was placed is not justified in kicking any person whatever who attempts to force his guard. I am not prepared to say what a sentry may do under such circumstances ; but I imagine that he is justified in using all reasonable force, and that the use of the foot may under certain circumstances not be unreasonable. It is perfectly certain that the police did attempt to force the guard which had been set under the Adjutant's directions. It is further in evidence, and it was so found by the Magistrate, that the chief constable was not in uniform, and the accused had no knowledge as to who he was. It is not alleged that the kick was unnecessarily violent, or that it caused any damage, and it would appear to have amounted to just such a use of the foot as may have been necessary to repel an invader of the space which the sentries were guarding. It appears probable that had the party who met with the sentry's foot been a private individual, a prosecution would not have been instituted, or would have been unsuccessful if instituted. I am of opinion that the sentence should be reversed."

There was no appearance for the Crown or for the accused.

OPINION.

JARDINE, J.—There is some discrepancy whether, as one witness says, the order to the soldiers was to prevent any person not in uniform going to the front of the house, or only to prevent any **[628]** person going there until they had ascertained that he was really on duty. We have no doubt that the order required the men of the military guard to give such access to persons of civil authority as the law requires, they being under the same obligation to act in subordination to the civil authorities responsible, in time of peace, for the maintenance of the public order as other well-intentioned citizens who exercise their legal right of protecting the

1892
AUG. 18.
CRIMINAL REFERENCE.
17 B. 626.

persons and property of other people from illegal violence. The case is not one to which chapter 9 of the Code of Criminal Procedure (X of 1882) applies for the protection of the soldier, who, in dispersing an unlawful assembly, acts in obedience to an order which under military law he is bound to obey. It is unnecessary to consider the case of a soldier who, acting on such an order, obstructs a civil officer, *whom he knows to be such* in the execution of his duty in ordinary times of quiet. In the present case there was no criminal intention, the kick was a mild and bloodless means of acting up to the military order, and it is found that the accused did not know who the chief constable was, and it is not found that he ought under all the circumstances to have guessed it. I have no doubt that, if the chief constable had not been an official, the soldier would, under our ordinary law, have committed no offence in obstructing and, if necessary, kicking him if he (the soldier) in good faith thought that the man forcing his way through the guard was, in so doing, removing the protection placed by the presence of the guard on the property. The kick would be justified under s. 81 of the Penal Code (XLV of 1860) as given in good faith for the purpose of preventing much greater harm, the looting of the house or the spread of the fire, on the same principle that the man is excused by that section who in a great fire pulls down other people's houses to prevent the conflagration from spreading. As Bostan did not know the official character of the chief constable, and this ignorance was a mistake of fact, not of law, he must be dealt with as if the chief constable were an ordinary citizen; and the District Magistrate of Ahmednagar is right in his view of the law that the conviction and sentence are wrong. We now quash the conviction and sentence.

Conviction quashed.

---

17 B. 629.

[629] APPELLATE CIVIL.

Before Mr. Justice Bayley, Chief Justice (Acting), and Mr. Justice Candy.

AJIBAL NARASINHA HEGDE AND ANOTHER (*Original Defendants*), *Appellants v.* SHIREKOLI TIMAPA HEGDE (*Original Plaintiff*) *Respondent.** [25th August, 1892.]

Civil Procedure Code (XIV of 1882), s. 282—Order in attachment proceeding, effect of—Judgment-debtor not necessarily a party to the investigation under an attachment proceeding.

The plaintiff obtained a decree. The defendants appealed. At the hearing of the appeal in the District Court a question was raised as to whether the defendants were not barred by limitation from denying the genuineness and validity of the lease and mortgage, they having failed to do so in certain execution proceedings which had taken place in 1890. It appeared that in execution of a decree against the father and the uncle of the defendants these lands had been attached. The plaintiff on that occasion had intervened, and set up his mortgage and lease which he produced. They were then held to be proved, and the lands were ordered to be sold subject to the plaintiff's mortgage. Upon these facts the District Judge held that by the attachment of their lands in these execution proceedings the defendants had been subrogated either to the cause of the decree-holder or to that of the plaintiff who intervened, and, therefore, they were parties "against whom the order was made." That order became conclusive against them within one year from its date, as they did not bring a suit

---

* Second Appeal, No. 461 of 1891.

to establish their right (art. II, sch. II, Limitation Act, 1877). He, therefore, confirmed the decree of the Court of first instance.

On second appeal to the High Court,

Held, reversing the lower Court's decree, that the defendants were not necessarily to be regarded as parties against whom the order in the execution proceedings was made. Whether they were or not, depended on the facts of the case. The Court accordingly remanded the case that the District Judge might investigate the facts and pass a decree accordingly.

[Diss., 15 M.C.C.R. 89 (91).]

SECOND APPEAL from the decision of A. H. Unwin, District Judge of Kanara.*

This suit was instituted by the plaintiff to recover arrears of rent and interest thereon. He produced the counterpart of a lease upon which he based his claim.

The defendants pleaded (*inter alia*) that the counterpart of the lease sued upon was not genuine, and that it was given in connexion with a fraudulent mortgage transaction effected by the plaintiff.

[630] The Subordinate Judge held that the counterpart was proved, and gave the plaintiff a decree.

On appeal by the defendants, the District Judge raised a question as to whether the defendants were barred from denying the genuineness and validity of the mortgage (Ex. 49) and the counterpart of lease (Ex. 68) relied on by the plaintiff. It appeared that the land in question had been attached in execution of a decree obtained against the father and uncle of the defendants in a suit in the Sirsi Court (No. 509 of 1878). The plaintiff had then intervened, alleging his mortgage and lease and producing the Exs. 49 and 68. In the investigation then held, the Subordinate Judge found that the mortgage (Ex. No. 49) was proved, and ordered that the attached lands should be sold subject to the plaintiff's mortgage. Upon these facts the District Judge observed, in giving his judgment in the present case: "It seems now to be urged, that the judgment-debtor defendants got no notice of, and were no parties to, this proceeding, and that the decision does not, therefore, bind them. This contention I believe to be utterly untenable. By the attachment of their lands, they must have had sufficient notice, and have been subrogated either to the cause of the decree-holder or to that of the intervening mortgagee in the subsequent proceeding 'as a party to the investigation of the claim': see *Netietom* v. *Tayanbarry*, (1) and therefore, defendants were 'as much a party against whom the order was made under the s. (246 of Act VIII of 1859=283 of Act X of 1877, under which the Sirsi Court's order was passed) as their judgment-creditor." That order became consequently conclusive against defendants after the lapse of one year from its date, 5th February, 1890, without suit brought by them to establish their right clear of the intervenor's alleged mortgage and lease—art. 11, sch. II of the Limitation Act, XV of 1877. They appear to have benefited, moreover, under the order by being left in physical possession of the lands."

The defendants preferred a second appeal.

Shamrav Vithal, for the appellants:—The order in the execution proceeding cannot be held to be binding upon us, because we **[631]** were

* This case was once before the High Court on a different point: see 15 B. 297.

(1) 4 M. H. C. R. 472.

1892
AUG. 25.
APPELLATE CIVIL.
17 B. 629.

not parties to it—*Shivapa* v. *Dod Nagaya* (1); *Kedar Nath Chatterji* v. *Rakhal Das Chatterji* (2). The order then made cannot be held to have the effect of *resjudicata*.

Narayan Ganesh Chandavarkar, for the respondent.

JUDGMENT.

PER CURIAM:—The District Judge, on the authority of *Netietom Perengaryprom* v. *Tayanbarry Parameshwaren* (3), has held that the order of the Court in the attachment proceedings is conclusive. But the authority of that case has been doubted; see *Shivapa* v. *Dod Nagaya* (1); *Kedar Nath Chatterji* v. *Rakhal Das Chatterji* (2). As was pointed out in the former of these two cases, a judgment-debtor cannot necessarily be regarded as having been a party to the investigation against whom the order was made, but it must depend upon the facts of each case.

We must, therefore, reverse the decree of the District Judge and remand the case, that he may investigate the facts and pass a decree accordingly. Costs to abide the result.

Decree reversed and case remanded.

---

17 B. 631.

APPELLATE CIVIL.

Before Mr. Justice Bayley, Chief Justice (Acting), and Mr. Justice Candy.

LALU GAGAL (*Original Plaintiff*), *Appellant* v. BAIMOTAN BIBI (*Original Defendant*), *Respondent*.* [6th September, 1892.]

Landlord and tenant—Suit by tenant to recover possession claiming as full owner—Subsequent claim as yearly tenant unjustly dispossessed—Notice to quit—Denial of landlord's title.

A plaintiff sued to recover possession of certain fields, &c., alleging that he was a permanent tenant of the defendant, having purchased the right of occupancy from previous occupants of the land. The lower Court held that the plaintiff's vendors were mere yearly tenants and not permanent tenants, but that the sale of their right to the plaintiff was valid, and that the plaintiff had been wrongfully dispossessed by the defendant, no notice to quit having been given. But,

Held, that the plaintiff could not recover, inasmuch as his plaint and the conduct of his case amounted to a denial of his landlord's (defendant's) title. In his suit the plaintiff claimed to be full owner, and he could not afterwards claim **[632]** to be restored to possession on the ground that he was a yearly tenant entitled to notice to quit, which was not given.

Vithu v. *Dhondi* (4) distinguished.

[R., 20 B. 759 (763).**]**

SECOND APPEAL from the decision of E. M. H. Fulton, District Judge of Ahmedabad, in appeal No. 333 of 1889.

The plaintiff sued to recover possession of certain fields and houses, alleging as follows:—

"In Thori Mubarak there is a field of 12 bighas which belonged to Bhala Rupa's occupancy, and was in his possession and enjoyment. He sold it to me for Rs. 50 by a registered deed dated 14th May, 1886. The said field was made over to my possession. *Since then I have been*

---

* Special Appeal, No. 522 of 1891.

(1) 11 B. 114. (2) 15 C. 674. (3) 4 M.H.C. R. 472. (4) 15 B. 407.

full owner. Besides, there are two houses near the chowra and four fields measuring about 64 bighas belonging by proprietary title to Ladha Mona. These he sold to me for Rs. 351 by a registered deed dated 19th May, 1886, and put them into my possession.

"Since then I have been *full owner* of altogether five fields and two houses. I began to cultivate the five fields through my servants, but the defendants obstructed me in July, 1886, and neither allowed me to cultivate the fields or to occupy the houses. In July, 1888, the defendants took possession of the property in dispute."

The defendant denied the plaintiff's right to recover, alleging that his (the plaintiff's) vendors were not owners of the property in suit, but were mere tenants holding under the defendant; that the sale was collusive and illegal, and that the plaintiff had no title to the property in dispute.

The Subordinate Judge held that the plaintiff's vendors were permanent tenants; that they had a right to transfer their occupancy rights by sale or mortgage, and that the sale to the plaintiff was valid. He, therefore, awarded the plaintiff's claim.

On appeal the District Judge found that the plaintiff's vendors were not permanent but yearly tenants; that the sale to the plaintiff was valid, and that he had been wrongfully dispossessed by the defendant. He held, however, that the plaintiff being a yearly tenant could only claim to be restored to possession by **[633]** alleging that he was a yearly tenant who had been dispossessed without notice from the defendant. The plaintiff, however, had not done this, but by his plaint and the conduct of his case wholly denied the defendant's (his landlord's) title. The District Judge said:—

"His plaint and the way in which his case has been conducted amounts to a denial of the lessor's title. He could only claim to be restored to possession by alleging that he was a yearly tenant who had been dispossessed without notice. He cannot come into Court, claiming a permanent tenancy, and on failure to establish that position be awarded possession and damages as a yearly tenant illegally dispossessed. The principles laid down in *Baba* v. *Vishvanath* (1) appear to govern this case. I have considered the case of *Purshotam Bapu* v. *Dattatraya* (2) and the decisions in printed judgments for 1880, p. 10 and p. 25 (*Ramchandra Appaji* v. *Dowlatji*; and *Hari Yamaji* v. *Ramabai*), but in all those cases the tenants were defendants who were held entitled to set up alternative defences. Here the facts are different. The plaintiff comes into Court alleging himself to be 'owner' which the subsequent conduct of the case shows was intended to mean permanent tenant; and the allegation on which his suit is based not being proved, his claim fails."

On these grounds the District Judge reversed the decree of the Subordinate Judge, and rejected the plaintiff's claim.

Against this decision the plaintiff preferred a second appeal to the High Court.

(*Branson* with him *Ganpat Sadashiv Rao*), for appellant (plaintiff):—The plaintiff is entitled to recover possession. He was dispossessed by the defendant without notice to quit. It is true he claimed as permanent tenant, but the setting up of a permanent tenancy by the plaintiff does not amount to such a disclaimer of the landlord's title as to dispense with the necessity of a notice to quit to a tenant—*Kali Kishen* v. *Golam Ali* (3); *Kali Krishna* v. *Golam Ally* (4). In the present case, no notice

(1) 8 B. 228. (2) 10 B. 669. (3) 13 C. 3. (4) 13 C. 248.

1892
SEP. 6.
APPELLATE CIVIL.
17 B. 631.

to quit was given to the plaintiff, and he is, therefore, [634] entitled to be restored to possession. The ruling in *Baba* v. *Vishvanath* (1) is dissented from in *Vithu* v. *Dhondi*(2).

Jardine (with him *Bhaishankar*, *Dinsha and Kanga*), for respondents.—The plaintiff has sued as *owner*, and not as a yearly tenant, to recover possession of the lands in suit. In the plaint he does not even say that he is a permanent tenant entitled to hold as long as he pays the rent. That case he put forward at a very late stage of the suit. His whole conduct amounts to a denial of the landlord's title. He is, therefore, not entitled to any notice to quit.

JUDGMENT.

CANDY, J.—The District Judge held that the plaintiff "cannot come into Court claiming a permanent tenancy, and on failure to establish that position be awarded possession and damages as a yearly tenant illegally dispossessed. The principles laid down in *Baba* v. *Vishvanath Joshi* (1) appear to govern this case.....The allegation on which his suit is based not being proved, his claim fails."

It is contended that as *Baba* v. *Vishvanath* (1) has been dissented from in *Vithu* v. *Dhondi*, (2) it follows that the plaintiff is entitled to recover possession as claimed. We are unable to accept that contention.

In *Baba* v. *Vishvanath* (1) the landlord sued in ejectment, asserting that he had given the defendant tenant a valid notice to quit. The defendant among other things contended that he was a permanent tenant not liable to ejectment as long as he paid a fixed rent, and that the plaintiff had no right to give him any notice to quit. The Court held, quoting *Shahaba Khan* v. *Balya*, (3) that "when the defendant did not admit a yearly tenancy, he could not claim the notice due only to a yearly tenant"; and, quoting *Vivian* v. *Moat* (4) and other English cases, "that setting up a right to hold at a customary rent in answer to a claim for increased rent is a repudiation of the landlord's title, which dispenses him from giving notice to quit."

In *Vithu* v. *Dhondi* (2) the plaintiff landlord sued in ejectment, asserting that he had given a valid notice to quit. Defendants [635] set up a plea of permanent tenancy, which the lower appellate Court held not proved. It was held by this Court that the notice alleged by the plaintiff was not in accordance with law, and that, therefore, there was no legal determination of the tenancy, and without such legal determination the plaintiff was not entitled to recover possession of the property from the tenant. Further, with reference to the two cases quoted above, it was pointed out that "in none of the cases relied upon in the judgment of the Court in *Baba* v. *Vishvanath* with the exception of the case of *Shahaba Khan* v. *Balya* had the disclaimer occurred subsequently to the filing of the plaintiff's suit. And as those cases were all decided in the English Courts, it may be desirable to point out that by English law (5), where a disclaimer is relied on, it must appear to have been made *before or on the day* mentioned in the writ of ejectment as the time when the claimant was entitled to possession,' and generally, 'in ejectment the plaintiff's title to actual possession must be shown to have accrued *on or before* the day on which possession is claimed in the writ (6).' And if the

(1) 8 B. 228.
(2) 15 B. 407.
(3) P.J. for 1873, p. 66.
(4) L.R. 16 Ch. 730.
(5) Woodfall's Landlord and Tenant, p. 78 (14th Ed.).
(6) Cole on Ejectment, p. 288.

legal effect of a disclaimer is a 'forfeiture' of the tenancy or 'a determination of the tenancy at the election of the landlord' (as to which the observations in *Purshotam* v. *Dattatraya* (1) and Woodfall's Landlord and Tenant, p. 376, are material) it would seem that such 'forfeiture' or 'determination' ought not, on general principles, to assist a plaintiff whose suit had been filed before it took place. It does not appear from the report of *Baba* v. *Vishvanath*, or from the judgment in *Shahaba Khan* v. *Balya*, that this distinction was mentioned in argument or was otherwise present to the mind of the Court." Further, with reference especially to *Baba* v. *Vishvanath*, it was pointed out that it may well be doubted whether a man's claiming to be a *mirasi* tenant ought of itself to be held to be a disclaimer of the landlord's title, and it was shown that the considerations urged by the Calcutta High Court in *Kali Kishen* v. *Golam Ali* (2) and *Kali Krishna* v. *Golam Ally* (3) and the remarks of this Court in *Haji Sayyad* v. **[636]** *Venkta* (4) did not appear to have been brought to the notice of the Judges who decided *Baba* v. *Vishvanath*. It was, therefore, decided in *Vithu* v. *Dhondi* that that suit in ejectment could not be maintained.

Now in the present case the plaintiff is the purchaser from the tenants, and he brought his suit claiming to be "full owner, and complaining that the defendant landlord interfered with his possession. Defendant, among other things, pleaded that the plaintiff's vendors had no rights of ownership. The District Judge held that the plaintiff came into Court, alleging himself to be "owner," which the subsequent conduct of the case shows was intended to mean permanent tenant. No doubt, as the District Judge remarked, the plaint, and the way in which the plaintiff's case was conducted, amounted to a denial of the lessor's title.

Can the plaintiff then, according to the principles laid down in *Vithu* v. *Dhondi*, claim to be restored to possession, and to be given damages, on the ground that as a yearly tenant he was entitled to a notice which was not given? We think not. In the cases quoted above the claims brought by the landlord plaintiff were founded on the alleged notices to quit, which were held to be invalid, and thus there had been no legal determination of the tenancies. The foundation of the claims failed. Here there could be no plea with regard to notice, for the form of the tenant's suit rendered such a plea wholly irrelevant. Accordingly no such plea was in fact put forward, and the question of the rights of the parties on the footing of the tenancy having been one from year to year was not raised or tried. Under these circumstances we hold that the ruling in *Vithu* v. *Dhondi* does not apply to the present case; and we confirm the decree of the District Judge with costs.

Decree confirmed.

(1) 10 B. 669. (2) 13 C. 3. (3) 13 C. 248.
(4) P.J. for 1880, p. 122; see also 15 B. 514, foot-note (*a*).

1892
SEP. 6.

APPEL-LATE CIVIL.

17 B. 637.

17 B. 637.

[637] APPELLATE CIVIL.

Before Mr. Justice Bayley, Chief Justice (Acting), and Mr. Justice Candy.

KHUSRUBHAI NASARVANJI (*Original Plaintiff*), *Appellant*
v. HORMAJSHA PHIROZSHA (*Original Defendant*), *Respondent.**
[6th September, 1892.]

Administrator—Liability of, for loss to estate—Compromise of claim by administrator—Subsequent suit by a creditor of estate to set aside the compromise and for damages for negligence of administrator—Indian Succession Act (X of 1865), ss. 280 and 328—Administrator's liability for neglect to get in any part of the deceased's property.

One Phirozsha Shapurji mortgaged certain property to Homjibhai Jamasji for Rs. 2,667. Homjibhai sued Phirozsha to recover the mortgage-debt. Pending the suit Phirozsha died in 1879. Thereupon Hormajsha, the son of Phirozsha, took out letters of administration to the deceased's estate and contested Homjibhai's claim. Homjibhai obtained a decree in the Court of first instance for the sale of the mortgaged property, and in execution of this decree the property was sold for Rs. 810 and purchased by Homjibhai. The decree was afterwards—*viz.* on 2nd August, 1883—reversed, on appeal, by the Assistant Judge. Thereupon Homjibhai entered into a compromise with Hormajsha by which it was arranged that Hormajsha should give up his claim under the appellate decree of the Assistant Judge, to be repaid by Homjibhai the sum of Rs. 810 which he had realized by sale of the mortgaged property, and that Homjibhai should pay to Hormajsha Rs. 240 on account of his costs incurred in the suit and in taking out letters of administration. This compromise was effected on 16th November, 1883.

In the meantime on 4th September, 1883, the plaintiff had purchased from one Bai Bhikaiji an old decree which was outstanding against the estate of the deceased Phirozsha. On 10th September, 1883, the plaintiff sought to execute this decree against the mortgaged property. Having failed in this attempt, the plaintiff filed a suit against Hormajsha for a declaration that the compromise of the 16th November, 1883, had been fraudulently effected with the object of defeating his (the plaintiff's) claim, and to recover Rs. 1,000 as damages from the defendant on account of his fraudulent and negligent conduct as administrator of his deceased father's estate. This suit was dismissed by both the lower Courts, on the ground that as there were other creditors who had claims against the estate, the plaintiff's proper remedy was an administration suit, which would enable the Court to assess the claims of all the creditors.

Held, reversing the lower Court's decree, that the plaintiff was entitled to recover. By the compromise of the 16th November, 1883, the defendant had given up his right under the appellate Court's decree of the 2nd August, 1883, to be repaid by Homjibhai the sum of Rs. 810 and had thereby occasioned a loss to the estate of that amount. He was, therefore, liable to the plaintiff to make good the amount under s. 328 of the Indian Succession Act (X of 1865), subject, however, to a deduction, under s. 280 of that Act, of the expenses incurred by him in obtaining letters of administration, and the costs of any judicial proceeding that might be necessary for administering the estate.

[R., 29 B. 96=6 Bom. L.R. 853 (854).]

[638] THIS was a second appeal from the decision of C. G. W. Macpherson, District Judge of Surat, in appeal No. 54 of 1888.

The facts of this case are fully stated in the head-note and in the judgment.

Lang (with him *Manekshah Jahangirshah*), for appellant.—The defendant was administrator of the estate of his deceased father. As such he obtained a decree against one Homjibhai, but failed to execute it.

* Second Appeal No. 876 of 1890.

He abandoned all his rights under the decree by entering into a compromise with Homjibhai. By so doing he occasioned a loss to the deceased's estate. He is, therefore, bound to make good the loss. See Williams on Executors, ss. 1806—11. See also s. 328 of Act X of 1865. An executor or administrator has no authority to compromise or release a debt due to the estate. The compromise in the present case was in the nature of a release. It is, therefore, invalid and *ultra vires*. It is, moreover, fraudulent and collusive, made with the express object of defeating the plaintiff's claim. The suit in its present form will lie. There is no necessity of filing an administration suit. It is not shown that there are any other creditors of the estate whose claims are recoverable at law.

Kalabhai Lalubhai (with him *Ganpat Sadashiv Rao*), for respondent.—The plaintiff's suit is one to recover damages from the defendant personally on the ground of fraud and negligence. Both the lower Courts have found that there was no fraud or negligence committed by the defendant. As regards any damage alleged to have been caused to the estate, the plaintiff has no *locus standi*, as he does not represent the estate. It is found that there are other creditors of the estate, and unless they all join in an administration suit, the claims of one creditor alone cannot be considered. The suit in its present form will not lie. Besides, it is wrong to attribute to the defendant any negligence in recovering anything from Homjibhai. There was nothing to recover from Homjibhai. Homjibhai was already in possession as a mortgagee before he purchased the equity of redemption. This mortgage-debt was considerably more than the price at which he purchased the equity of redemption. The estate, therefore, suffered no loss by reason of the compromise.

JUDGMENT.

[639] BAYLEY, C.J. (Acting).—On the 15th November, 1886, the plaintiff filed his plaint in this suit against Hormajsha Phirozsha and Homjibhai Phirozsha to recover Rs. 1,000 as damages, which the plaintiff claimed in consequence of a certain settlement come to by the defendants on the the 16th November, 1883, in respect of a decree in appeal No. 40 of 1883, which settlement, the plaintiff alleged, was fraudulently come to by the defendants in collusion with each other, with the object of defeating a claim which the plaintiff then had against the property of one Phirozsha Shapurji, the deceased father of the first defendant, to whose estate the first defendant had obtained letters of administration from the District Court of Surat.

After the filing of the suit the second defendant Homjibhai died, and the suit as against him being withdrawn proceeded against Hormajsha.

On the 13th September, 1888, the Subordinate Judge at Surat rejected the claim and ordered the parties to bear their own costs. The plaintiff appealed, and on the 30th June, 1890, the District Judge of Surat confirmed the decree of the lower Court, ordering each party to bear his own costs in appeal.

The District Judge in his judgment stated the facts of the case as follows :—

One Phirozsha Shapurji died in 1878 indebted, it was said, to the extent of Rs. 50,000, and Homjibhai (original second defendant), who had filed a suit for the recovery of a mortgage-debt prior to Phirozsha's death, applied to the District Court to issue letters of administration. The defendant Hormajsha, son of Phirozsha, at first refused to take out letters

1892
SEP. 6.
APPEL-
LATE
CIVIL.
17 B. 637.

of administration, but finally did so, and contested Homjibhai's claim. Homjibhai was successful in the Court of the Subordinate Judge, but in appeal the decree was reversed on the 2nd August, 1883, by the Assistant Judge at Surat. Meanwhile, and before the decree was reversed by the Assistant Judge, the mortgaged property, which seemed to have been Phirozsha's only assets, had been sold for Rs. 810 under the decree of the Subordinate Judge and purchased by the decree-holder Homjibhai, and the sale had been confirmed. After the decision of the appeal by the Assistant Judge, and before Homjibhai's time for appealing [640] to the High Court had expired, Homjibhai seems to have opened negotiations through Dr. Dosabhai, a mutual friend, with Hormajsha, with whom he was on bad terms, for the compromise of the matter, and after consultation with Mr. Ladkoba, a pleader, an agreement was arrived at, the terms of which were that Homjibhai should refrain from appealing to the High Court and should retain the mortgaged property, but should pay Hormajsha Rs. 240, the amount of his costs in the suit and in taking out letters of administration, as assessed by Mr. Ladkoba. This compromise, which was effected before the expiration of the time for appealing to the High Court, was duly certified.

The present plaintiff, however, had, after the Assistant Judge had reversed the Subordinate Judge's decree, purchased (on 4th September, 1883), for Rs. 499 from one Bai Bhikaiji an old decree of 1878 for Rs. 2,171 and costs, obtained on the 27th March, 1878, by her in suit No. 43 of 1878 against Phirozsha Shapurji, the first defendant's father, which was still in force, and he endeavoured to execute this decree against the mortgaged property, *i.e.*, the mortgaged property which Homjibhai had bought for Rs. 810 under the decree subsequently reversed by the Assistant Judge. At first the plaintiff applied, under s. 234 of the Civil Procedure Code, for execution of the decree against the defendant Hormajsha as the legal representative of Phirozsha. The Subordinate Judge passed an order directing execution to issue against Hormajsha personally to the extent of Rs. 810. The District Judge reversed that order in appeal, and on second appeal to the High Court the decree of the District Court was confirmed with costs. The case in the High Court is reported in I.L.R., 11 Bom., 727. The High Court held that in s. 234 of the Civil Procedure Code it is not provided that in an execution proceeding the representative shall be made answerable as well for what with diligence on his part would have come to his hands as what actually has come to his hands, and that the Legislature did not intend to make him answerable in other cases except through the medium of a regular suit.

The plaintiff then brought the present suit, contending that the compromise was come to in order to defeat his claim, he and defendant being bitter enemies, and that he was thus deprived of [641] Rs. 810, which with interest would be fully Rs. 1,000, for which he contends the defendant Hormajsha is personally liable to him.

The District Judge states that the record shows that Phirozsha's estate had many other creditors. The Subordinate Judge at the close of his judgment says that the defendant had produced Ex. No. 35 to show that the plaintiff is not the only decree-holder who has tried to execute his decree against the sum of Rs. 810 recovered by Homjibhai, but that he did not think it necessary to consider how far it assists the case of the defendant. We do not see that the District Judge has found or stated that there were any other decree-holders against the deceased Phirozsha or his estate.

Among the plaintiff's grounds of appeal to the District Court against the decision of the Subordinate Judge were the following :—That the lower Court erred in holding that the defendant was not bound to collect the debt of Rs. 810 due from Homjibhai ; that the lower Court ought to have held that the compromise with Homjibhai was illegal and fraudulent, and made with a view to cause loss to plaintiff, and that it was not made in the interests of the estate of the deceased Phirozsha ; and that the lower Court ought to have held that defendant intentionally failed to collect Rs. 810 due from Homjibhai and thereby prevented the execution of plaintiff's decree, thus rendering himself personally liable, and the lower Court ought, therefore, to have passed a decree as prayed for by plaintiff.

The District Judge ruled that the point for determination appeared to be, has plaintiff established his claim to the damages he asks for or to any portion of them? And he found such issue in the negative.

He says that the appellant asked that the issues annexed to the proceedings should be raised, the fourth of which was as follows :—" Did Hormajsha as administrator neglect to get in any part of the property of the deceased and release a debt of Rs. 810 due to it by one Homjibhai? Did he unjustly and fraudulently release it? Is he personally liable for that debt to the plaintiff?" But the District Judge states that such issues did not appear to him to be necessary to the disposal of the appeal.

[642] We are unable to concur with the views entertained by the Subordinate Judge and the District Judge.

At the conclusion of the operative part of the agreement of compromise dated the 16th November 1883 (Ex. No. 22), the defendant says: "I have given up my claim to the right which has accrued due to me under the decree of the Assistant Judge, in my favour, of taking back from Homjibhai the amount recovered by him (under the Subordinate Judge's decree)."

Section 278 of the Indian Succession Act (X of 1865), an Act binding on the defendant, who is a Parsi, and described in the plaint as residing in the Surat District, enacts that an administrator shall collect with reasonable diligence the property of the deceased and the debts which were due to him at the time of his death. By s. 280 the expenses of obtaining letters of administration, including the costs incurred in respect of any judicial proceedings that may be necessary for administering the estate, are to be paid next after the funeral expenses and death-bed charges. And by s. 282 it is enacted that save as aforesaid no creditor is to have a right of priority over another by reason that his debt is secured by an instrument under seal or on any other account, but the administrator shall pay all such debts as he knows of, including his own, equally and rateably, as far as the assets of the deceased will extend.

By s. 327 when an executor or administrator misapplies the estate of the deceased, or subjects it to loss or damage, he is liable to make good the loss or damage so occasioned. By section 328 when an executor or administrator occasions a loss to the estate by neglecting to get in any part of the property of the deceased, he is liable to make good the amount. Illustration (*a*) to s. 328 says: "The executor absolutely releases a debt due to the deceased from a solvent person, or compounds with a debtor who is able to pay in full. The executor is liable to make good the amount."

In *Nilkomul Shaw* v. *Reed* (1) it was decided by Sir R. Couch, C. J., and Ainslie, J., that where a person obtains a decree against an executor

(1) 12 B. L. R. 287.

1892
SEP. 6.
APPELLATE CIVIL.
17 B. 637.

or administrator he is entitled to have his decree [643] satisfied out of the assets of the deceased, and that s. 282 of the Indian Succession Act does not interfere with that right.

In *Remfry* v. *De Penning* (1), a decree for money had been obtained against a person who afterwards died intestate. Letters of administration to his estate were granted to the Administrator-General of Bengal. The decree-holder applied for execution of his decree against the assets in the hands of the Administrator-General. Pigot, J., held that he was entitled to have his decree satisfied out of the assets of the deceased, although those assets were not sufficient to pay in full all the claims made against the estate. Mr. Justice Pigot said that he must follow the course pursued in a case (unreported) cited in argument of *The Alliance Bank of Simla* v. *Hoff*, decided by Mr. Justice Cunningham in 1884, where execution was ordered to issue against the executor of a judgment-debtor for the full amount of the decree, though the testator's estate was not sufficient to pay all his debts.

In the first of the above cited cases Sir R. Couch, C. J., said: "The provision in s. 203, Act VIII of 1859, entitled the decree-holder to have his decree satisfied out of the property of the deceased or out of the property of the defendant, the executor, if it should appear that he had not duly applied the property of the deceased; and s. 282 of the Indian Succession Act does not interfere with that right."

The two subsequent cases just cited appear to have been decided under or by analogy to the corresponding s. 252 in the Civil Procedure Code, Act XIV of 1882, relating to a decree against the representative of a deceased person for money to be paid out of the deceased's property, which enacts that if no property of the deceased remains in the possession of the judgment-debtor, and he fails to satisfy the Court that he has duly applied such property of the deceased as is proved to have come into his possession, the decree may be executed against the judgment-debtor to the extent of the property not duly applied by him, in the same manner as if the decree had been against him personally.

[644] In each of those two cases the decrees had been obtained against the deceased debtor. Such was the procedure here, the decree in the suit No. 43 of 1878, brought by Bai Bhikaiji against Phirozsha Shapurji, having been passed on the 27th March, 1878, after the passing of which decree Phirozsha died, and his son, the defendant, then obtained letters of administration to his estate.

Now the defendant by compromising Homjibhai's claim on his mortgage (which at the time of such compromise had been held to be an unfounded one, the Assistant Judge having decided that it had been paid), and by giving up (as stated in the agreement of compromise (Ex. 22) dated the 16th November, 1883), his claim to the right which had accrued due to him under the decree of the Assistant Judge in his favour of taking back from Homjibhai the amount recovered by him under the Subordinate Judge's decree, undoubtedly occasioned a loss to the estate by neglecting to get in that part of the property of the deceased and by s. 328 of the Succession Act "he is liable to make good the amount."

Had the property worth Rs. 810 been recovered by the defendant, as it ought to have been, it would have been available, wholly or in part, to be applied towards satisfaction of the plaintiff's decree. But having

(1) 10 C. 929.

neglected to get in that portion of the estate of Phirozsha he is liable to the plaintiff to make good the amount.

The defendant is entitled under s. 280 of the Succession Act (X of 1865) to first deduct the expenses of obtaining letters of administration, which we think, were stated in the argument before us to have amounted to Rs. 100, and also the costs incurred by him in respect of any judicial proceedings that may be necessary for administering the estate, such costs being directed to be paid next after the funeral and death-bed charges. These costs can be ascertained in execution of the present decree. Taking the value of Phirozsha's property, which the defendant ought to have recovered, at Rs. 810, the balance, with six per cent. interest from the 16th November, 1883, must be paid by defendant to plaintiff.

[645] The decree of the District Judge is reversed and a decree passed in favour of the plaintiff in accordance with the above remarks. All costs on defendant.

Decree reversed.

---

17 B. 645.

APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Telang.

GANPATRAM JEBHAI (*Original Plaintiff*), *Applicant v.* RANCHHOD HARIBHAI (*Original Defendant*), *Opponent.** [23rd November, 1892.]

Mamlatdar's Act (Bombay Act III of 1876)—Suit in a Mamlatdar's Court—Procedure where one of several plaintiffs in such a suit dies and the right to sue does not survive to the surviving plaintiffs—Code of Civil Procedure (Act XIV of 1882), chap. XXI—Its applicability to a suit in a Mamlatdar's Court— Practice—Procedure.

The Bombay Mamlatdar's Act (III of 1876) makes no provision for the substitution of the names of heirs in the case of the death of one of the parties, and Chap. XXI of the Code of Civil Procedure (Act XIV of 1882) cannot be held to apply to proceedings in a Mamlatdar's Court. Accordingly where a possessory suit was filed by two persons in a Mamlatdar's Court, and one of them died pending the suit, and it appeared that the right to sue did not survive to the surviving plaintiff alone,

Held that the Mamlatdar had no alternative but to dismiss the suit.

THIS was an application under s. 622 of the Code of Civil Procedure (Act XIV of 1882).

One Ganpatram Jebhai and Adesang Himdas filed a suit in the Mamlatdar's Court to recover possession of certain property, and while the suit was pending Adesang died.

On Ganpatram's application the case was adjourned for a fortnight to enable the heirs and legal representatives of the deceased plaintiff to be made parties to the suit.

As the deceased's heirs did not express their willingness to join as co-plaintiffs, the Mamlatdar rejected the plaint under s. 13 of Act III of 1876, holding that in the absence of one of the plaintiffs the suit could not be proceeded with.

Thereupon the widow of the deceased Adesang applied to the Court, apparently under s. 108 of the Code of Civil Procedure **[646]** (XIV of 1882)

---

* Application under Extraordinary Jurisdiction No. 136 of 1892.

1892
NOV. 23.

APPELLATE CIVIL.

17 B. 645.

to have the suit restored to the file. The Mamlatdar rejected this application, holding that he could not entertain it.

Against this order the present application was made to the High Court under its revisional jurisdiction.

A rule *nisi* was issued, calling upon the opponent to show cause why the Mamlatdar's order should not be set aside.

Goverdhan Madhavram Tripati, for the opponent, showed cause.—The Mamlatdar's order is right. The Mamlatdar's Act (III of 1876) contains no provision for making the legal representatives of a deceased plaintiff a party to a suit. Nor is there any provision in that Act for restoring a suit to the file after it was dismissed for default. The provisions of the Civil Procedure Code relating to both these points do not apply. Bombay Act III of 1876 lays down a special procedure. And there is nothing in the Act to show that the Code of Civil Procedure is intended to govern cases for which the special procedure makes no provision—*Kasam Saheb* v. *Maruti* (1).

Gokuldas Kahandas Parikh, for the applicant, in support of the rule.—It would be hard on a suitor in a Mamlatdar's Court if it were held that, on the death of a sole plaintiff or of one of several plaintiffs, the suit cannot be continued by the heirs of the deceased, merely because there is no specific provision in the Mamlatdar's Act for entering the names of the deceased's heirs on the record. In such a case the ordinary procedure laid down in Act XIV of 1882 ought to apply. Section 647 of the Code of Civil Procedure makes the provisions of the Code applicable to all judicial proceedings in any Civil Court. And as the Mamlatdar's Court is a Civil Court, chap. XXI of the Code is applicable to suits in the Mamlatdar's Court. The Mamlatdar was, therefore, wrong in dismissing the suit on the death of one of the plaintiffs in this case

JUDGMENT.

TELANG, J.—The purpose of the Mamlatdar's Act, as pointed out in the case of *Basapa* v. *Lakshmapa* (2) being "temporary only and chiefly to provide for the cultivation of the land and to [647] prevent breaches of the peace until the Civil Court should determine the rights of the disputants," the procedure provided was of a very summary character. The Act makes no provision for the substitution of the names of heirs in the case of the death of one of the parties, and we are not prepared to say that chap. XXI of the Civil Procedure Code is applicable. To hold that this chapter is applicable, and that the heir to a deceased party has a right to intervene at any time within six months from the date of such party's death, would introduce an element of delay, which would be inconsistent with the summary nature of the Act. In *Kasan Saheb* v. *Maruti* (1), the High Court held that s. 328 and the following sections of the Civil Procedure Code were not applicable to proceedings under the Mamlatdar's Act, and the reasoning on which the decision was based seems to us to hold good equally in the case of chap. XXI. Our attention was called to the case of *Nana Bayaji* v. *Pandurang Vasudev* (3), in which the remarks of another Division Bench appeared to lead to the conclusion that s. 332 of the Code could be resorted to in such proceedings, but the point was not really before the Court for decision.

It may be urged that it is very anomalous that, after a suit has been duly instituted, no provision should exist for its continuance on the death

(1) 13 B. 552. (2) P. J. for 1877, p. 58. 3) 9 B. 97.

of one of the parties ; but it must be remembered that the object of Bombay Act III of 1876, as stated in the preamble, was to consolidate and amend the law relating to the powers and procedure of Mamlatdars' Courts, and that unless we were to hold that the Legislature had, in the sections of the Act itself, failed to carry out its purpose of consolidating the law relating to the procedure of Mamlatdars' Courts we could not accede to the argument that it was intended that the prescribed procedure should be supplemented on a variety of points by procedure borrowed from the Code. There is, however, no reason to impute to the Legislature any such failure of purpose. The main object in view being speedy and merely temporary relief it was probably thought inexpedient to make any provision for the continuance of a suit on the death of one of the [648] parties ; inasmuch as to force an heir to intervene immediately on the occurrence of a death before he had had sufficient opportunity of ascertaining the extent of his rights might lead to permanent injustice, while to allow him six months to consider his position would defeat that object by protracting the proceedings. Although the sudden termination of a suit before the Mamlatdar, consequent on the death of one of the parties, might cause inconvenience to the surviving party, still that inconvenience would be merely of a temporary nature, inasmuch as it would remain open either to him or to the heirs to seek relief at any time in the ordinary Civil Courts.

Under these circumstances we think that, so far as the second plaintiff's case was concerned, the Mamlatdar had no alternative but to dismiss it on his death.

As regards the first plaintiff, the Mamlatdar ought, no doubt, to have given his reasons for holding that the right of suit did not survive to him alone. But as it appears that the claim was one in which he did not allege a right to sole possession, and as it has not been suggested that the second plaintiff's interest passed entirely to him by survivorship, it is obvious that he was not competent to carry on the suit alone, and that, therefore, the Mamlatdar was right in dismissing it.

For the above reasons, we consider that this rule must be discharged with costs.

Rule discharged.

---

17 B. 648.

ORIGINAL CIVIL.

Before Mr. Justice Bayley and Mr. Justice Farran.

RANCHORDASS AMTHABHAI (*Original Plaintiff*), *Appellant v.* MANEKLAL GORDHANDASS (*Original Defendant*), *Respondent.**

[22nd December, 1890.]

Encroachment—Injunction—Highway—Place dedicated by owner of land for convenience of occupiers of adjoining houses—User of such open space—Covenant or grant presumed—Easement—Right of way—Landlord and tenant—Variance between pleading and evidence—Proctice—Procedure.

The plaintiff and defendant occupied houses situated in the same lane and opposite each other. Close to both houses was an open space in which a cross had [649] stood. The plaintiff alleged that the said vacant space was originally intended for and had always been used by the occupants of his house and the

---

* Suit No. 93 of 1888. Appeal No. 677.

1890
DEC. 22.

ORIGINAL CIVIL.

17 B. 648.

residents in the lane in common for the purposes of recreation, save where the cross stood. The cross had been for many years visited by Christain worshippers who prayed and worshipped there. The plaintiff also alleged that, in addition to the general use of the open space, he and his predecessors in title and the occupants of his said house had for more than twenty years used the open space as a footway and a way for carriages and other vehicles to approach the said house and to stand and be able to turn there. He complained that the defendant had wrongfully removed the cross, and enclosed the greater portion of the said open space, and he prayed for a declaration that he and the occupants of his house were entitled to the use of the said space for purposes of recreation and as a footway and carriageway and for an injunction. The defendant pleaded that the whole of the open space formerly belonged to a Portuguese religious confraternity who were the *fazendars* of both of his property and the plaintiff's; that this confraternity had permitted the cross to be erected on the land, at which the residents of the houses of the plaintiff and defendant and other adjacent houses who were then Portuguese used to assemble and worship: that the Portuguese having left the locality the cross was removed, and the part of the open space which had been enclosed by the defendant had been sold to him by the confraternity in 1887. He denied the user of the space alleged by the plaintiff.

Held that the evidence was not sufficient to establish that the land in dispute had been dedicated to the public, but that, on the evidence, the Court was justified in presuming and ought to presume a covenant on the part of the *fazendari* owners of the cart to keep the lane, including the upper end of it, open for the use of the owners of the houses abutting upon it. Such a covenant should be presumed equally in the case of a landowner giving land for building purposes to *fazendari* tenants on a perpetual tenure at a fixed rent and in the case of a owner selling land out and out for building purposes.

Where the plaintiff suing to prevent an encroachment on certain land alleged that the land was set apart for recreation, but the evidence established that it was set apart generally for the more convenient occupation of the houses surrounding it (which would include recreation purposes).

Held that the plaintiff ought not on that account to fail altogether and be left to a fresh action. The defendant had not been mislead or induced to refrain from calling evidence to rebut the plaintiff's case.

THE plaintiff was the owner of a house situate in Portuguese Lane, Agiary Street, Kalbadevi Road, in Bombay. The defendant owned a house in the same lane and opposite the plaintiff's house.

The plaintiff alleged that to the west of his house, and to the south of the defendant's house, there had been for more than twenty years an open space in which stood a cross on a pedestal. The **[650]** vacant space measured 23 feet from north to south and from east to west, about 23 feet at one end and 24 at the other.

The following paragraphs of the plaint set forth the plaintiff's case:—

"3. The said vacant space was originally intended for, and has always been used by, the occupants at the plaintiff's said house and the residents in the said lane in common for purposes of recreation, save where the said cross was erected. The said cross has constantly been visited for very many years past by Christian worshippers, who have prayed and otherwise worshipped there.

"4. The plaintiff says that, in addition to the general use of the said open space, he and his predecessors in title and the occupants of their said house have, for many more than twenty years prior to the acts of the defendant complained of, enjoyed the use of the said open space as a footway and a way for carriages and other vehicles to approach the said house and to stand and be able to turn round there. The plaintiff says further that the water from his said house has been for many years past conducted through a drain under the said open space, which said drain is shown on the said plan and denoted as plaintiff's drain."

1890
DEC. 22.
ORIGINAL CIVIL.
17 B. 648.

The plaintiff complained that the defendant had recently wrongfully removed the cross and enclosed the greater part of the open space by building walls, &c., thereon, leaving only a narrow passage on the east and west side of the said space. He prayed that it might be declared that he and the occupants of his house were entitled to the free and uninterrupted use of the said space for purposes of recreation and as a footway and carriageway, and for an injunction. He also prayed for a declaration of his right to drain water from his house through the drain referred to in the fourth paragraph of the plaint.

The defendant in his written statement alleged that the whole of the open space formerly belonged to a certain Portuguese religious confraternity who were the *fazendars* of the property both of plaintiff and defendant; that this confraternity permitted a cross to be erected on the land at which the Portuguese inhabitants **[651]** then resident in the houses, now occupied by the plaintiff and the defendant, and other adjoining houses situate on land belonging to the confraternity used to assemble and worship; that the Portuguese having left the locality the cross was removed, and the part of the open space now enclosed by the defendant was sold to him by the confraternity on the 26th July, 1887. He denied that the vacant space had been used as a place for recreation, or that the plaintiff and his predecessors in title had enjoyed its use as a footway or carriageway for twenty years. He further alleged that sufficient space had been left for a footway and carriageway.

Jardine and *Anderson* appeared for the plaintiff.

Lang and *Inverarity*, for defendant.

The lower Court (Parsons, J.) held that the plaintiff was entitled to the use of the drain referred to in the plaint, but as to the other claims in the plaint the suit was dismissed with costs. The Court found that the space was not originally intended for, and had not been used by, the occupants of the plaintiff's house as alleged in the plaint; that the plaintiff and his predecessors in title and the occupants of his house had not used the space in the mode stated in the plaint for more than twenty years, and that the plaintiff was not entitled to the space as a footway or carriageway.

The plaintiff appealed.

Macpherson (Acting Advocate General) and *Anderson*, for the appellant (plaintiff), contended that there was ground for holding that the space in question was public highway, and on this point cited *Rex* v. *Lloyd* (1), *Rex* v. *Barr* (2), *Rugby Charity* v. *Merryweather* (3), *Vernon* v. *Vestory of St. James, Westminster* (4). But it was not necessary to claim it as a highway. Regarding the right claimed by plaintiff as an easement, or a right arising out of an implied grant, they cited *Selby* v. *Crystal Palace District Gas Company* (5); *Bourke* v. *Davis* (6); Goddard on Easements, (4th ed.), p. 101.

[652] *Lang* and *Inverarity*, for the respondent (defendant), contended that there was no evidence that the land in question had been dedicated to the public, or that it had been used except for the purpose of passing to and from one of the adjoining houses.

JUDGMENT.

FARRAN, J.—The evidence on the record is insufficient, in our opinion, to establish that the land, which is in dispute round the cross,

---

(1) 1 Camp. 260. (2) 4 Camp. 16. (3) 11 East 375, notes.
(4) 16 Ch. D. 449. (5) 30 Beav. 606. (6) 44 Ch. D. 110.

1890
DEC. 22.
ORIGINAL CIVIL.
17 B. 648.

has been dedicated to the public. There is nothing to show that any public body has ever taken upon itself the care or the lighting of the place, or that the public ever resorted to it except that members of the Roman Catholic community in Bombay used to visit and worship near the cross. The cross has, however, been removed by the directions of the representatives of that community, and the right to visit the *locus in quo* for the purpose of worshipping at the cross, if it ever was a right vested in the public, has consequently ceased with the removal of the cross. Although a *cul de sac* like this may be impliedly dedicated to the public—*Vernon* v. *Vestry of St. James, Westminster* (1); *Rex* v. *Lloyd* (2); *Daniel* v. *North* (3)—it requires stronger evidence to prove the dedication of such a place than is called for to prove the dedication of a way or road left open at either end without gate or notice to indicate its private character. This absence of proof and the absence of allegation in the plaint that the place has been devoted to the public, render it unnecessary for us further to consider the arguments which have been presented to the Court in this aspect of the case.

The next question which arises for consideration is whether the evidence establishes that it has been set apart by the *fazendari* owner of the oart for the more comfortable enjoyment of the several owners of the houses abutting upon it and upon the more narrow passage by which it is approached from the main street, which would imply the user of it for the purposes for which open spaces surrounded by houses are commonly used, including the user of it for the purpose of driving carts and other vehicles over it and turning them upon it. Upon a building estate land is thus set apart by grant or **[653]** covenant, and the grant or covenant may be either express or implied. In *Selby* v. *Crystal Palace District Gas Company* (4), in laying out a building estate, lands were set apart by express covenant to be used as roads, as if the same were public roads. *Expley* v. *Wilkes* (5) was the case of an implied covenant or grant by a grantor, that land, which in the plan annexed to the grant was described as "new street," should be kept as, at least, a private street. Somewhat similar is the case of *Brown* v. *Alabaster* (6), where a grant of a house with a garden at the back was held to carry with it a right of way over a defined roadway into the garden behind, though it was not a way of necessity. It passed as a continuous and apparent easement. All the earlier authorities are collected and analysed in that case.

But in all these instances the origin of the grantee's title and the circumstances under which the grant was made were known; and an implied grant or covenant was presumed from the known circumstances of the grant itself. *Moody* v. *Steggles* (7) was, however, a case in which the circumstances, under which the right claimed by the plaintiff arose, were unknown; and the Court from long and uninterrupted user implied a grant. In this way a grant was also presumed in the case of *Lancaster* v. *Eve* (8). The law is thus stated by Fry, J., in the former case: "Where there has been a long enjoyment of property in a particular manner, it is the habit, and, in my view, duty, of the Court, so far as it lawfully can, to clothe the fact with right." If, therefore, the evidence in this case shows that the vacant space in front of the plaintiff's premises has been used by the occupiers and owners of his and the other houses

(1) 16 Ch. D. 449.
(2) 1 Camp. 260.
(3) 11 East 372.
(4) 30 Beav. 606.
(5) L. R. 7 Ex. 298.
(6) 37 Ch. D. 491.
(7) 12 Ch. D. 261.
(8) 5 C.B.N.S. 717.

in the oart in a particular manner for a long series of years, I think it is the duty of the Court to infer a legal origin for such user.

This naturally leads us to consider the evidence in the present case. There is no extant record, or direct proof, by which it is possible to determine the reason why the narrow passage which leads from the main street was allowed to widen out into an open space at its northern end. It may have been left vacant to **[654]** allow ample room for worshippers at the cross to kneel and stand around it, or the cross may have been erected there because a suitable vacant space already existed, having been left unoccupied for some other reason. The fact that the cross is supposed to have been erected by public subscription rather points to the latter hypothesis as the correct one, but it is conjecture. We know from the plan (Ex. No. 4) that before, and in, the year 1836 the vacant space existed almost exactly as it now exists, and the cross then had been erected upon it. The buildings which at that time stood in the oart were of an unsubstantial kind, described as *tatti* huts, and it may safely, we think, be inferred that the leaving of the vacant space and the letting out of the building lots were co-eval. From the plan (Ex. 4) alone it is not quite clear whether at its date the broad space was treated as part of the passage of the oart or not. Its colouring on the plan is the same as that of the narrow passage leading to it, and to get to plots Nos. 5, 6, 7, and the northern part of plot 8, it was necessary to pass over it. On the other hand, the words on the plan "passage of oart of 3*a*" rather markedly turn to the east on reaching the northern extremity of the narrow passage, as though the draftsman avoided writing on the wider space. The fact, however, that the only approach to the plots we have enumerated is over the vacant space, and that in the old deed of 1828 (Ex. G) the vacant space is described as a road, and that there is no line or mark on the plan separating it from the narrow passage, lead, I think, to a strong inferenee that the vacant space was then treated as a continuation of the passage, and the turning of the words descriptive of the passage to the east is intended rather to include the space between plots 8 and 9 in the passage than to exclude the broad vacant space from it.

As far as the memory of living witnesses goes back, the vacant space has existed and has been used by the inhabitants of the oart for all sorts of purposes. Carts and *reclas* which come up the narrow lane, turn on it, and there is evidence that they have been in the habit of being driven to the northern extremity when houses are being rebuilt or repaired. Building materials are laid on it; the inhabitants and their visitors pass over it; clothes, rice, &c., are exposed over or on it to dry; *pandals* on ceremonial **[655]** occasions are erected, and children use it to play in. A drain, which leading up the narrow passage branched off to the east and west when it reached the broad space, was in 1871 built through it by means of a contribution from most of the inhabitants of the oart to lead off the sullage water from their several houses; water-pipes, a little later, were laid down in it. All this has been done without, as far as the evidence shows, any permission being asked from, or given by, the *fazendari* owners of the oart. In one letter of 26th April, 1872, which was put in, it is, however, stated that the *fazendar* of the lane had no objection to each household connecting his drains with the general drain which had been then constructed; but this applied equally to the houses along the narrow lane and to those surrounding the broad space, and it does not appear

1890
DEC. 22.
ORIGINAL CIVIL.
17 B. 648.

that the *fazendar* was ever, in fact, consulted on the subject. The statement was made apparently to induce the recipient to bring pressure to bear on the owners of houses Nos. 41, 42 to pay their shares of the cost of constructing the general drain, fearing, I suppose, that they might allege that they had not applied to open connection with it. No inference as to the user of the lane and open space being permissive can, we think, under the circumstances be drawn from this statement of D'Penha. At the utmost it only shows that he considered the consent of the *fazendar* tenants requisite to justify the householders in breaking up the land to form such connections.

Under these circumstances we consider that the Court is justified in presuming, and ought to presume, a covenant on the part of the *fazendari* owners of the oart to keep the lane, including the upper end of it, open for the use of the owners of the houses abutting upon it. It seems to us that such a covenant should be presumed equally in the case of a land-owner granting land for building purposes to *fazendari* on a perpetual tenure at a quit-rent and in the case of one selling land out and out for building purposes.

The case, however, which we have thus indicated as established by the evidence was not the case put in argument before the learned Judge in the Court below, and it varies in some degree from the case as put forward in the plaint. The broad space is there [656] alleged to have been "intended,"— by which we presume is meant "set apart,"— by the *fazendari* owners for the residents in the lane, and used by them in common, *for purposes of recreation*; the plaintiff bases his right to drive and turn his carriages and vehicles on it upon a user of it in this manner by himself and his predecessors for many more than twenty years. His prayer is that it may be declared that he and the occupants of his house are entitled to the free and uninterrupted user of the open space for purposes of recreation and as a footway and carriageway from his house and as a place in which carriages may stand and turn. The relief to which the evidence shows that he is entitled, is, in effect, the same as that which he prays for—to have the broad space which the defendant has enclosed with a wall left unobstructed. It is true that a plaintiff must succeed not only *secundum probata*, but also *secundum allegata*; but we think that it would be taking a too technical view of the pleadings to hold because the plaintiff alleges that the place was set apart for recreation, and the evidence establishes that it was set apart generally for the more convenient occupation of the houses surrounding it (which would include recreation purposes), that the plaintiff ought on that account to fail altogether and be left to a fresh action. If the defendant had been misled or induced to refrain from calling evidence to rebut the plaintiff's case, this course might be adopted; but here the defendant has called evidence which, in the main, coincides with that of the plaintiff.

We must not omit to notice that before the defendant purchased and enclosed the open space the plaintiff wanted to buy part of this very land, but the plaintiff has only recently purchased his house in the oart and may have been misled by the *fazendari* owner offering the open space for sale. The defendant has not been misled by this, for the covenants in his purchase deed show that he was aware that he was purchasing with a doubtful title, and one which would probably lead him into a law suit.

For these reasons we consider that the plaintiff is entitled to a decree in terms of the prayer of his plaint (which should in express terms exclude from its operation the space heretofore [657] actually occupied by the

cross). As the case has been pretented to this Court in an entirely different aspect from that in which it was presented to the Court below, due no doubt to the manner in which the plaintiff launched his case, we allow the appeal with costs, but without costs in the Court of first instance, and vary the decree to the extent we have indicated.

Appeal allowed.

1890
DEC. 22.
ORIGINAL CIVIL.
17 B. 648.

Attorney for the plaintiff : Mr. *Mirza Hussein Khan.*
Attorneys for the defendant : Messrs. *Ardesir, Hormasji and Dinsha.*

---

17 B. 657.

ORIGINAL CIVIL.

Before Mr. Justice Parsons.

AHMED BIN SHAIK ESSA KHALIFFA AND OTHERS (*Plaintiffs*) *v.* SHAIK ESSA BIN KHALIFFA AND OTHERS (*Defendants*).*

[4th April, 1892.]

Decree—Execution—Alteration of decree—Decree in terms of an award ordering (inter alia) *delivery of moveable property—Loss of part of such moveable property and consequent failure to deliver—Application to insert in decree an order to pay value of such moveable property in event of failure to deliver—Civil Procedure Code (XIV of* 1882), *ss.* 206-8—*Practice.*

A partition suit brought by a son against his father was referred to arbitration. On the 9th January, 1890, the award was published, and on the 27th March, 1890, the defendants moved for and obtained a decree in terms of the award. By this decree it was ordered that in satisfaction of the plaintiff's claim the defendant should pay to him Rs. 1,05,000 in the manner therein stated, *viz.*, Rs. 40,000 to be paid forthwith and the balance of Rs. 65,000 to be paid "upon the plaintiff's delivering to the defendant certain specified property, which included two vessels or buglows, called respectively the 'Nasri' and 'Sambuk'." In no event was defendant to be required to pay the Rs. 65,000 before the 15th November, 1890. At the date of the decree the vessel 'Sambuk' was at sea on a voyage, and on the 18th June, 1890, while still on the voyage, she was lost. On the 15th November, 1890, the plaintiff's attorneys demanded payment of the balance of Rs. 65,000. They offered to deliver the other properties specified in the decree, but stated that the vessel 'Sambuk' had been lost. They offered to pay its value, which they estimated at Rs. 1,000. The defendant, however, demanded the delivery of the buglow, which he stated to be worth a very large sum. The defendant having, under the circumstances, refused to pay the Rs. 65,000, the plaintiff applied for execution of the decree which was refused. He then obtained a rule calling on the defendant to show cause why the decree of the 27th March should not be amended **[658]** or rectified by stating therein the amount of money to be paid to the defendant as an alternative if delivery of the vessel 'Sambuk' could not be made, such delivery having become impossible.

Held, that the rule must be discharged. The objection was to an award, not to a decree. Possibly it might have been open to the parties to object to the award before it was filed, on the ground that it ought to have stated a sum to be paid to the defendant in case some of the property could not be delivered to him. If such an objection had been made, the Court might possibly have remitted the award, or refused to file it. No such objection, however, was taken, and the award was filed, and a decree obtained, in accordance with the award. The award could not be modified by the Court, nor could the decree, which must be in accordance with the award.

SUIT for partition. The first plaintiff was the son of the first defendant, and he brought this suit in September, 1886, praying that the

---

* Suit No. 383 of 1886 ; Appeal No. 746.

1892
APRIL 4.

ORIGINAL CIVIL.

17 B. 657.

property of his grandfather Khaliffa bin Abdulla might be divided and partitioned among the parties entitled thereto according to their rights and interests therein.

By a consent order, made in the suit on the 15th August, 1889, the suit and all matters in difference between the parties were referred to arbitration. On the 9th January, 1890, the arbitrator made and published his award, which was filed on the 11th March, 1890. On the 27th March, 1890, on a motion made on behalf of the defendants, a decree was passed in terms of the award.

By this decree it was ordered that in full satisfaction of the claim of the plaintiff the first defendant should pay to the plaintiff the sum of Rs. 1,05,000 in the manner therein provided, *viz.*, that the sum of Rs. 40,000 should be forthwith paid by the said defendant and the balance of Rs. 65,000 should be paid "upon the said plaintiff's delivering over to the said Shaik Essa *bin* Khaliffa the five boxes mentioned in para. 5 of the plaint and two buglows 'Nasri' and 'Sambuk' referred to in the affidavit of Ahmed bin Essa, and the whole of the immoveable property in the Persian Gulf, &c." The said decree further provided that in no event should the defendant be required to pay the said balance of Rs. 65,000 before the 15th November, 1890.

At the date of the said decree the vessel "Sambuk" was at sea on a voyage, and on the 18th June, 1890, while still on the voyage, was lost.

[659] On the 15th November, 1890, the plaintiffs' attorneys wrote to the defendants' attorneys reminding them that the sum of Rs. 65,000 had become due on that day, and requiring payment. They offered to deliver the other properties mentioned in the decree, but stated that the vessel "Sambuk" had been lost at sea. In the correspondence which subsequently took place, the plaintiffs offered to pay the value of the lost vessel "Sambuk", but they and the defendants could not agree upon the value. The plaintiffs estimated her value at Rs. 1,000, but the defendants' attorneys in a letter of the 20th December, 1890, said: "Our client wants the said buglow under one of the conditions in the decree, as your clients (*i.e.*, the plaintiffs) are bound specifically to deliver the same and as it is worth a very large sum in our client's estimation.

The defendant having under these circumstances refused to pay the Rs. 65,000 the plaintiff applied for execution of the decree, but on the 16th July, 1891, his application was refused.

The plaintiff then (on the 19th March, 1892) obtained a *rule nisi*, calling on the first defendant to show cause why the decree of the 27th March, 1890, should not be amended or rectified by stating therein the amount of money to be paid to the said first defendant as an alternative if delivery of the vessel named "Sambuk" could not be made to the said first defendant, and "why such further or other order should not be made as justice and good conscience require in consequence of the loss of the said vessel 'Sambuk' and by reason of all the circumstances of the case as disclosed in the said affidavit, and why (if necessary) the amount of money to be fixed as an alternative for the delivery of the said vessel should not be ascertained by this Honourable Court or by the arbitrator, Mr. Shaik Abdul Aziz bin Ali Ebrahim heretofore appointed in this suit after taking such evidence as may be necessary." In his affidavit the plaintiff said "The plaintiffs are unable to execute the said decree for the balance thereof and interest without having the said decree amended by this Honourable Court in the following respect, namely, in regard to the delivery of the said vessel 'Sambuk,' the delivery of which has become impossible by

1892
APRIL 4.
ORIGINAL CIVIL.
17 B. 657.

[660] the act of God. Under the circumstances aforesaid this Honourable Court will be pleased to direct that the said decree should be amended by stating therein the amount of money, *i.e.*, the value of the said vessel 'Sambuk,' which is to be paid to the defendant in lieu of delivering the said vessel."

Jardine for the defendant showed cause.—The decree was in terms of an award. The Court cannot alter it. The decree provided for the payment of Rs. 65,000 on the plaintiff's handing over certain specified property, in which the ship "Sambuk" was included. If that property is not handed over, there is no obligation on the defendant to pay the money. Section 208 of the Civil Procedure Code (XIV of 1882) does not apply. He referred to rules Nos. 108 and 204 of the High Court Rules.

Kirkpatrick for plaintiff, *contra* :—We do not apply to alter the decree. We merely ask that the Court should make its decree in the form required by the law by inserting the words prescribed by s. 208 of the Code (XIV of 1882). It was for the Court to see that its decree was in proper form. The fact that the decree is on an award makes no difference. The decree is the decree of the Court and not that of the parties. Section 208 gives no discretion to the Court—Daniell's Chancery Practice, Vol. I, p. 822 (6th Ed.) ; *Ishwardas* v. *Dosibai*(1) ; *Karim* v. *Rajooma*(2) ; *In re Swire*(3); *Hughes* v. *Jones*(4) ; *In re Havelock's Trusts* (5). The Court has corrected the decree where the property was immoveable property—*Ram Saran* v. *Persidhar Rai* (6) ; *Sundara* v. *Subbanna* (7) ; *Vithal Janardan* v. *Vithojirav* (8) ; *Shivapa* v. *Shivpanch Lingapa* (9) ; section 10 of Charter of Supreme Court.

JUDGMENT.

PARSONS, J.—I am unable to interfere in this matter, which is really an objection, not to a decree, but to an award, and the cases cited do not touch that point. The parties referred their [661] dispute to private arbitration, and the award made was filed under s. 526 of the Civil Procedure Code (XIV of 1882), and a decree followed thereon. Possibly it might have been open to the parties to have objected, before the award was filed, that the award ought to have stated the amount of money to be deducted from the sum payable to plaintiff in case the latter could not deliver all the moveable property he was ordered to deliver to the defendant before he got the Rs. 65,000. Had such an objection been taken, the Court possibly might have either remitted the award or refused to file it. No such objection, however, was taken, and the Court, with the consent of all parties, ordered the award to be filed, and a decree followed in accordance with the award. It is impossible for the Court now to set aside that decree and remit the award to the arbitrator for him to determine afresh what sum the plaintiff shall receive now that the ship has been lost and the plaintiff is unable to deliver it to the defendant, and it is equally impossible for the Court to determine the then value of the ship itself and order that the plaintiff shall receive the sum of Rs. 65,000 less that value on delivering to the defendant all the property except the ship. The award cannot be so modified by the Court, and if the award cannot, then the decree which follows it cannot, for it must be in accordance with the award. There is

(1) 7 B. 316. (2) 12 B. 174. (3) 30 Ch. D. 239 (246).
(4) 26 Beav. 24. (5) 35 L. J. (Ch.) N. S. 228. (6) 10 A. 51.
(7) 9 M. 354. (8) 6 B. 586. (9) 11 B. 284.

1892
APRIL 4.
ORIGINAL CIVIL.

no injustice whatever in the case, for the delivery of the property was at the option of the plaintiff, and the impossibility of delivery of all the property may have been in the mind of the arbitrator when he made the award.

Rule discharged.

17 B 657.

Attorneys for the plaintiff :—Messrs. *Payne, Gilbert and Sayani.*
Attorneys for the defendant :—Messrs. *Little, Smith, Nicholson and Bowen.*

---

17 B. 662 = Chitty's S.C.C.R. 375.

[662] SMALL CAUSE COURT REFERENCE.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Starling.

GIRDHAR DAMODHAR (*Plaintiff*) *v.* KASSIGAR HIRAGAR, (*Defendant.*)*
[7th July, 1893.]

Jurisdiction—Foreigner—Non-resident foreigner carrying on business by his munim *in Bombay—Small Cause Court—Small Cause Courts Act (XV of* 1882*)*, s. 18.

Where a foreigner who did not reside in Bombay carried on business there by his *munim.*

Held that under s. 18 (1) of the Small Cause Courts Act (XV of 1882) the Small Cause Court in Bombay had jurisdiction to try a suit brought against him in that Court.

Per SARGENT, C.J.—*Prima facie* the word 'defendants' in cl. (*b*) of s. 18 has the same meaning in each of the three cases in which that clause gives **[663]** jurisdiction to the Court; and as the word clearly includes non-British subjects among the defendants over whom the clause gives jurisdiction if they are "resident," or "personally work for gain," within the territorial limits of the Small Cause Court, it would be a strained construction to hold that it did not include them among the defendants over whom the clause gives jurisdiction on the ground that they are "carrying on business" within the limits.

---

* Small Cause Court Suit No. 21864 of 1892.

(1) Section 18 of the Presidency Small Cause Courts Act (XV of 1882):

Subject to the exceptions in s. 19, the Small Cause Court shall have jurisdiction to try all suits of a civil nature.

When the amount or value of the subject-matter does not exceed two thousand rupees; and

(*a*) the cause of action has arisen, either wholly or in part, within the local limits of the jurisdiction of the Small Cause Court, and the leave of the Court has, for reasons to be recorded by it in writing, been given before the institution of the suit; or

(*b*) all the defendants, at the time of the institution of the suit, actually and voluntarily reside, or carry on business, or personally work for gain, within such local limits; or

(*c*) any of the defendants, at the time of the institution of the suit, actually and voluntarily resides, or carries on business, or personally works for gain within such local limits, and either the leave of the Court has been given before the institution of the suit, or the defendants who do not reside, or carry on business, or personally work for gain, as aforesaid, acquiesce in such institution.

Explanation I.—When in any suit the sum claimed is, by a set off admitted by both parties, reduced to a balance not exceeding two thousand rupees, the Small Cause Court shall have jurisdiction to try such suit.

Explanation II.—Where a person has a permanent dwelling at one place, and also a lodging at another place for a temporary purpose only, he shall be deemed to reside at both places in respect of any cause of action arising at the place where he has such temporary lodging.

Explanation III.—A corporation of company shall be deemed to carry on business at its sole or principal office in British India, or, in respect of any cause of action arising at any place where it has also a subordinate office, at such place.

1893
JULY 7.

SMALL CAUSE COURT REFERENCE.

17 B. 662=
Chitty's S. C. C. R. 375.

Although it is true that a non-British subject, who does not personally carry on business within the territorial limits of the Court, does not make himself personally subject to the municipal law of British India, still, by establishing his business in British India, from which business he expects to derive profit, he accepts the protection of the territorial authority for his business and his property resulting from it, and may be fully regarded as submitting to the Courts of the country.

[R., 20 B. 133 (143) ; 25 B. 528 (532) ; 26 M. 544 (552) ; 29 M. 69 (70) ; 37 M. 163 (169) = 18 Ind. Cas. 189 = 24 M.L J. 619 (625) ; 11 M.L.J. 91 (106) ; (1914) M.W. N. Sup. 1 = 15 M.L.T. 1 ; **Cons. and Expl.**, 29 M. 239 (249) = 16 M.L J. 238 = 1 M.L.T. 71 ; **D.**, 26 M. 544 (552) (**P.C.**) = 5 Bom. L.R. 494 = 7 C.W.N. 754 = 30 I.A. 220 = 13 M.L.J. 287 = 8 Sar. P.C.J. 523.]

THIS was a case stated by C. W. Chitty, Chief Judge, for the opinion of the High Court, under s. 69 of the Presidency Small Cause Courts Act (XV of 1882).

The suit was brought by the plaintiff in the Court of Small Causes to recover from the defendant the sum of Rs. 1,300-11-6, being the price of goods sold by the plaintiff to the defendant in Bombay.

It was admitted that the defendant resided in Cutch, out of the jurisdiction of the Court, and that he carried on business in Bombay by a *munim*. It was also the fact that no leave of the Court had been obtained for the institution of this suit.

Several defences were pleaded by the defendant at the trial, but the only one material to this report was the defence that the Court had no jurisdiction to try the suit. At the conclusion of the hearing the Chief Judge gave judgement for the plaintiff, but at the defendant's request he stated a case for the High Court. One of the questions on which the opinion of the High Court was asked was the following :—

Whether the Court had jurisdiction, the defendant not being a resident of Bombay or a British subject, but a resident of Cutch, and no leave having been obtained to file this suit ?

Macpherson and *Inverarity* for the defendant :—The defendant is a foreigner, who does not reside in Bombay, and we contend that the Court has, therefore, no jurisdiction. The jurisdiction of the Court must be based either on cl. (*a*) or cl. (*b*) of s. 18 of the Presidency Small Cause Courts Act (XV of 1882). These **[664]** clauses give jurisdiction, 1st, where the cause of action wholly or in part has arisen within the local limits, and leave has been obtained; 2ndly, where the defendant (*a*) actually and voluntarily resides, or (*b*) carries on business within the local limits. The action is brought to recover the price of goods sold to the defendant in Bombay. The cause of action having thus arisen in Bombay, the Court of course would have had jurisdiction if leave had been obtained (s. 18) ; but it is admitted that no leave was obtained in this case. So the jurisdiction (if any) must arise from some other circumstance, and cl. (*a*) may be excluded from consideration. It is also admitted that the defendant does not reside within the jurisdiction. The sole ground, then, upon which jurisdiction over the defendant can be claimed is that by his *munim* he carries on business in Bombay, and the question is, does this circumstance give the Court in Bombay jurisdiction over a non-resident foreigner ? We say it does not. We contend that the expression "or carry on business" in cl. (*b*) of s. 18 must be read "or *being British subjects* carry on business." The words "being British subjects" must be understood, for the Indian Legislature has no power by its laws to give its Courts jurisdiction over non-resident foreigners. That is a principle recognised by all Legislatures and Courts of Justice—Reports of State Trials, New

1893
JULY 7.
SMALL CAUSE COURT REFERENCE.
17 B. 662 = Chitty's S. C. C. R. 375.

Series, Vol. IV, p. 1331 ; *Lopez* v. *Burslem* (1); and see *Kessowji Damodar Jairam* v. *Khimji Jairam* (2). Legislatures can only affect foreigners who reside within their territory. In *Macleod* v. *Attorney General for New South Wales*(3) it was held that in an Act of the New South Wales Legislature, inflicting a punishment for bigamy "wheresoever the second marriage shall take place," the word "wheresoever" must be read "wheresoever *in this colony*." We adopt the argument addressed to the Court for the defendant in the case of *Kessowji Damodar Jairam* v. *Khimji Jairam* (2) (see pp. 510, 511 and 512 of the report).

Scott, for plaintiff, *contra*.—The Court has jurisdiction. This Court in construing an Act of the Legislature has no power to add words to it. I contend that the decision in *Kessowji Damodar* **[665]** *Jairam* v. *Khimji Jairam* (2) was wrong and should not be followed, and I adopt the argument made in that case (see p. 513 of the report) for the plaintiff. In that case Scott, J., added words to the Letters Patent. That case is in conflict with *Harivallabhdas* v. *Utamchand*(4), on which I rely. Counsel also cited *Daniel* v. *Oakley*(5).

Macpherson in reply.—If the words "being a British subject" are not imported into s. 18, cl. (*b*), we impute an intention to the Indian Legislature to do what it has no power to do.

JUDGMENT.

SARGENT, C. J.—The only question which has been argued before us in this Small Cause Court reference is whether cl. (*b*) of s. 18 of the Small Cause Court Act (XV of 1882) confers jurisdiction on the Small Cause Court when the defendant is not a British subject and resides outside the territorial limits of that Court, but is "carrying on business" by a *munim* within those limits. That such "carrying on business" need not be "personal" was, I think, not disputed. The decision of the Madras Court in *Muthaya Chetti* v. *Allan* (6) on the same words in the Letters Patent, and the reasons given by Turner, C. J., for so holding, are, I think, conclusive. The soundness of the early decision of the Madras Court to the contrary in *Subbaraya Mudali* v. *The Government, &c.*, (7) was, I may remark, doubted by Sausse, C.J., and Arnold, J., in *Framjee Cowasjee* v. *Hormasjee Cowasjee*(8).

Passing to the real question in this reference, *viz.*, whether the case of defendants carrying on business within the territorial limits of the Small Cause Court—which it is to be observed are the same as those of the High Court,—must be restricted to British subjects, is not free from authority. In *Kessowji Damodar* v. *Khimji Jairam* (2) Mr. Justice Scott, construing similar words in s. 12 of the Letters Patent, 1865, held that they must be confined to British subjects.

It is to be remarked, at the outset, that the general term "defendants" precedes and governs the whole of the cl. (*b*), and, therefore, *prima facie* it was intended to have the same **[666]** meaning when read with each of the three several cases mentioned in the clause as giving the Court jurisdiction; and as non-British subjects are clearly subject to the jurisdiction if they are "resident" or "personally work for gain" within the territorial limits of the Small Cause Court, it would be a strained construction of the clause to hold that they were excluded when

(1) 4 Moore's P. C. C. 300, (305).
(2) 12 B. 507.
(3) L.R. (1891) Ap. Ca. 455.
(4) 8 B.H. C. R. (O. C. J.) 236.
(5) 28 Sol. Journal, 477.
(6) 4 M. 209.
(7) 1 M.H. C.R. 286.
(8) 1 B. H. C. R. 221.

1893
JULY 7.

SMALL CAUSE COURT REFERENCE.

17 B. 662 = Chitty's S. C. C. R. 375.

the ground of jurisdiction is that they are "carrying on business" within those limits. The learned Judge who decided *Kessowji Damodar* v. *Khimji Jairam* was not unconscious of this difficulty in excluding non-British subjects, but he held that he ought to disregard it, as "to do otherwise," he said, " would be a violation of the rule that every statute is to be construed and applied, so far as the language admits, so as not to be inconsistent with the comity of nations, or with the established rules of private international law."

There is no authority that I am aware of, nor was any referred to in argument, for there being a rule of construction couched in such very general terms. The rule as stated by Lord Esher, M. R., in the important case of *Companhia de Mozambique* v. *British South Africa Company* (1), is that "the question whether the Courts of a nation will or will not entertain jurisdiction of any dispute is to be determined exclusively by its nation itself, *i. e.*, by its Municipal Law. If by express legislation the Courts are directed to exercise jurisdiction, the Courts must obey. If there is a proper inference to the same effect, the result is the same. But there are certain rules which have, by universal consent, indicated the circumstances from which the inference may properly be drawn." One of those rules, as stated by the Court in *Ex parte Blain* (2), is that, *prima facie*, all legislation is territorial, in the sense, as stated by James, L. J., that, "unless the contrary is expressly enacted or plainly implied, legislation is only applicable to foreigners who by coming into England, whether for a long or short time, have made themselves subject to English jurisdiction," and accordingly the Court in that case held that the Bankruptcy Act is not to be construed so as to give the Court of Bankruptcy power to adjudicate a foreigner bankrupt, who, although member of an English firm, carrying on business in England, had never been in England and had not [667] committed any act of bankruptcy in England. The above principle was doubtless assumed in the decision of the Privy Council in *Lopez* v. *Burslem* (3) and also by the House of Lords in *Jefferys* v. *Boosey* (4), where it was held that tha Copy-right Act did not apply to foreigners resident abroad ; and again in *Macleod* v. *Attorney-General of New South Wales* (5) the Privy Council held that an Act of the New South Wales Legislature, which legislated as to the offence of bigamy, must be confined to an act done within the territorial jurisdiction of New South Wales, but it is to be remarked that these were all cases in which the Legislature conferred a benefit or imposed a penalty as the consequence of some act done or omitted to be done, and, therefore, have no direct bearing on the construction of such an Act as that under consideration. The question is whether the Legislature did not intend to depart from the general territorial rule. It may be true that non-British subjects who do not reside in British India do not make themselves personally subject to to the general Municipal Law of British India, still by establishing their business in British India, from which business they expect to derive profit, they accept the protection of the territorial authority for their business and their property resulting from it, and may be fairly regarded by so doing as submitting to the jurisdiction of the Courts of the country. Moreover, in considering what was the true intention of the Legislature, it is right to bear in mind the special circumstances of the presidency towns in this country as regards the great number of non-British subjects

(1) L. R. (1892) 2 Q. B. 358 (394). (2) 12 Ch. D. 522.
(3) 4 Moo. P. C. C. 300. (4) 4 H.L.C. 815. (5) L.R. (1891) Ap.Ca. 455.

1893
JULY 7.

SMALL CAUSE COURT REFERENCE.

17 B. 662 = Chitty's S. C. C. R. 375.

who carry on trade within them, either personally or by their *munims* and other agents, and are constantly having transactions with British subjects giving rise to causes of action both within and outside the presidency towns, the latter of which do not fall under cl. (*a*)—a circumstance which might well affect the Legislature in determining the jurisdiction of the Presidency Courts, as regards defendants.

These considerations coupled with the general language of the clause, which, as already observed, requires it to be construed as giving jurisdiction to try suits against defendants generally who [668] satisfy any one of the conditions mentioned in the clause irrespective of their being British or non-British subjects, create, in my opinion, a strong presumption in favour of a less strict application of the "territorial" principles of construction above referred to, than was adopted in *Kessowji Damodar* v. *Khimji Jairam*(1); and I cannot think that the above considerations are entitled less weight because the construction would enable actions to be brought in the Presidency Courts against non-British subjects on causes of action arising out of British India, or even out of India. Such causes of action would necessarily be personal actions, to which the rule of territoriality has never been applied in England. It was urged, indeed, that the tribunals of other countries would not give effect to the judgment of the Small Cause Court in such cases; but such an argument is entitled to little weight, if indeed it is not quite irrelevant, as observed by Lord Hobhouse in delivering the judgment in *Ashbury* v. *Ellis*(2) in the following terms:—"When a judgment of any tribunal comes to be enforced in another country, its effect will be judged of by the Courts of that country with regard to all the circumstances of the case."

Upon the whole of I am of opinion that the Small Cause Court had jurisdiction to try the suit, and the question as to the jurisdiction must, therefore, be answered in the affirmative.

STARLING., J.—In this case the plaintiff sues the defendant, who is the subject of a Native State, in respect of a cause of action arising wholly within the jurisdiction of the Bombay Court of Small Causes, alleging that he is carrying on business within the jurisdiction. The fact that the cause of action arose within the jurisdiction will not in this case justify the filing of the suit, because the leave of the Court was not obtained to its being filed in accordance with cl. (*a*) of s. 18 of Act XV of 1882; consequently the only point which the Court has to consider is whether a non-resident foreigner carrying on business within the city of Bombay can be sued in the Small Cause Court.

Now it seems to me that, in this case, we have nothing to do with questions of international law. All we have to do is to [669] determine whether the defendant is a person against whom the Legislature has permitted a suit to be filed in the Courts of this country, in which a decree can be passed and executed in this country against the property of the defendant within the jurisdiction, and against his person if he comes within the jurisdiction; and I am of opinion that the defendant, who admittedly has a firm in Bombay in which he carries on business through his *munim*, is such a person. In this conclusion I am supported by the case of *Ex-parte Blain*(3), in which James, L. J., at p. 526 says: "No doubt it (*i. e.*, the English Legislature) has a right to say, to a Chilian, or to any other foreigner, 'If you make a contract in England or commit a breach of contract in England, under a particular Act of

(1) 12 B. 507. (2) L.R. (1893) Ap. Ca. 339. (3) L.R. 12 Ch. D. 522.

1893
JULY 7.

SMALL CAUSE COURT REFERENCE.

17 B. 662 = Chitty's S. C. C. R. 375.

Parliament, a particular procedure may be taken by which we can effectually try the question of that contract, or that breach, and give execution against any property of yours in this country.' But that is because the property is within the protection and subject to the powers of the English law. To what extent the decision of such a question would be recognized abroad remains to be considered, and must be determined by the tribunals abroad. If a foreigner, being served with a writ under the provisions of the Judicature Act, did not choose to appear, and the Legislature said, 'If you do not appear you will commit a default in that way, and we will give judgment against you,' whether that judgment would, under the circumstances, be recognized by foreign tribunals, as being consistent with international law and the general principles of justice, is a matter which must be determined by them." Cotton, L.J., also at p. 531 says: "We are not dealing with the question which might arise if an English Act of Parliament had expressly said that, as against a Chilian subject, or any other alien who had never been in England, the Court should, on certain facts being proved, entertain a petition and make an adjudication. In such a case it might be the duty of the Court, acting in the execution of the English Act of Parliament, whatever the consequences might be and however foreign nations might object, to say, this is the English Statute, and we must act on it, and the question which you, a foreigner, raise, we are bound to disregard."

[670] Now these two passages seem to me fully applicable to this case. The Legislature has enacted that, if a person carries on business within the jurisdiction, a suit may be brought against him, and I do not think we ought to explain away the plain words of this enactment and say that it is not every person who carries on business within the jurisdiction who may be sued, but only British subjects. What a foreign Court might do, if a decree in such a suit were sued upon in such a Court, is not a question which we need discuss, and this is distinctly laid down in the case of *Ashbury* v. *Ellis* (1).

Cases in bankruptcy do not afford much help in the elucidation of the present question, for it is a local enactment extending to England only, and many of its provisions are of a highly penal nature.

In *Ex parte Crispin* (2) it was held that a foreigner who comes to England temporarily, contracts debts, and then commits an act of bankruptcy, can be made a bankrupt although he may be abroad at the time the petition is filed. This decision has never been disapproved of, but on the contrary was quoted with approval in *Ex parte Pascal*(3), in which at p. 512, Mellish, L.J., cites that case, and holds that it makes no difference if the debt were contracted abroad. The real test in these cases is whether the defendant has done within the jurisdiction, either personally or by his authorized agent, an act which brings him within the terms of the enactment applicable to his case, and I do not see any reason why the trading of a foreigner by his servants within the jurisdiction should not be held to be such an act.

The case of *Ex parte Blain* has been relied upon by the defendant, and also by Scott, J., in *Kessowji Jairam* v. *Khimji*(4), as showing that Acts such as the Bankruptcy Act and the present one cannot operate upon foreigners who reside outside the jurisdiction. I do not think that is the effect of *Ex parte Blain*. It seems to me that the *ratio decidendi* of that

(1) L. R. (1893). Ap. Ca. 339.
(2) L. R. 8 Ch. 374.
(3) 1 Ch. D. 509.
(4) 12 B. 507.

1893
JULY 7.

SMALL CAUSE COURT REFERENCE.

17 B. 662 = Chitty's S. C. C. R. 375.

case was that the Chilian partners had never been within the jurisdiction, and consequently could not have personally committed an act of [671] bankruptcy by a particular act of their agents (the English partners) which they had not authorized, and of which they had not cognizance, and that, as such was the case, the Court would not assume that the Legislature intended that an act of partners in England not authorized by the Chilian partners should operate upon the latter, who were not actually subject to the jurisdiction in a case where the operation would result in a compulsory personal attendance in England. If this be the true view of that case, it in no way militates against the conclusion to which I have come.

It has never been doubted that under certain circumstances a suit could be brought in England against a foreigner, and the questions which have arisen have always been as to what was good service of the writ; generally whether it could be served as a matter of course, or whether leave of a Judge must be obtained, or whether notice only of the action should be given. This remark applies to all the cases cited on the recent rules under the Judicature Acts as to suits against firms. Partners can now be sued in the name of their firm, and the questions that have arisen have been as to how service of the writ in the action was to be effected. The Judges have seemed to be of opinion that service as a matter of course in certain instances would be an infringement of international law, but yet it would appear that they admitted the possibility of the writ being served by leave of a Judge. Consequently these cases, in my opinion, only apply to the construction of certain new and rather complicated rules of practice which really do not give us any practical assistance in the present case. Besides which, the question is, not whether a writ can be served, but whether an action can be brought. When one looks at the changes there have been in the rules themselves, and the divergent decisions of various Courts on the rules, it can hardly be said that the practice in England has at present been put upon a satisfactory basis so as to afford unerring guidance to us in such a case as the present.

Attorneys for the plaintiff:—Messrs. *Bhaishankar and Kanga.*

Attorneys for the defendant:—Messrs. *Little, Smith, Nicholson and Bowen.*

---

17 B. 672.

[672] APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Candy.

In re GULABDAS BHAIDAS.* [15th September, 1892.]

Company—Indian Companies Act (VI of 1882), s 28—Shares issued as fully paid up—Rights of a purchaser with notice taking from a purchaser without notice—Notice—Contributory.

Twenty shares of the Bella Spinning, Weaving and Manufacturing Company, Limited, were originally allotted to A as fully paid up shares partly for work done, and partly for work to be done for the company. The agreement under which the shares were so allotted was not registered as required by s. 28 (1) of Act VI of 1882.

---

* Appeal No. 108 of 1892.

(1) Section 28 of Act VI of 1882 provides as follows:—

"Every share in any company shall be deemed and taken to have been issued and to be held subject to the payment of the whole amount thereof in cash, unless the same has been otherwise determined by a contract duly made in writing and filed with the Registrar of Joint Stock Companies at or before the issue of such shares."

1892
SEP. 15.

APPELLATE CIVIL.

17 B. 672.

A sold three of these shares to D, who had no notice that they were not fully paid up. D sold the three shares to G, who was the managing director of the company. The company was wound up by the Court. At the date of the winding up, G was holder of the three shares. In settling the list of contributories, the Court ordered G's name to be placed on the list in respect of the three shares.

Held, that G was not liable as a contributory. Though G was a managing director of the company, and as such must have known that the shares had been issued as fully paid up shares without complying with s. 28 of Act VI of 1882, he was not on that account estopped from taking advantage of the equitable rule which protects a purchaser with notice taking from a purchaser without notice.

APPEAL against the order of J. B. Alcock, District Judge of Surat, made in winding up proceedings under the Indian Companies Act VI of 1882.

The Bella Spinning, Weaving and Manufacturing Company, Limited, was ordered to be wound up by the Court in 1881.

Twenty shares of this company were originally issued as fully paid up shares to one Dorabji, a contractor, partly for work done, and partly for work to be done for the company. The agreement under which the shares were so issued was not registered according to s. 28 of Act VI of 1882.

[673] Dorabji sold three of these shares to one Dadyshet, who had no notice that the shares were not fully paid up.

Dadyshet sold the three shares to Gulabdas, who was the managing director of the company. At the date of the winding up, Gulabdas' name appeared on the register of the company as the holder of the three shares.

In settling the list of contributories, the District Court was of opinion that as Gulabdas was a managing director of the company he must be taken to have notice that the shares were not fully paid up, and that the fact of the intermediate holder not having notice, did not help him. The Court, therefore, held that Gulabdas was liable, as a contributory, to pay the full amount of the three shares. Gulabdas' name was accordingly placed on the list of contributories.

Against this order Gulabdas appealed to the High Court.

Kalabhai Lallubhai, for appellant:—The appellant bought the shares from a person who had no notice of their not being fully paid up shares. The fact that the appellant had notice is immaterial. The ruling in *In re Stapleford Colliery Company* (1) is conclusive on the present question.

Ganpat Sadashiv Rao, for respondents (official liquidators):—The appellant was a managing director of the mill. As such he must have known that the shares which he purchased were not, either in fact or in law, fully paid up. He cannot, therefore, avail himself of the equitable rule which protects a purchaser with notice taking from a purchaser without notice. That doctrine does not apply in the present case. The words of s. 28 of Act VI of 1882 are clear. According to that section every shareholder is bound to pay, in cash, the full amount of the shares he holds, unless there is a registered agreement to the contrary. There is none such here. The appellant was, therefore, rightly put on the list of contributories.

JUDGMENT.

SARGENT, C. J.—Twenty shares were originally issued to the contractor Dorabji as fully paid shares and registered in his name, of which three were sold and transferred to Mr. Dadysett, **[674]** who, it is admitted, had no notice that the shares were not fully paid up. The

(1) 14 Ch. D. 432.

1892
SEP. 15.
APPEL-LATE CIVIL.
17 B. 672.

decision in *In re Stapleford Colliery Company* shows that as between the company and Mr. Dadysbet the three shares must be treated as paid up, and that he could make a good title to a purchase whether with or without notice. It appears that they were sold to the appellant Gulabdas, who was the managing director of the company, and it has been urged that, as such, he must have known that the shares had been issued as fully paid up shares without complying with s. 28 of Act VI of 1882, and cannot, therefore, take advantage of the rule which protects a purchaser with notice taking from a purchaser without notice. This argument, however, was addressed to the Court in *In re Stapleford Colliery Company*(1), where the appellant and his father, whose executor he was, had been the solicitor and chairman of the company at the time of the agreement with the contractor; and yet the appeal Court held that the fact of their being such officers made no difference in their title.

We are unable to distinguish the present case from the one referred to, and must, therefore, discharge the order of the Court below placing the name of Mr. Gulabdas on the list of contributories. Appellant to have his costs throughout.

Order reversed.

---

17 B. 674.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Candy.

VENKATESH KHANDO AND ANOTHER (*Plaintiffs*) *v.* CHANAPGAVDA (*Defendant*).* [15th September, 1892.]

Award—Civil Procedure Code (XIV of 1882), s. 525—Application for filing the award registered as a suit—Objections taken by the defendant—Court precluded from filing award.

An application for filing an award being registered as a suit, the defendant raised objections, and the following issues were raised :—

(1) Whether a certain arbitrator was nominated or accepted as one of the arbitrators by the defendant ?

[675] (2) Whether there was any and what illegality apparent on the face of the award ?

(3) Whether the proceedings conducted by the arbitrators were illegal ?

Held that the objections taken by the defendant, which were the subject of the above issues, precluded the Court from filing the award.

[R., 17 A. 21 (24) = 14 A.W.N. 187 ; 20 B. 596 (600) ; 28 B. 287 = 6 Bom. L.R. 15 (16) ; 13 C.P.L.R. 53 (56) .**]**

THIS was a reference made by Rao Bahadur Vithal Vaikunth Vagle, First Class Subordinate Judge of Dharwar, under s. 617 of the Civil Procedure Code (XIV of 1882).

The reference was as follows :—

"This was an application registered as a suit under s. 525 of the Civil Procedure Code (XIV of 1882) for filing an award made by arbitrators appointed by the parties without the intervention of the Court.

"The defendant objected to the award being filed, on the following grounds :—

"(1) The application was time-barred.

---

* Civil Reference, No. 12 of 1892.

(1) 14 Ch. D. 432.

"(2) The award was made without authority and was illegal.

"(3) His signature to the agreement of submission to the arbitration was obtained on 18th April, 1891, without mentioning the names of the arbitrators. One Krishnaji Tirko's name was fraudulently inserted in the margin of the agreement in the place of Shripad Naik, and the parties were the same day examined by the other two arbitrators in the absence of the said Krishnaji Tirko. The appointment of Krishnaji thus made was illegal.

"(4) Shripad Naik having refused to act as an arbitrator, he (defendant) prayed for the appointment of a Lingayat arbitrator whom he considered trustworthy. He was, however, told that it could be subsequently done, and that for the present nothing beyond the examination of of accounts would be done. Under this misrepresentation his signature was taken to a stamped agreement on 28th April, 1891, without disclosing the contents thereof. From that day up to the last, the arbitrator Balkrishna Shastri never took any part in the arbitration.

"(5) The proceedings conducted in the absence of Krishnaji and Balkrishna are illegal: *a fortiori* the award based thereon was also illegal and void.

"**[676]** (6) The award was not made on the 15th June, 1891, as it purports to be, but was made in the month of September.

"(7) He (defendant) repeatedly protested against the proceedings taken by the remaining arbitrators without appointing proper persons in the place of Balkrishna, who was absent, and of Shripad, who refused to act, but they paid no heed to it and refused to receive the written application given by him. He thereupon sent his application by post on 15th June, 1891. They made an award on plain paper and fraudulently antedated it. Balkrishna Shastri's signatures to the proceedings were afterwards taken, and no copy of the award was given to him.

"(8) The plaintiffs have been awarded time-barred items and have wrongly discredited the receipts passed by the plaintiffs' deceased father for certain payments.

"(9) The two arbitrators, who really conducted the proceedings, did not take down his statements correctly and did not examine him fully. They rejected what evidence he tendered, and having accepted inadmissible evidence from the plaintiffs made the award with partiality in collusion with the plaintiffs.

"(10) The award could not be filed, the proceedings of the arbitrators being illegal, fraudulent and unjust."

The Court thereupon raised, in all, eight points for decision, out of which points Nos. 1, 2 and 3 were as follows:—

"(1) Whether Krishnaji Tirko was nominated or accepted as one of the arbitrators by the defendant?

"(2) Whether there is any and what illegality apparent on the face of the award?

"(3) Whether the proceedings conducted by the arbitrators were illegal?"

The Subordinate Judge referred the following point for decision:—

"Whether the Court has power to enquire into the allegations made by the defendant, and then to file the award, or refer the applicants to a separate suit, as it thinks fit according to the circumstances disclosed in the enquiry?"

[677] The Subordinate Judge's opinion on the point was in the affirmative.

1892
SEP. 15.

APPEL-
LATE
CIVIL.

17 B. 674.

Dhondu M. Sanzgiri (*amicus curiæ*,) for the plaintiffs.
Narayan G. Chandavarkar (*amicus curiæ*,) for the defendant.

JUDGMENT.

SARGENT, C. J.—The decision in *Samal* v. *Jaishankar* (1), which was followed in *Hirijibhai* v. *Jamsetji* (2) and is in accordance with the remarks of the Calcutta Court in *Bijadhur* v. *Manohur* (3), is conclusive that the objections taken to the award by the defendant, which are the subject of issues 1, 2 and 3, preclude the Court from filing the award, unless, indeed, as Mr. Justice West expressed it in *Samal* v. *Jaishankar* (1), the Court considers the objections "obviously unfounded," which there is no ground for doing in the present case. The question, therefore, raised by the decision in *Dandekar* v. *Dandekars* (4) does not arise and need not be considered.

Order accordingly.

---

17 B. 677.

APPELLATE CIVIL.

Before Mr. Justice Bayley Chief Justice (Acting), and Mr. Justice Candy.

PURUSHOTTAM VAMAN SOMAN (*Original Defendant*), *Appellant* *v.* KASHIDAS JEYCHANDSHET (*Original Plaintiff*), *Respondent.**

[16th September. 1892.]

Khoti lands—Mortgage—Sale in execution of decree in mortgage—Suit for possession by assignee of purchaser at such sale—Consent of Khot *to alienation.*

One Babsha, the registered occupant of certain lands situate in a *khoti* village mortgaged the lands to one Velji, who got a decree on the mortgage. In execution of the decree the lands were sold to Panachand, who assigned them to the plaintiff. In January, 1878, the defendant, as *khot*, took possession of the land, alleging that Babsha had no right to mortgage; that he had left the village and forfeited his occupancy; that he (the defendant) had thereupon rightfully taken possession of the land in 1878, and that the occupancy had been declared forfeited by revenue authorities in August, 1887, under ss. 86 and 153 of the Bombay Land Revenue Code, Bombay Act V of 1879. In 1888 the plaintiff brought this suit to recover the lands. The lower Court held that the defendant by accepting rent from the mortgagee was proved to have "consented to the mortgage and its necessary consequences."

[678] On appeal to the High Court,

Held, reversing the decree of the lower Court, that the plaintiff on the strength of his purchase from Panachand in 1887 had no right to eject the defendant.

[R., 30 B. 290 (303) = 7 Bom. L.R. 941.]

SECOND appeal from the decision of M. P. Khareghat, Assistant Judge of Thana.

Suit to recover possession of certain lands. The lands in dispute were *khoti* lands, of which one Babsha *alias* Babaji Hir Mehtar was the registered occupant. He had mortgaged the lands with possession to Velji, the brother of the present plaintiff. The mortgagee got a decree on his mortgage, and the lands were sold under the decree at a Court sale and were purchased by one Panachand Girdhar, who subsequently assigned his rights under the purchase to the plaintiff. The plaintiff thereupon let

---

* Second Appeal, No. 307 of 1891.

(1) 9 B. 254. (2) P.J. for 1890. 250. (3) 10 C. 11. (4) 6 B. 663.

out the lands to tenants, from whom the defendant Purushottam Vaman Soman, the *khot* of the village in which the lands were situate, took possession. The plaintiff now sought to recover possession of the lands, alleging that the defendant had illegally taken possession.

The defendant contended that the lands in dispute being *khoti*, the tenant Babsha had no right to alienate them. He alleged that Babsha having left the village for more than twelve years, he (defendant), as *khot* had applied to Government in the year 1878 to have the lands entered as *khoti khalsa* (lapsed to the *khot*), and that his application having been granted, he had been in possession and enjoyment of the lands as owner, and that he had no knowledge of the decree on the mortgage, nor of the Court sale and purchase thereunder, and that the plaintiff was not entitled to recover possession after the lands had been entered in the Government records as *khoti khalsa*.

The Subordinate Judge (Rao Saheb B. S. Joshi) allowed the plaintiff's claim.

The defendant appealed, but the Assistant Judge confirmed the decree.

The defendant preferred a second appeal.

Purushottam Parashuram Khare, for the appellant (defendant) :—The Judge found that as we received assessment from the **[679]** mortgagee Velji, we had consented to the mortgage by Babsha. He held that we had waived our right to object to the alienation by receiving rent from the alienee. We submit that though we received rent from the mortgagee, we never consented to the sale of the property either to the respondent or to his assignor the auction-purchaser. We are, therefore, not bound by the sale. Further, the sale had the effect of forfeiting the occupancy rights of the original tenant, and the lands being entered in the Government records as *khoti khalsa*, we have become their full owner.

The Judge has found that the plaintiff's vendor did not obtain any greater right than the original tenant, and, therefore, he could not further alienate, our consent being only to the first alienation and its necessary consequences. We contend that the sale to the respondent was not a necessary consequence of the original alienation, *viz.*, the mortgage transaction effected by Babsha. It may be that the auction sale to Panachand was the necessary consequence of the mortgage, but the sale by Panachand to the plaintiff was not a further necessary consequence. The appellant is the *khot* of the village, and the lands in dispute were entered in his name, as *khoti khalsa*, in or about the year 1878, while the Court sale was held in January, 1886, and the assignment to the respondent is dated February, 1887 ; so neither at the time of the Court sale, nor of the purchase by the respondent, the tenant had any interest in the land. We, therefore, submit that the respondent is not entitled to recover possession.

Narayan Ganesh Chandavarkar, for the respondent.

JUDGMENT.

CANDY, J.—This suit was brought in 1888 for possession of certain lands by plaintiff as assignee from one Panachand, who was the purchaser in a sale in execution of a mortgage decree against Babsha, the registered occupant of the lands in a *khoti* village. Plaintiff alleged that he had let the lands to his tenants, but that the defendant *khot* had wrongfully taken possession in January, 1878. Defendant—the *khot*—pleaded that Babsha had no right to mortgage the lands, and that, by leaving the village, Babsha had forfeited his occupancy, and that he (the *khot*) had taken possession in 1878.

1892
SEP. 16.
APPEL-
LATE
CIVIL.
17 B. 677.

[680] The Subordinate Judge found that the plaintiff as purchaser from Panachand (the purchaser at the Court sale) was entitled to bring the suit; that the occupants of *khoti* lands in defendant's villages could "make a transfer of their occupancy rights as by mortgage or sale," and that the lands were not liable to be classed as "*khoti khalsa*," since, though Babsha had left the village, his son was residing there, and the order of the revenue authorities (Ex. 12) directing the lands to be entered as "*khoti khalsa*" was passed in August, 1888, after the institution of the suit. On appeal made by the *khot* to the District Court the Assistant Judge found that there was "not the slightest evidence that any tenant ever claimed to alienate his tenancy as of right and the *khot* consented to such claim or that he ever led his tenants to expect that he would not contest such a claim. On the contrary his application in 1878 to the Mamlatdar to have the lands given up by tenants transferred to his name (Ex. 12) shows that he was ready enough to exercise his right whenever opportunity offered." But the Assistant Judge held that the *khot's* consent to the particular alienation in question had been established by the fact that he had allowed the mortgagee to be in possession and had taken rent (assessment) from him for six or seven years. "No doubt" (the Assistant Judge said) "the alienee has no more right than the original tenant, and, therefore, he cannot alienate it further, the consent being only to the first alienation and its necessary consequences."

On second appeal made to this Court by the *khot*, it has been pointed out that on the Assistant Judge's finding the plaintiff is not entitled to succeed; for admitting that the *khot* consented to the particular mortgage by Babsha to Velji (as to which reference may be made to the remarks of this Court in *Nagardas* v. *Ganu* (1)), and that a necessary consequence of that alienation was a suit brought by Velji on the mortgage, and a Court sale, in which Panachand was the purchaser, it was not a further necessary consequence that Panachand should sell his rights to the plaintiff. To this the plaintiff's pleader rejoins that the plaintiff is an undivided brother of Velji, the original mortgagee. This may be so; but the suit was not brought by the plaintiff as [681] mortgagee: the claim is distinctly based on the fact that Panachand had assigned his rights, as Court purchaser, to the plaintiff, and that he (plaintiff) while in possession through his tenants was dispossessed in January, 1888. It has now been found by the Assistant Judge that the *khot* took possession of the lands in 1877 or 1878, (and has held possession ever since), and that he then applied to the revenue authorities for the forfeiture of the occupancy (ss. 86, 153, Land Revenue Code). It is also clear that the occupancy was declared forfeited to the *khot* in August, 1887, before the institution of this suit (not after, as supposed by the Subordinate Judge). Whether Babsha's son resided in the village or not, it is not contended that the registered occupant or any one on his behalf paid or tendered the assessment since 1879. It is thus clear that the plaintiff, on the strength of his purchase from Panachand in 1887, has no right to eject the *khot*. Under these circumstances we must reverse the decree of the Assistant Judge, and reject the claim. All costs on plaintiff throughout.

Decree reversed.

(1) P. J. (1891) 107.

17 B. 681.

1892
SEP. 20.

APPELLATE CIVIL

APPELLATE CIVIL

17 B. 681.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Candy.

MAHADU (*Original Defendant No.* 2), *Appellant v.* LAKSHMNAN. (*Original Plaintiff*), *Respondent.** [20th September, 1892.]

Jurisdiction—Revenue Jurisdiction Act (X of 1876), s. 4 (c)—Mortgage—Suit for redemption—Sale of mortgaged land by Native Chief for arrears of assessment—Purchaser at sale—Claim by purchaser against mortgagor and mortgagee.

The plaintiff sued to redeem certain land mortgaged by him to the first defendant. The second defendant claimed the land as owner, alleging that the mortgagor and mortgage had failed to pay the assessment on the land to the Native Chief to whom it was due. The latter had accordingly sold it by public auction to realize the assessment, and he (defendant No. 2) had bought it. The Court of first instance rejected the plaintiff's claim on the ground that the suit could not be entertained by a Civil Court under the provisions of the Revenue Jurisdiction Act (X of 1876) and the Land Revenue Code (Bombay Act V of 1879).

On appeal the District Court reversed the decree and remanded the case for trial on the merits.

Held, confirming the order of the District Court, that Government having rendered no assistance in the proceedings for the realization of the revenue by the **[682]** Native Chief on which the defendant relied, the jurisdiction of the Civil Court was not taken away by s. 4 (*c*) of the Revenue Jurisdiction Act (X of 1876).

APPEAL against an order passed by G. C. Whitworth, District Judge of Nasik.

The plaintiff sued to redeem certain land mortgaged by him to defendant No. 1. Defendant No. 2 was in possession.

Defendant No. 1 (Vithu) answered that the mortgage debt was not paid off, and that a large sum was still due to him.

Defendant No. 2 (Mahadu valad Shama) resisted the claim. He admitted that the land in dispute originally belonged to the plaintiff and had been mortgaged by him to defendant No. 1, but he alleged that they had both failed to pay the Government assessment due to the Chief of Vinchur, who had therupon sold the land at public auction for the recovery of the arrears of assessment, and that he (defendant No. 2) had purchased it. He, therefore, claimed to hold the land as owner.

The Subordinate Judge rejected the plaintiff's claim on the following grounds :—

"Now the simple question is that whether, after the land has been disposed of for default in payment of arrears of Government revenues thereon by the occupants thereof, can the Civil Court take cognizance in having the land restored to the occupant. My opinion is in the negative. The reasons are that s. 4, both paragraphs of cl. (*c*) and last paragraph of cl. (*f*) of the Revenue Jurisdiction Act (X of 1876) prevents Civil Courts from entertaining claims against Government or others for setting aside sales for arrears of land revenue or claims connected with or arising out of any proceedings for the realization of land revenue or respecting the occupation of vacant land. Here, if there is any claim of the plaintiff or defendant No. 1, it is against not defendant No. 2, but against the Vinchurkar Chief, who is not made a party. The Vinchur Chief with respect to the land occupies the same position as the British Government with respect to revenue-paying lands in British India, and as the Collector's

* Appeal No. 22 of 1892.

1892
SEP. 20.
APPELLATE CIVIL.
17 B. 681.

procedings under ss. 56 and 57 of the Land Revenue Code (Act V of 1877) could not be taken cognizance of by the Civil Courts, so the Vinchurkar Chief having exercised a similar power [683] under ss. 56 and 57 of the Land Revenue Code in respect of the lands in suit for arrears of revenue, the Civil Court cannot take cognizance."

On appeal by the plaintiff the District Court reversed the decree and remanded the case for trial on the merits. The Judge remarked :—

"I think the Subordinate Judge was wrong in regarding the Vinchurkar as standing in the place of Government for the purposes of the Land Revenue Code and the Revenue Jurisdiction Act. If the Vinchurkar was an independent Chief, then Vinchur was not British India, and the Acts named would not apply at all. But it is admitted that the Vinchurkar was the holder of a *saranjam* and exercised both civil and magisterial powers under *sanads* from the British Government, and there is nothing to show that he had higher rights in revenue matters than can be conferred upon holders of alienated villages under the Land Revenue Code. These do not include the power of forfeiture of land. Only forfeiture to Government is recognised (s. 153), and Government was not concerned in this matter. If the land was sold for default, it was sold subject to the first defendant's lien ; if it was not sold, it is still the plaintiff's, subject to the first defendant's lien."

Defendant No. 2 preferred a second appeal.

Shivram Vithal Bhandarkar, for the appellant.

Daji Abaji Khare, for the respondent.

JUDGMENT.

SARGENT, C. J.—As it is clear from the judgment of the Subordinate Judge, and it is also assumed by the District Judge, that Government rendered no assistance in the proceedings for the realization of the revenue by Vinchurkar, on which defendant No. 2, relies, we must hold that the jurisdiction of the Civil Court is not taken away by s. 4 (*c*), Act X of 1876. And we, therefore, confirm the order with costs.

Order confirmed.

---

17 B. 684 (F.B.).

[684] FULL BENCH.

Before Mr. Justice Parsons, Mr. Justice Telang, and Mr. Justice Candy.

RATULAL RANGILDAS (*Plaintiff*) *v.* VRIZBHUKHAN PARABHURAM (*Defendant*).* [22nd April and 27th September, 1892.]

Stamp—Order for payment of money on a person not a banker.

The plaintiff agreed to lend money to the defendant for payment of his trade debts, &c. In pursuance of the agreement the defendant gave his creditors "*chits*" for certain sums. These "*chits*" were addressed to the plaintiff and requested him to pay the amounts mentioned therein. He did so, and now sued for the amount advanced. It was contended by the defendant that the "*chits*" being cheques or bills of exchange were inadmissible in evidence, because unstamped. The Court found that by the agreement the plaintiff was not constituted the defendant's banker within the meaning of cl. (6), s. 3 of the Stamp Act, 1879.

Held that the *chits* did not require a stamp.

[D., 13 Ind. Cas. 330=38 P. L. R. 1912=184 P. W. R. 1912.]

---

* Civil Reference, No. 21 of 1891.

1892
SEP. 27.

FULL BENCH.

17 B. 684 (F.B.).

THIS was a reference made by Khan Bahadur Burzorji Edalji Modi, Judge of the Court of Small Causes at Surat, under s. 49 of the Indian Stamp Act (I of 1879).

The facts stated in the reference were as follows:—

The plaintiff agreed to lend the defendant money required by the latter for paying his trade debts, &c. In pursuance of this agreement the defendant between the 24th July, 1888, and the 5th November, 1888, gave "*chits*" to his creditors addressed to the plaintiff. These "*chits*" were all in the following form:- "To Patel Ratulal Rangildas written by Vrizbhukhandas Parbhuram. Give Rs. (stating amount) to (stating name of payee). Dated, &c."

These *chits* were presented to the plaintiff, who paid the amounts mentioned in them, and got a receipt endorsed on the back of each "*chit.*"

The plaintiff after giving credit for certain payments brought this suit for Rs. 499. The defendant contended that the "*chits*" were inadmissible in evidence, unless stamped with an anna stamp, as bills of exchange or cheques, and that the duty and penalty could not be accepted under s. 34 of the Stamp Act I of 1879.

[685] The Judge submitted the following question for decision:—

"Whether the *chits* * * are chargeable with a stamp duty of one anna either under article 19 of sch. I of Act I of 1879 as cheques or under any other provision of the Stamp Act."

The opinion of the Judge was that the "*chits*" were not chargeable with a stamp duty, as they were not cheques.

TELANG, J.—The statement of the agreement in the plaint, as summarized by the Small Cause Court Judge, is very loose, and it is not easy from that statement to make out with precision the relations of the parties as created by that agreement. I think it will be better to ask the Small Cause Court Judge to take evidence as to the nature of the original agreement (which does not appear to be in writing) and certify his finding on such evidence before we express an opinion on the question put. As the matter stands, I am inclined to think that the plaintiff was *not* a 'banker,' and that the *chits* in question need not have been stamped. The plaintiff appears only to have undertaken to lend money as required for the purpose indicated, and that alone can hardly constitute him the defendant's 'banker.'

BIRDWOOD, J.—I concur in the proposed reference. The following issue might be sent down for trial:—

"Whether the plaintiff was constituted by the alleged agreement the defendant's banker, within the meaning of cl. (6) of s. 3 of the Indian Stamp Act, 1879?"

Both parties should be allowed to give evidence as to the nature of the agreement, and the finding should be certified within three months.

SARGENT, C. J.—I concur.

The case was accordingly sent back, and the finding of the Judge on the above issue was in the negative. The case came again before the Full Bench.

JUDGMENT.

PER CURIAM.—The Small Cause Court Judge having found on the issue in the negative, the answer to this reference must also be in the negative.

Order accordingly.

1892
SEP. 27.

APPELLATE CIVIL.

17 B. 686.

17 B. 686.

[686] APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Candy.

BAYABAI (*Applicant*) *V.* SARASVATIBAI, MINOR, BY HER GUARDIAN GANGADHAR BHAGAVANT (*Opponent*).* [27th September, 1892.]

Will—Probate—Application for probate refused by District Court on ground that will not proved—On appeal finding by High Oourt that the will was proved—Subsequent application for probate to be made to District Court and not to High Court—Practice—Procedure.

Where on appeal from the District Court it was found by the High Court that a will was proved.

Held that a subsequent application for probate should be made to the District Court.

THIS was an application against an order passed by Dr. A. D. Pollen, District Judge of Poona.

One Bayabai presented an application to the District Court at Poona to obtain probate of a certain will under Act V of 1881. The District Judge found that the will was not proved and rejected the application. Bayabai appealed, and the High Court reversed the order, holding that the will was proved by the evidence, and directed that probate be granted to her (see Printed Judgments for 1891, p. 146).

In pursuance of the High Court's order, Bayabai presented a fresh application to the District Court for the grant of the probate on the 10th February, 1892. The application was also rejected by the Judge on the following grounds:—

"The application for probate must be made to the Court that ordered the grant of probate. This Court cannot proclaim that the will was proved before it when it has held that the will was not proved. The probate is equivalent to a decree, and when a decree is reversed on appeal by an appellate Court, it is the appellate Court that passes a new decree."

Bayabai then applied for probate to the High Court.

Mahadeo Chimnaji Apte, for the applicant.

JUDGMENT.

SARGENT, C.J.—The District Judge objects to issuing a probate, because, he says, he cannot proclaim that the will was proved [687] before the District Court. No doubt the District Court would have to state in the probate that the will was proved before it, but so it must be deemed to have been, after the decision of this Court that it was established on the evidence. In order to execute the order of this Court a probate, (which is not, as the District Judge supposes, a decree of the Court, but "the copy of the will under the seal of the Court" s. 3, Act V of 1881), has to be prepared and issued, which, under s. 583, is the duty of the lower Court. We must, therefore, refuse the application that probate be granted by this Court, and direct the District Judge to grant it.

Application rejected.

* Civil Application No. 443 of 1892.

17 B. 687 (F.B.).

1892
SEP. 29.

FULL BENCH.

17 B. 687 (F.B.).

FULL BENCH.

Before Mr. Justice Parsons, Mr. Justice Telang and Mr. Justice Candy.

PRALHAD LAKSHMANRAV NIKANE (*Plaintiff*) *v.* VITHU AND ANOTHER (*Defendants*).* [29th September, 1892.]

Stamp—Money-bond—Endorsement of transfer—Sections 13, 14 *and* 34 *of the Indian Stamp Act* (*I of* 1879).

The endorsement of transfer written on a simple money-bond duly stamped requires a stamp, and can be stamped under s. 34 of the Indian Stamp Act (I of 1879).

THIS was a reference made by Rao Saheb Sakharam Mahadev Karandikar, Subordinate Judge of Devgad in the Ratnagiri District, under s. 49 of the Indian Stamp Act (I of 1879).

The defendants Vithu and Atma executed a simple money-bond in favour of one Ramshet Vitshet Khadaya, who subsequently transferred his interest in the bond to plaintiff Pralhad Lakshman Nikane. The instrument of transfer was written on the back of the impressed stamp-paper on which the principal bond was written. A question having arisen as to whether the instrument of transfer required to be stamped, the Subordinate Judge submitted the following question for decision :—

"(1) Whether the instrument of transfer on which the plaintiff has sued, can be stamped by this Court as per s. 34 of the Stamp Act I of 1879."

[688] The opinion of the Subordinate Judge was in the affirmative.

There was no appearance of parties.

OPINION.

TELANG, J.—It appears to us that the endorsement of transfer in this case cannot be treated as falling within the exemption allowed by the proviso to s. 13, which in terms extends only to "any endorsement which is duly stamped or is not chargeable with duty." *Ex concessis* the endorsement in this case is *not* duly stamped and *is* chargeable with duty. It must, therefore, be held to fall under the principal clause of s. 13, which forbids a second instrument being written upon a paper on which one instrument has already been written. The second instrument being thus written in contravention of s. 13 must under s. 14 be deemed to be unstamped. And then s. 34 and its provisos, which apply to all unstamped instruments, whether actually or only constructively so, must come into operation. This appears to us to be the true construction of the sections. But in *In the matter of Hanmapa* (1) the opinion is expressed that the Collector ought to refuse to stamp the endorsement, because it is made in contravention of s. 13. That seems to indicate that in such a case the power to set the matter right by the enforcement of a penalty, as provided elsewhere in the Act, does not apply. As at present advised, we are not prepared to go as far as this. It would be equivalent to adding another sanction to the rule laid down in s. 13 besides the sanction provided in s. 14. We think that that is not a correct construction of the Act. We have consulted Sargent, C.J., upon the point, and he authorizes

* Civil Reference No. 13 of 1892.

(1) 13 B. 281.

1892
SEP. 29.
FULL BENCH.
17 B. 687 (F.B.).

us to say that he agrees in the view now expressed, and that in *Hanmapa's* case it was not the intention of the Court to decide the point which has here arisen. The answer to the question put by the Subordinate Judge must be in the affirmative.

Order accordingly.

17 B. 689.

[689] APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Candy.

FARDUNJI ASPANDIARJI (*Original Opponent*), *Appellant v.* NAVAJBAI (*Original Applicant*), *Respondent.** [29th September, 1892.]

Letters of administration, grant of—Deceased having no property or fixed place of abode within district—Jurisdiction of the District Judge—S. 240 of the Indian Succession Act (X of 1865).

A District Judge cannot grant letters of administration to a Parsi if the deceased had not at the time of his death a fixed place of abode or any property within his district. See s. 240 of the Indian Succession Act, X of 1865.

APPEAL from an order of J. B. Alcock, District Judge of Surat.

One Aspandiarji died after making a will of his property bequeathing a legacy to his daughter Jaiji, who had possession of part of his estate at Surat. The will was proved and Jaiji received her legacy. Afterwards Navajbai, widow of Mancherji Aspandiarji (son of the testator), brought a suit against Jaiji in the Subordinate Judge's Court at Surat for the administration of Aspandiarji's estate. Jaiji died pending that suit. Navajbai thereupon presented an application to the District Court at Surat under s. 222 of the Indian Succession Act (X of 1865) for the grant to her nominee Thakardas of letters of administration to Jaiji's estate.

The opponent Fardunji Aspandiarji, a brother of Jaiji, contended that the Court had no jurisdiction to grant the application, inasmuch as Jaiji left no property within the jurisdiction of the District Court at Surat, and that she resided at Bombay.

The District Judge of Surat granted the application, observing: "Jaiji had possession of part of Aspandiarji's estate in Surat. She gets nothing under his will except a legacy, which she has received; the will having been proved and the estate administered in Surat. This Court, therefore, has jurisdiction to make an order under s. 222."

The opponent appealed against the order.

Govardhanram M. Tripathi, for the appellant:—The application can only be granted under the provisions of s. 240 of the Indian Succession Act. Jaiji owned no property of her own at [690] Surat, nor was she a resident there. The mere circumstance that the administration suit is going on at Surat, and that Jaiji was in possession of Aspandiarji's property at Surat, could not give to the District Judge the jurisdiction to entertain the application for administration to Jaiji's estate.

Manekshah J. Taleyarkhan, for the respondent.

JUDGMENT.

SARGENT, C.J.—The Court of Surat, in which the suit to administer the estate of Aspandiarji has been brought, had no jurisdiction to grant

* Civil Reference No. 84 of 1892.

administration of Jaiji's estate. Section 222 of Act X of 1865 enables the plaintiff to apply for the issue of letters of administration to his nominee; but the Court, to which such application had to be made, was the Court as determined by s. 240, and as Jaiji had not "a fixed place of abode, nor owned property," within the district of the District Judge of Surat at the time of her death, that Court had no jurisdiction to grant the letters of administration asked for.

We must, therefore, discharge the order appealed from, but without costs.

Order discharged.

---

17 B. 690 (F.B.).

FULL BENCH.

Before Sir Charles Sargent, Kt., Chief Justice, Mr. Justice Parsons and Mr. Justice Telang.

GADADHAR BHAT (*Original Plaintiff*), *Appellant v.*
CHANDRABHAGABAI (*Original Defendant*), *Respondent.**
[6th December, 1892.]

Hindu law—Inheritance—Moveable property—Daughter-in-law inheriting moveable property from father-in law—Estate taken by her in such property—Widow—Widow's estate in moveables—No power to dispose by will of moveables.

Where a son predeceased his father, and the son's widow subsequently succeeds to her father-in-law's property as his heir, she takes the same estate in it as she does in property inherited by her from her husband.

Under the law of Mitakshara a widow has no power to bequeath moveable property inherited by her from her husband.

In the presidency of Bombay, moveable property inherited by a widow from her husband devolves on her death to her husband's heirs.

If the decision of *Damodar* v. *Purmanandas* (1) is to be regarded as necessarily giving to the heir of a widow on her death such moveable property inherited from her husband as remains undisposed of by her, it must be treated as of no authority.

[**F.**, 28 B. 453=6 Bom. L.R. 460 (462); 8 Ind. Cas. 214 (215)=4 S.L.R. 77; **R.**, 24 B. 192 (204)=1 Bom.L.R. 574; 32 B. 59=9 Bom.L.R. 1305 (1318); 2 Bom. L.R. 888 (890); 10 Bom-L.R. 210 (222); 5 Ind. Cas. 752=6 N.L.R. 46 (47); **D.**, 21 B. 170 (173).]

[691] THIS was a first appeal from the decision of Rao Bahadur Naro Mahadeo Thosar, First Class Subordinate Judge of Ahmednagar.

The plaintiff, Gadhadhur Bhat, sued to recover the property of his paternal uncle Bhatam Bhat Sakharam (see the genealogy given below in the judgment of Jardine, J.), who died in 1881. Bhatam Bhat had a son named Kashinath, who predeceased his father, having died childless in 1878. He left a widow named Vithabai, who on Bhatam's death in 1881 took possession of his property and remained in possession until her death in 1887. On her death her sister, the defendant Chandrabhagabai, took possession, claiming it under the will of Vithabai. The plaintiff now sued for this property, claiming it as the heir of Bhatam.

The Subordinate Judge found that the plaintiff was the heir of Bhatam and that the will of Vithabai was invalid as to the immoveable property, but valid as to the moveable property.

---

* Appeal No. 34 of 1890.

(1) 7 B. 155.

1892
DEC. 6.
FULL BENCH.
17 B. 690 (F.B.).

The plaintiff appealed.

In appeal the case came before Jardine and Parsons, JJ., who referred the following question to a Full Bench :—

" Whether under the law of the Mitakshara, Vithabai had power to bequeath to the defendant by her will moveable property inherited by her from her husband."

In referring the case the Judges stated their opinion as follows :—

JARDINE, J.— This appeal is made by the plaintiff from an original decree of the Subordinate Judge of the First Class at Ahmednagar. The plaintiff claimed certain ancestral moveable and immoveable property from the defendant, alleging that he was entitled as heir of Bhatam Bhat. The defendant pleaded title under the will of her sister Vithabai, the deceased widow of Kashinath, the son of Bhatam Bhat, who survived Kashinath. Kashinath seems to have left no issue. The relationships are shown in the following table :—

[692] Megbasham Bhat.

Ramchandra	Sakharam
Nana	Bhatam Bhat died 1881
Gadadhar Bhat (plaintiff)	Kashinath died 1878, leaving widow Vithabai, who died 1887.

The Subordinate Judge found that the plaintiff was not united in family with Bhatam Bhat ; that on the death of Vithabai he was the proper heir of Bhatam Bhat ; that the will purporting to be made by Vithabai was proved ; that it was invalid as regards the devise of the immoveable and valid as regards the bequest of the moveable property.

The only question argued before us, in appeal, is one of law, namely, whether Vithabai had power to bequeath the moveable property, which includes some bonds that have come into the defendant's possession.

The reasons for this part of his decision are recorded by the Subordinate Judge as follows :—" Bhatam Bhat had only a money interest in the property taken in mortgage. So what he left to his daughter-in-law, Vithabai, was simply a money interest,—that is, so much money converted into a mortgage-right shape. So these mortgage-bonds as well as the other moveable property, consisting of ornaments and simple money bonds, were a sort of property which I regard Vithabai as competent to devise in favour of the defendant. If she had disposed of this property in her lifetime, I think no one could have questioned her competency to do so. If this was the case in her lifetime, I think the same may be said to hold good after her death."

Mr. Jardine contended for the appellant that moveable property inherited by a widow from her husband's family is not *stridhan*, and, therefore, is not her absolute property to dispose of as she pleases by will. Mr. Branson argued the contrary of these propositions on behalf of the respondent. In dealing with the authorities, some of which are collected in the judgment of [693] Mr. Justice Scott in *Damodar* v. *Purmanandas* (1), Mr. Jardine conceded that moveable property taken by a widow under *gift or will* of the husband is *stridhan*, and at the widow's disposal, and

(1) 7 B. 155.

that the above decision was right as regards the property in suit before Mr. Justice Scott, which had come to the widow by bequest of her husband, but he contended that the learned Judge went too far in the *obiter* remark at p. 164, that "the *resume* of recent decisions shows a consensus of authority deciding that a widow may deal absolutely with moveables *inherited* from her husband."

Mr. Jardine began by citing the authority of Mr. Mayne, s. 370, Mayne's Hindu Law (5th Ed.), which quotes three cases out of 1 Borradaile—*Chooneelal* v. *Jussoo* (1), *Dhoolubh* v. *Jeevee*(2), *Umroot* v. *Kalyandas* (3)—and *Venkata Rama* v. *Venkata Suriya* (4) for the following statement:—

"A married woman may make a will of her *stridhana* or any other property which is absolutely at her own disposal. But she cannot devise property inherited from males, since her interest in it ceases at her death."

Mr. Mayne's views are more fully stated in chap. 20 about Woman's Estate where the definition of *stridhan* in the Mitakshara is fully discussed. In s. 567 he comes to the power of a widow over moveables, and in s. 598 observes, in conclusion, as follows:—

"Whenever the question arises for final decision, it will be well to bear in mind the observations of the Judicial Committee in *Bhugwandeen* v. *Myna Baee* (5). These show that the texts which authorize a woman to dispose absolutely of moveable property *given* to her by her husband are different from those which control her disposition of property *inherited*, and that she may probably have larger powers over the former than over the latter. Also, that reliance can no longer be placed upon the much canvassed text of the Mitakshara (ii 11. s. 2), as raising any [694] analogy between property inherited by a woman and her *stridhanum*, as regards her right to dispose of it."

The rulings referred to are those mentioned in s. 567 at p. 706, *Thakoor* v. *Rai Baluk Ram* (6), *Bhugwandeen* v. *Myna Baee* (5), *Collector of Masulipatam* v. *Cavaly Vencata* (7), *Keerut* v. *Koolahul* (8), To the above I would add *Muttu Vaduganadha* v. *Dora Singa* (9). See the passage at pp. 108, 109, quoted in *Jankibai* v. *Sundra* (10).

Mr. Branson, however, relies on the views expressed in *Vijiarangam* v. *Lakshuman*(11) by Mr. Justice West that all property acquired by a woman by inheritance is classed by the Mitakshara as *stridhan*. On this subject I will presently refer to the discussion by the Full Bench in *Bhagirthibai* v. *Kahnujirav* (12) and the interpretation of that decision in *Jankibai* v. *Sundra*. However, it does not follow, as a consequence from the property being *stridhan*, that the widow has unrestricted power to alienate. At p. 266 of the report of *Vijiarangam's* case, West, J., says: "A widow may dispose as she pleases of property as to which this power is expressly conferred, but to recognize inherited property as part of her *stridhan* by no means involves the consequence that she can alien it without good reason." See West and Buhler, 317 to 322, for this discussion and cf. s. 584, Mayne's Hindu Law. The same reasoning was also applied to the devolution, on the death of the widow, of moveables inherited from

(1) 1 Bor. 60. (2) 1 Bar. 75. (3) 1 Bor. 314.
(4) 2 M. 333. P.C. (5) 11 M.I.A. 487,510 (514)=9 Suth. W.R. (P.C.) 23.
(6) 11 M. I.A. 139 (173). (7) 8 M.I. A. 529.
(8) 2 M. I. A. 331. (9) 8 I.A. 99, 108 (109)=3 M. 290.
(10) 14 B. 612 (621). (11) 8 B H.C.R. O.C.J. 244 (260, 271) (12) 11 B. 285.

1892
DEC. 6.
FULL BENCH.
17 B. 690 (F.B.).

the husband and treated as *stridhan* in *Harilal* v. *Pranvalavdas* (1) by Sargent, C.J.

The earlier cases in Borradaile's Reports are not of much importance as authorities; they are reviewed in *Bhagirthibai's* case (2). In the case of *Pranjivandas* v. *Devkuvarbai* (3), which arose in the Island of Bombay, Sir M. Sause. Chief Justice of the Supreme Court, comes to the following conclusion:—"On the **[695]** whole, I think the spirit and practice of Hindu law, as recognized in Western India, will be best construed by treating the widow as having uncontrolled power over the moveable estate." In *Vinayak* v. *Lakshmibai* (4) that Chief Justice says the above decision was passed after lengthened consideration of all the accessible authorities, and that the doctrine about daughters was mainly based on the authority of the Mayukha. The case of *Bechar* v. *Bai Lakshmi* (5) was from Gujarat. It came before Forbes, Erskine and Westropp, JJ. They were "of opinion that the Hindu law existing on this side of India gives a widow absolute power over the moveable property of her deceased husband which has been inherited by her." In *Lakshmibai* v. *Ganpat* (6), Arnould, J., decided that the widows of separate Hindus who died without male issue are entitled as heirs, *absolutely* to their husbands' shares of the moveable property. The case arose in this island.

The above decisions are those in which the present question has been actually decided in the Courts of this Presidency. In other cases there are *dicta* on which Mr. Branson relies. In *Balvantrav* v. *Purshotam* (7), where the Full Bench decided a question of limitation, they say: "The widow in this Presidency takes a limited estate only in the immoveable property of her childless husband, or son, but she takes his moveable estate absolutely—*Bechar* v. *Bai Lakshmi* (5) *Vinayak* v. *Lakshmibai* (4), *Pranjivandas* v. *Devkuvarbai* (3); *Chandrabhagabai* v. *Kashinath* (8). In the case of *Mayaram* v. *Motiram* (9), immoveable property only was in suit. So in *Tuljaram* v. *Mathuradas* (10), the question before the Court related only to immoveable property received by a widow in gift. The following passage in Westropp, C. J.'s judgment at p. 670 seems not to have been required for the decision of the case:—"Here in this Presidency, the widow, who as such takes the property of her husband dying without leaving male issue and separated from his kinsmen, is, except for certain limited purposes, restrained from alienating such portion **[696]** of that property as is immoveable. In it she has only an estate *durante viduitate*, but she is entitled to his moveable estate absolutely—*Pranjivandas* v. *Devkuvarbai* (3); Mayukha, Ch. IV, s. 8, pl. 3, 4; see also 8 Bom. H, C. Rep. at p. 156, O. C.J.; 4 Bom. H.C. Rep. at p. 163, O.C.J. and 6 Bom. H.C. Rep. p. 1; Act XV of 1856, s. 2."

The next case is that of *Damodar* v. *Purmanandas* (11) decided by Scott, J., in 1883. The *dictum* already quoted is *obiter* as regards *inherited* moveables. The learned Judge expressly says that the question of law before him related to property left to the widow by her husdand's will. The following authorities which he cites deal with wills and gifts;—*Koonjbehari Dhur* v. *Premchand* (12); *Venkata Rama* v. *Venkata Suriya* (13);

(1) 16 B. 229.
(2) 11 B. 285 (298).
(3) 1 B.H. C. R. O. C. J. 130.
(4) 1 B.H. C. R. O. C. J. 117 (124).
(5) 1 B. H. C. R. A. C. J. 56.
(6) 4 B. H. C. R. O. C J. 162.
(7) 9 B. H. C. R. 99 (111).
(8) 2 B. H. C. R. 323.
(9) 2 B.H. C. R. 313.
(10) 5 B. 662.
(11) 7 B. 155.
(12) 5 C. 684.
(13) 1 M. 281, and in the Privy Council on appeal 2 M. 333.

Vyavahara Mayukha, Ch. IV, s. 10, pl. 9. The following, which he also cites, relate to property inherited, and the last of the three is *obiter*—*Bechar* v. *Bai Lakshimi* (1), *Pranjivandas* v. *Devkuarbai* (2), and *Balvanrav* v. *Purshotam* (3). The text of Katyayana, which Scott, J., restricts to immoveables "certainly includes both moveable and immoveable property" according to the Privy Council in *Bhugwandeen's* case (4) and has since been interpreted to include moveables by Turner, C. J., and Muttusami, J., in *Narasimha* v. *Venkatadri* (5), who at p. 292 also observe that "in Vyavahara Mayukha, Ch. IV, s. 8, sloka 4, Katyayana's text is expressly stated as applying to moveable and immoveable property." Mr. Justice Scott also quotes some decisions of the Privy Council. To meet Mr. Mayne's argument in s. 598, he remarks that the Judicial Committee strictly limited their decision in *Bhugwandeen's* case to the cases governed by the Benares School, and he quotes the well-known remark in *Thakoor* v. *Rai Baluk Ram* (6), that "the result of the authorities seems to be, that although according to the law of the Western Schools the widow may have the power of disposing of moveable property inherited from her husband, which she has **[697]** not under the law of Bengal, she is by the one law, as by the other, restricted from alienating any immoveable property which she has so inherited; and that on her death the immoveable property, and the moveable, if she has not otherwise disposed of it, pass to the next heirs of her husband."

This quotation fitly leads to a discussion of the Privy Council cases to which I now turn. At p. 174 of the same Report, their Lordships say generally that there are many cases to "show that, according to the Benares and other Western Schools, the power of a widow over property inherited from her husband is limited, and that on her death it passes to his heirs." In interpreting the Mitakshara, Ch. II, s. 11, pl. 2, their Lordships exclude the widow's inherited property from peculium or *stridhan* proper. This judgment and the two cases mentioned in it and *Bhugwandeen's* case are the basis of the statement of Mr. Mayne, which, as regards immoveables, I take to be correct (s. 567) that it is thoroughly settled that a widow takes only a restricted estate, and that at her death it passes to her husband's heirs.

In *Bhugwandeen's* case (4) decided in 1867, the Judicial Committee interpret the meaning of the word *stridhan* and define the widow's power of disposal. After alluding to the Mitakshara and discussing the texts of Nareda and Katyayana found in Colebrooke's Digest, Texts 476—477, they say that "the preponderance of authority is certainly in favour of the proposition that, whether the widow has or has not the power to dispose of inherited moveables, they as well as the immoveable property, if not disposed of, pass on her death to the next heirs of the husband." At p. 512 it is remarked that "both the Vivada Chintamani and the Mayukha confine *stridhan* within the definitions of Manu and Katyayana. They exclude property inherited and the other acquisitions which are comprehended in the last clause of the paragraph of the Mitakshara, but are excluded by Sir W. Macnaghten." At p. 513 the opinion is expressed that "the reasons for the restrictions which the Hindu law imposes on the widow's dominion over her inheritance from her husband, whether

---

(1) 1 B. H. C. R. A. C. J. 56.
(2) 1 B.H. C.R. O. C. J. 130.
(3) 9 B H. C. R. 99 (111).
(4) 11 M.I.A. 487 (511).
(5) 8 M. 290.
(6) 11 M.I.A. 139 (175).

1892
DEC. 6.
FULL BENCH.
17 B. 690 (F.B.).

founded on her natural dependence on others, her duty to lead [698] an ascetic life, or on the impolicy of allowing the wealth of one family to pass to another, are as applicable to personal property, invested so as to yield an income, as they are to land. The more ancient texts importing the restriction are general. It lies on those who assert that moveable property is not subject to the restriction to establish that exception to the generality of the rule." These remarks were apposite to the decision as regards the moveable property in suit.

There are some decisions of the Privy Council which are not noticed by Mr. Justice Scott. In *Chotay Lall* v. *Chunnoo Lall* (1), the Bombay cases were reviewed by the Judges at Calcutta, and the different views held by Sir J. Arnould in *Bhaskar* v. *Mahadev* (2) and by Mr. Justice West in *Vijiarangam's* case (3), which is treated as decided on the Mayukha, are considered. At p. 31 the Privy Council say of the daughter's estate: "No doubt in the Courts of Bombay there have been rulings and *dicta* in favour of the view that she takes the entire property. Their Lordships do not think it necessary, especially after their own decisions as to widows' estates, to go into an examination of the Indian cases."

Muttu Vaduganadha's case (4) related, like the last, to the nature of a daughter's estate inherited from her father. The Privy Council deal with the passage of the Mitakshara about *stridhan*, Ch. II, s. 11, pl. 2, and say, p. 108, 'it is impossible to construe it as conferring upon a woman taking by inheritance from a male a *stridhan* estate transmissible to her own heirs.' They say of the cases of *Thakoor Deyhee*, *Bhugwandeen*, and *Chotay Lall*, that all these cases were governed by the Mitakshara law. *Bhugwandeen's* case is treated by the Calcutta Judges as authority that a Hindu widow under that law has no power to alienate the moveable estate inherited from her husband, to the prejudice of his heirs—*Sheolochun Singh* v. *Saheb Singh* (5).

In discussing *Chotay Lall's* and *Muttu Vaduganadha's* cases in *Jankibai's* case (6) I remarked that they were not Bombay cases, and that their Lordships interpreted the Mitakshara without [699] using the Mayukha, as it may be assumed they would if they had been declaring the law of this Presidency. In the present judgment I have pointed out that in *Bhugwandeen's* case they did resort to the Mayukha as well as to Katyayana and Nareda. Mr. Justice Scott in *Damodar's* case says he follows the Mayukha and he cites Ch. IV, s. 10, pl. 9, which relates to gifts only. What he cites is a text of Nareda, but he does not notice the comment of the Privy Council on the very same text in *Bhugwandeen's* case(7), which confines that text to gifts and expressly excludes inheritance.

The present case comes from Ahmednagar, where the law is based on the Mitakshara, and the Mayukha may be used in construing the Mitakshara, though the Mayukha has not the special and almost paramount authority it has acquired in Gujarat—*Bhagirthibai's* case (8). The Mayukha is only a secondary authority in the Maratha country—West and Buhler, p. 10. It serves to illustrate and supplement the Mitakshara there. But it may be followed so far only as its doctrines do not stand in opposition to its express precepts or to the general principles of the Mitakshara —*Jankibai's* case. This consideration diminishes the weight of *Pranjivan* v. *Devkuvarbai* and *Damodar* v. *Purmanandas* as well as of cases decided on

---

(1) 6 I.A. 15. (2) 6 B.H.C.R. O.C.J. 1. (3) 8 B.H.C.R. O.C. J. 244.
(4) 8 I. A. 99. (5) 14 C. 387 (390). (6) 14 B. 612 (622).
(7) 11 M.I.A. 487 (510 and 511). (8) 11 B. 285 (294).

the law of the Island of Bombay and other regions where the Mayukha has special authority. It also detracts from the value of *dicta* of distinguished Judges when based on the Mayukha, as in *Tuljaram* v. *Mathuradas*. The decision in *Bhugwandeen's* case, which Scott, J., confines to the Benares School, is really an interpretation of the Mitakshara after some consideration of the Mayukha, and has been applied by the Privy Council to cases arising in the Madras Presidency.

It becomes, therefore, an important question whether the supposed weight of authority is sufficient to require this Court to adhere to the Bombay decisions rather than follow those of the Privy Council as regards cases governed, as this is, by the Mitakshara. Now, of the three cases in which the Supreme Court and the High Court have actually decided the question before us, two arose in this island and the other in Broach. The *dicta* in the **[700]** three other cases where the question was not before the Court, *viz.*, *Balvantrav* v. *Purshotam*, *Tuljaram* v. *Mathuradas*, and *Damodar* v. *Purmanandas*, are substantially based on these Mayukha cases. *Vijiarangam's* case was decided on the Mayukha, and all that West, J., said therein about the Mitakshara is treated as *obiter* by Couch, C. J., and Ainslie, J., in *Chotay Lall's* case, and as like *Devkuvarbai's* case, a decision on the Mayukha. Sir R. Couch treats the opinion expressed by West, J., as opposed to that of Sir J. Arnoald and contrary to the decision of the Privy Council in *Bhugwandeen's* case, and adds: "He argues, as I understand him, that this case was not rightly decided." I lay stress on these words of so eminent a Judge as Sir R. Couch, because they show that he was not prepared to accept the *dicta* of Judges however learned, when they conflicted with the interpretations of the Mitakshara by the Privy Council. In *Jankibai's* case, I have expressed my belief that the remark of the Privy Council at p. 32 of the report of *Chotay Lall's* case referred to *Vijiarangam's* case, namely, that the Bombay case most relied upon was governed by the law of the Mayukha. As pointed out in *Jankibai's* case (p. 618), Sargent, C.J., in *Dalpat* v. *Bhagvan* (1) treats the decision on the Mayukha as to the *stridhan* including inherited property in *Vijiaranagam's* case as reopened by the decision of the Privy Council in *Muttu Vaduganadha's* case. See Mayne's Hindu Law, s. 576. The above observations of the Judicial Committee, by whose decisions we are bound, confining one of the most carefully considered Bombay cases to the Mayukha, seem to me to neutralize to a large extent those of the Judges of this Court who have confined the decision in *Bhugwandeen's* case to the Benares School. Doubtless we must give due weight to the rule *stare decisis*, but the question remains to which ?—those of the Privy Council directly interpreting the Mitakshara, or those of this Court applying the peculiar law of the Mayukha? Whether there has been a long course of decisions operating outside this island and the other regions governed by the Mayukha, I am unable to pronounce. None have been shown to us. Those mentioned in the two digests of unreported decisions appear to relate to immoveables. *Bai Jamna* **[701]** v. *Bhaishankar*(2), decided by Birdwood and Parsons, JJ., quotes *Damodar* v. *Purmanandas* with approval as stating the law about inherited moveables disposed of during the widow's lifetime, but does not apply that doctrine to the widow's bequest by will of inherited moveables, and on the contrary follows *Thakoor Deyhee's* and *Bhugwandeen's* cases on that point.

---

(1) 9 B. 301 (303).

(2) 16 B. 233.

1892
DEC. 6.
FULL BENCH.
17 B. 690 (F.B.).

The three rulings, as already remarked, are under the Mayukha Law; the three *dicta* are substantially based on Mayukha cases. So was *Vijiarangam's* case; and there Mr. Justice West says the consequence does not follow, from his view of the extent of the term *stridhan*, that the widow has unrestrained power of disposal, p. 269. Thus he limits the words "absolute estate."

It was after the decision in *Dalpat* v. *Bhagvan* in this Court and of *Chotay Lall's* and *Muttu Vaduganadhas'* by the Privy Council that *Bhagirthibai* v. *Kahnujirav*(1) came before a Full Bench of this Court consisting of Sargent, C.J., West and Birdwood, JJ. In *Jankibai's* case, where I sat with Birdwood, J., I gave my reasons, p. 623, for treating the decision as substantially based on the Mitakshara, the Mayukha being used where it does not conflict as a secondary authority. The Full Bench consider the Privy Council rulings. At p. 617, I personally express the opinion that we must take the decision "as settling that in this Presidency, whether under the Mitakshara or the Vyavahara Mayukha, a daughter inheriting from her father takes an absolute and not a life estate. We may also, I think, take the case as an authority for holding that the daughter took the estate as *stridhan* in some sense of the word." At p. 620 I quote this sentence from the Full Bench judgment—

"If the daughter takes an absolute estate, it has been understood she must, in the absence of an express rule to the contrary, transmit it to her own heirs." Then I add: "The implication seems to be that the establishment of the proposition, that the daughter takes an absolute estate, establishes also two other propositions, namely, that the property is *stridhan* and that it descends as such. But see Tagore Law Lectures, 1878, page 302."

[702] If I am right in this remark, the question whether the property inherited by Kashinath's widow in the case before us is *stridhan* in the narrow and technical sense as in the Mayukha, Ch. IV, s. 10, pl. 1, 2, or in its etymological and larger sense as in the Mitakshara, Ch. II, s. 11, pl. 3 and 4, is of less consequence in dealing with the Full Bench decision. So far as the present question is analogous, the first requirement is to show that the widow took an "absolute estate." That being proved, the Bench would have held it to be *stridhan*; and I think Mr. Branson's argument is inverted and is opposed to authority when he contends that if the property is *stridhan* then the widow has unrestricted power of disposal. It is true that the Full Bench judgment discusses with approval (pp. 293—311) *Devkuvarbai's* case as to power to alienate. But as I understand the judgment, this point, *viz.*, the widow's power to alienate, was not the question referred or decided. On considering the reference and arguments, as well as the language of the judgment, I come at length to the opinion that the question whether a daughter inheriting from her parents takes an absolute estate, means whether it descends to her heirs, and not to those of her father. At p. 309 the learned Judge says: "The completeness of a woman's estate in property taken by inheritance does not necessarily involve complete independence in dealing with it. The Mitakshara is careful to demonstrate that dependence is as consistent with full ownership in the case of a woman as of a child; and it seems likely that Vijnaneshvara looked to this dependence as a safeguard for the enlarged estate which he assigned to women." This view of Mr. Justice West's language is that which consists with what he said in *Vijiarangam's* case. At p. 310 he says that "the

(1) 11 B. 285.

subjection of a woman to restrictions on alienation is quite consistent with full ownership in her." I may here observe that Dr. Jolly, while affirming West J.'s view as to what the Mitakshara includes in *stridhan* as against Mr. Mayne (Tagore Law Lectures, 1883, p. 243), concludes his history of Female Property with the statement that the Mitakshara School has, by putting restrictions on dominion, removed the consequences of that identification of *stridhan* with woman's property in general. He also points out that there is [703] no authority for observing in Bombay and South India the distinction found in the Law of Mithila between moveable and immoveable property inherited by a widow. He discusses the Mayukha, pp. 252—259, and says: "It may be confidently asserted, therefore, that there is no more reason for observing this distinction in regard to property inherited from males in Bombay and South India, where this point seems to be still open to question, than in Bengal and Benares, where the non-existence of such a distinction as this has long been settled by authority." The above impairs Scott, J.'s remark, so far as it relates to the question of inherited moveables, about the commentators being all of one opinion. So also do the decisions in Bengal and the more recent in Madras. *Narasinha* v. *Venkatadri* (1) decided in 1884 is an interpretation of the Mitakshara, as to moveables inherited from a husband, by the light of the Mayukha and the southern authorities. It does not, however, notice the Bombay rulings and *dicta*. The learned Judges say: "The Mitakshara doctrine seems to be that the widow has a complete vested ownership, as contra-distinguished from a mere right to use, though her power over it to make a gift or sale at her pleasure is restricted by express texts. Hence those who considered the text of Katyayana to be applicable only to immoveable property doubted whether the widow was precluded from alienating moveable property. Having regard, however, to the extent to which the widow's power of disposition is treated, as restricted in the leading commentaries in the south, there appears to be little or no difference in the result. Hence the Judicial Committee observed in the *Collector of Masulipatam* v. *Kavali* that the restrictions on the widow's power of alienation are of the very substance of her heritage. Assuming for a moment that she has a large power over moveable than over immoveable property, it can by no means be larger than that possessed by the father of a Hindu family under the text of Yajnavalkya cited in Mitakshara, Ch. I, s. 1, sl. 27. It is observed by Mr. Mayne in s. 229 that the power must generally be taken to be limited to such necessary or suitable purposes as would come within the ordinary power of the head of a household. We should prefer to say [704] that the nature of moveable property being such that in many cases conversion is essential to its enjoyment, the widow is not precluded from converting it, but must preserve the capital, unless the expenditure of it is necessitated by the insufficiency of the income to provide for her maintenance, subject, nevertheless, to a power to dispose of a moderate portion for works of piety"—*Narasinha* v. *Venkatadri* (1).

It may be noted, in passing, that the Privy Council decision in *Lakshman Dada Naik's* case (2) and *Gurivi Reddi* v. *Chinnama* (3) were cited to us by Mr. Apte for the appellant as to the father's power to alienate by will.

The present case has been argued substantially on the judicial authorities, and I do not think it necessary now to enter on examination of the texts of Hindu law. As regards the authorities, it appears to me

---

(1) 8 M. 290. (2) 5 B. 48. (3) 7 M. 93.

1892
DEC. 6.
FULL BENCH.
17 B. 690 (F.B.).

that the solution of the question of the widow's power of alienation does not depend so much on the definitions of *stridhan* as on the reasons of the Hindu law, restricting the widow's dominion. These are given by the Privy Council in *Bhugwandeen's* case and elsewhere. The Privy Council rulings are based on the Mitakshara. The three Bombay rulings are based on the Mayukha. They deal more with the definition of *stridhan* and less with the restrictions on dominion. The various *dicta* are supported substantially by these rulings on the Mayukha, and though most of these *dicta* on the point before us are deliberate and well-considered opinions, yet they as well as the rulings have been questioned in other Courts. I do not consider the question about inherited moveables to be so firmly settled by the Bombay decisions as to require us to follow the current. It has always been met by the opposing current of Privy Council decisions. As pointed out by Scoble *arguendo* in *Vijiarangam's* case, some of the authorities are remarks of a single Judge. The case of *Narasinha* v. *Venkatadri* (1) and Dr. Jolly's lectures have seen the light since Mr. Justice Scott decided *Damodar's* case. The books show that the question has always been one in debate. I do not think it is touched by the Full Bench decision in *Bhagirthibai's* **[705]** case, which I may remark was not quoted before us. The inclination of my own views is to follow the Privy Council in *Bhugwandeen's* case. I say this on the assumption that, in cases falling under the Mitakshara law, no fixed doctrine has been established on the faith of which property has passed, and a practice grounded. The question is certainly one of general importance, and considering the opinions expressed and the rulings passed in this Court and the Supreme Court, some of them by Full Benches, in favour of the widow's power to dispose as she pleases of moveable property inherited from the husband, I am now of opinion that we should now refer to a Full Bench the following question :—

Whether, under the law of the Mitakshara, Vithabai had power to bequeath to the defendant by her will moveable property inherited by her from her husband?

PARSONS, J.—I concur in the proposed reference. Assuming that Vithabai had power to dispose of the moveable estate in suit in her life-time, it does not, I think, follow that she could dispose of it by will. In my opinion, she could not, for at the moment of her death the estate would vest in the heirs of her husband, and no estate of hers would remain to pass under the will. In the case of *Bai Jamna* v. *Bhaishankar* (2), Birdwood, J., and myself held that "there is a difference between property inherited by a woman from her husband and property acquired by her as *stridhan*. Both may be called *stridhan*, but that only can legally be held to be her personal property which is such at the time of her death, and passes as such to her own heirs." As, however, there are decisions of this Court now brought to our notice which imply the power to a widow to dispose by will of such property, the point is one that ought to be determined finally by a Full Bench.

The case being thus referred, it came on for argument before a Full Bench consisting of Sargent, C. J., and Parsons and Telang, JJ.

Jardine (with *Mahadev Chimnaji Apte*) for the appellant (plaintiff): —Under the Mitakshera, which is the paramount authority in the Deccan, a Hindu widow has no power to alienate **[706]** moveable property which she has inherited from her husband. Even a Hindu father,

(1) 8 M. 280.

(2) P.J. (1891), 77=16 B. 233.

1892
DEC. 6.
FULL BENCH.
17 B. 690 (F.B.).

whose rights under the Hindu law are more extensive than those of a widow who merely gets a life estate, is not entitled to dipose of all ancestral moveables—*Lakshman Dada Naik* v. *Ramchandra Dada Naik* (1). Though a widow may alienate moveables inherited by her from her husband or his relatives during her life-time, she cannot do so by will: her power of disposition comes to an end at her death. Property nherited by a widow in her husband's family is not her *stridhan*—Mayne's Hindu Law (4th Ed.,) s. 370: *Choonilal Jussoo* (2); *Dhoolubh* v. *Jeevee* (3); *Umroot* v. *Kalyandas* (4); *Venkata Rama* v. *Venkata Suria* (5); *Narasinha* v. *Venkatadri* (6); *Bhugwandeen* v. *Myna Baee* (7); *Sheolochan Singh* v. *Saheb Singh* (8); *Harilal* v. *Pranvalavdas* (9). See also *Isri Dut Koer* v. *Hansbutti Koerain* (10); *Gurivi Reddi* v. *Chinnamma* (11); *Mussumat Thakoor Deyhee* v. *Rai Baluk Ram* (12) and *Chotay Lall* v. *Chunnoo Lall* (13).

Gangaram B. Rele, for the respondent (defendant):—In Western India a widow has power to alienate moveable property inherited by her in her husband's family—*Bhugwandeen* v. *Myna Baee* (7). It has been an established rule that a Hindu widow can dispose of moveables during her life time, and such disposition cannot be impugned after her death. If a widow has got absolute power during her life time, why should she not have the power to dispose away by will? To say that she cannot do so by will, though she is the absolute owner during life time, would be to restrict her power, and the two positions would be conflicting. There is no direct ruling that a widow can devise away by will moveable property inherited from her husband, but such disposition would seem to be merely an exercise of her acknowledged absolute right, and it is reasonable to infer that she has the power which is consistent with that right—*Bechar Bhagvan* **[707]** v. *Bai Lakshmi* (14); *Vinayak Anandrav* v. *Lakshimibai* (15); *Pranjivandas* v. *Devkuvarbai* (16); *Mayaram* v. *Motiram* (17); *Chandra Bhagabai* v. *Kashinath* (18); *Lakshimibai* v. *Ganpat Moroba* (19); *Bhaskar Trimbak* v. *Mahadeo Ramji* (20); *Vijiarangam* v. *Lakshman* (21); *Balvantrao* v. *Purshotam* (22); *Tuljaram* v. *Mathuradas* (23); *Damodar* v. *Parmanandas* (24); *Bhagirathibai* v. *Kanhujirao* (25); *Harilal* v. *Pranvalavdas* (9); West and Buhler, pp. 312, 314, 317.

JUDGMENT.

SARGENT, C. J.—As Kashinath predeceased his father, Bhatam Bhat, Vitha's title to succeed was as daughter-in-law to Bhatam Bhat, and, as she was introduced into the family by marriage, she could not, on any rational principle, take a different estate from that to which she would have succeeded had her husband survived him. See the remarks of Westropp, C. J., in *Tuljaram Morarji* v. *Mathuradas and others* (23). It becomes, therefore, necessary to consider what is the estate a widow takes in the moveable property which she inherits from her husband.

---

(1) 5 B. 48. (2) 1 Bor. 60. (3) 1 Bar. 75.
(4) 1 Bar. 314. (5) 2 M.P.C. 333. (6) 8 M. 290.
(7) 11 M.I.A. 487. (510.) (8) 14 C. 397. (9) 16 B. 229.
(10) 10 C. 324. (11) 7 M. 93. (12) 11 M.I.A. 139.
(13) 6 I. A. 15. (14) 1 B.H.C.R.A.C.J. 56.
(15) 1 B.H.C.R.A.C.J. 117. (16) 1 B.H.C.R.A.C.J. 130. (17) 2 B.H.C. R.A.C.J. 313.
(18) 2 B.H.C.R.A.C.J. 323. (19) 4 B. H. C. R. O. C.J. 150.
(20) I.B.H.C.R. O.C.J. 1. (21) 8 B. H. C. R. O. C. J. 244.
(22) 9 B. H. C. R. 99. (23) 5 B. 662 (670). (24) 7 B. 155.
(25) 11 B. 285.

1892
DEC. 6.
FULL BENCH.
17 B. 690 (F.B.).

Before proceeding to consider the authorities in this Court, it will be convenient to refer to certain important judgments of the Privy Council on the subject.

In *Bhugwandeen Doobey* v. *Myna Baee* (1), the question was (see p. 495), whether, according to the law of the *Benares* School, a Hindu widow is competent to dispose, by will or deed of gift, of either moveable or immoveable property, inherited from the husband to the prejudice of her next heirs—and their Lordships, after referring to the decisions in the High Courts of Madras and Bombay, in which a distinction was said to have been drawn between moveable and immoveable property and pointing out that the authorities upon which that distinction is based were not accepted at Benares, proceed to discuss the law, as they say, "independently of those decisions." and arrive at the conclusion that such a distinction was not tenable, and that the widow's [708] "power of disposition over both moveable and immoveable property is limited to certain purposes, and on her death both pass to the next heirs of her husband."

More recently in *Mutta Vaduganatha Tevar* v. *Dorasinga Tevar* (2), where the question was as to the estate of a daughter, the Privy Council after referring to *Bhugwandeen Doobey* v. *Myna Baee* (1), broadly lay it down as settled that "as regards *both moveable and immoveable* property, a woman, taking by inheritance from a male, takes only a restricted interest which, on her death, devolves on the heir of the last male owner." It is plain, however, as shown by their Lordships' remarks in the second paragraph of their judgment at p. 109, that this decision was based on the Mitakshara as applicable to Benares, and that they did not intend to shut out the possible contention that such a construction of the Mitakshara was not applicable to other parts of India, and they proceed to remark that, as regards the Carnatic, where the case before them arose, the other authorities in the Carnatic besides the Mitakshara, *viz.*, the Smriti Chandrika and Daya Vibhaga, afford no reason for holding that "the root of the title was to be found in the woman and not in her father." This examination of the above important judgment of the Privy Council shows clearly, we think, that their Lordships considered that the law as to the nature of the widow's estate in the property inherited from her husband might not only be different in the Benares and other Western Schools from what it is in Bengal, but that the law might also differ in the Benares and Western Schools according as the Mitakshara, which was, for the most part, the principal authority in those schools, might receive different constructions by being read by the light of the other authorities in those schools in conjunction with local usage and custom. This conclusion from the Privy Council authorities is developed more at length in the judgment in *Bhagirthibai* v. *Kahnujirav* (3).

Passing, then, to the consideration of the Bombay authorities on the subject, we find it laid down as far back as 1859 by Sir Matthew Sausse in *Pranjivandas* v. *Devkuvarbai* (4), that "according to the spirit and practice of Hindu law, as recognized [709] in Western India, the widow has an uncontrolled power over the moveable estate, but has nothing more than a life estate in the immoveable estate." In 1863, Forbes, Erskine and Westropp, JJ., in *Bechar* v. *Bai Lakshmi* (5), also held that "the Hindu law on this side of India gives a widow absolute power over the moveable property of her deceased husband which has been inherited

(1) 11 M. I. A. 487 (507). (2) 8 I. A. 99. (3) 11 B. 285 (292).
(4) 1 B.H.C.R. 130. (5) 1 B. H. C. R. 56

1892
DEC. 6.
FULL BENCH.
17 B. 690 (F.B.).

by her, but no power to alienate immoveable property, except under certain circumstances."

Since these decisions, the question as to the estate of the widow in moveable property inherited from her husband would not appear to have called for judicial decision in this Presidency. However, in the judgments delivered in *Lakshmibai* v. *Ganpat Moroba* (1), *Lalchand Ramdayal* v. *Gumtibai* and *Ghela Pema* v. *Gumtibai* (2) and *Tuljaram Morarji* v. *Mathuradas and others* (3) we find Sir M. Westropp stating the law to be well settled that the widow inherits "an absolute interest" in the moveables. It is difficult to read this statement of the law otherwise than as meaning that the widow took the moveables as her own property in the largest sense of that expression, and indeed in *Morarji Gokuldas* v. *Parvatibai* (4) it was assumed that the widow could make a valid will of the moveable property of her husband, the only disputed questions in that case being whether she could inherit owing to her blindness and whether her will was established. However, in *Mussumat Thakoor Deyhee* v. *Rai Baluk Ram* (5) the Privy Council had already expressed the opinion that the result of the authorities seemed to be that although, according to the law of the *Western Schools*, the widow might have a power of disposing of *moveable* property inherited from her husband which she has not under the Bengal law, she is by the one law, as by the other, restricted from alienating any *immoveable* property, and that on her death the immoveable property and the moveable, if she has not otherwise disposed of it, pass to the next heirs of her husband. And again in *Bhugwandeen Doobey* v. *Myna Baee* (6), after referring to the Bombay **[710]** cases in 1 Bom. H. C. Rep., their Lordships say: "The preponderance of authority is certainly in favour of the proposition that, whether the widow has or has not the power to dispose of inherited moveables, they, as well as the immoveable property, if not disposed of, pass on her death to the next heirs of her husband." In *Jaikisondas Gopaldas* v. *Harkisondas Hullochandas and another* (7), Mr. Justice Green states this to be settled law on the authority of the above statements in 11 M. I. A. at pp. 139 and 487, and of those also in *Vijiarangam* v. *Lakshman* (8); and the above view of the law as regards the devolution of the moveable property on the widow's death was also followed by Sargent, C. J., and Nanabhai, J., in *Harilal Harjivandas* v. *Pranvalabdas Parbhudas* (9) in a case from Ahmedabad, and again by Birdwood and Parsons, JJ., in *Bai Jamna* v. *Bhaishankar* (10).

There is, doubtless, great difficulty in reconciling the views which, the above authorities show, have prevailed in this Court as to the absolute estate of the widow in the moveable property and the devolution of that estate on the death of the widow—a difficulty which cannot be got over by drawing a distinction between the Mitakshara when construed by itself and the same authority when construed by the light of the Mayukha, as both of these authorities treat woman's property as including other property than her technical *stridhan*, and both leave the question—whether that "other property" includes property inherited by a widow from her husband—in precisely the same state for decision as may be seen by comparing Ch. IV, s. 8, paras. 1 and 2, of the Mayukha,

(1) 4 B.H.C.R. O.C.J. 150 (163).
(2) 8 B.H.C.R. O.C.J. 140 (156).
(3) 5 B. 662 (670).
(4) 1 B. 177.
(5) 11 M.I.A. 139 (175).
(6) 11 M. I A. 487 (511, 512).
(7) 2 B. 9 (12).
(8) 8 B.H.C.R. 244.
(9) 16 B. 229 (232).
(10) 16 B. 233 (237).

1892
DEC 6.
FULL BENCH.
17 B. 690 (F.B.).

with Ch. II, s. I, para. 39, of the Mitakshara. The Mayukha cannot, therefore, be said to afford any assistance in construing the Mitakshara in a different sense from what has been given to it by the Privy Council, and, indeed, the judgment of West, J., in *Vijiarangam* v. *Lakshman* (1), where that learned Judge is disputing the correctness of the Privy Council construction of the Mitakshara, shows that no fresh argument was to be derived from the Mayukha in aid of the view he was contending for, *viz.*, that property inherited by [711] a widow from her husband was woman's property based on Mitakshara, Ch. XI, s. 11, paras. 3 and 4. As to the conclusion arrived at by Sir Matthew Sausse that the widow has the power of alienation over the moveables, the judgment shows that it was the result of the statement in Steele's Law and Customs of Hindu Castes.

In this state of the authorities, we think that the ruling of the Privy Council, that the property inherited by a widow from her husband devolves on his heirs at her death, must have effect given to it throughout the Presidency with regard to the devolution of the moveables so inherited and to that extent, if the decision in *Damodar* v. *Purmanandas* (2) is to be regarded as necessarily giving the moveables that remain to the widow's heirs, it must be treated as of no authority. Assuming then, as we think we must, that the moveables existing at the time of the widow's death devolve, by inheritance, on her husband's heirs, we think the widow's power of alienation over the moveables cannot be regarded as including the power of willing them away at her death so as to displace the right of inheritance by her husband's heirs. We must, therefore, answer the question referred to us in the negative.

The reference being answered in the negative, the Division Bench reversed the decree.

---

17 B. 711.

ORIGINAL CIVIL.

Before Mr. Justice Starling.

MUNCHERJI FURDOONJI MEHTA AND PEROZBAI (*Plaintiffs*) *v.* NOOR MAHOMEDBHOY JAIRAJBHOY PIRBHOY AND OTHERS (*Defendants*)* [12th June, 1893.]

Mortgage—Sale by mortgagee—Notice of sale—Subsequent mortgage of same property—Notice of sale to mortgagors—Notice of sale to subsequent mortgagees—Delay in selling—Rescission of notice of sale—Suit by second mortgagee to prevent sale—Offer to redeem joint mortgage—Right of mortgagee to sell mortgaged property.

Certain property was mortgaged to the defendants in 1885 for Rs. 60,000, and the mortgage-deed contained the usual power of sale on notice to the mortgagors or their [712] assigns. The debt was not paid, and the defendants on the 31st August 1891, gave notice of sale to the mortgagors, but did not then proceed further in the matter. Three days after this notice, *viz*, on the 3rd September, 1891, the mortgagors mortgaged the property to the plaintiffs for Rs. 10,000. On the 18th November, 1892, the plaintiffs by letter offered to transfer their mortgage to the defendants or to join with them in selling the property. In the event of their being unwilling to accept either of these proposals, the plaintiffs requested the defendants to render an account of the sum due to them in order that they (the plaintiffs) might, if so advised, redeem the defendant's mortgage. On the 3rd December, 1892, the plaintiffs by letter enquired whether the defendants

---

* Suit No. 236 of 1893.

(1) 8 B.H.C.R. 244 (257).

(2) 7 B. 155.

1893
JUNE 12.

ORIGINAL CIVIL.

17 B. 711.

were willing to reconvey the mortgaged property on payment of a certain sum, which was less than the amount the defendants claimed, but they did not positively offer to pay the defendants either that amount or the amount which might be found to be due. In April, 1893, the defendants advertised the property for sale on the 27th of that month without giving notice of sale to the plaintiffs, and on that day the plaintiffs filed a suit and obtained a rule, restraining the defendants from proceeding with the sale. In the argument of the rule it was contended for the plaintiffs, first, that the defendants had no power to sell, because their mortgage-deed required previous notice of sale to be given to the mortgagors or their assigns, and no such notice had been given to the plaintiffs, who, as subsequent mortgagees were assigns of the equity of redemption ; secondly, that the notice of sale given to the mortgagors on the 31st August, 1891, had been rescinded and a fresh notice was, therefore, required, and, thirdly, that inasmuch as the plaintiffs were willing to redeem the defendants' mortgage, the sale should be restrained.

Held—(1) that notice to the plaintiffs was not necessary. Proper notice had been given to the mortgagors on the 31st August, 1891, three days before the plaintiffs had acquired any interest in the equity of redemption. No further notice was required to be given to any person who at that time was not an assign. in order to enable the defendants to sell under that notice. An assign must take things in the state in which he finds them, and cannot claim to alter rights which have accrued before he has any authority to interfere ;

(2) that the notice of sale of the 31st August, 1891, had not been rescinded by the defendants, who were not bound to give a fresh notice before the sale advertised to be held on the 27th April, 1893. The mere fact of a long delay taking place between the maturing of the notice of sale and the actual sale does not make a fresh notice necessary ;

(3) that on the evidence it did not appear that the plaintiffs were able and willing to redeem the defendants' mortgage. The plaintiffs admittedly had not the money inhand, and the Court would not interfere with a mortgagee's right to sell on the mere chance of the plaintiffs being able to make arrangements to pay the amount due at some uncertain time.

Where a mortgage-deed which gave the mortgagee a power of sale contained also a proviso that the remedies of the mortgagors, their heirs, administrators, and assigns in respect of any breach of the clauses or provisions (relating to such sale) or of any impropriety or irregularity whatever in any such sale should be in damages.

[713] *Held*, on the authority of *Prichard* v. *Wilson* (1), that the Court would not grant an injunction to restrain the mortgagee from selling the mortgaged property.

RULE for an injunction restraining a sale by mortgagees of mortgaged property.

The plaintiffs were second mortgagees of the property in question. The first three defendants were prior mortgagees. The remaining defendants (Nos. 4 to 8) were the owners and mortgagors.

The plaint stated that the first three defendants, were the mortgagees of the property in question under a mortgage dated 7th September, 1885, for Rs. 60,000. They also held a deed of further charge on the said property dated 12th October, 1880, for Rs. 9,000.

The said property was mortgaged to the plaintiffs on the 3rd September, 1891, for a sum of Rs. 10,000. At the date of suit the amount due to the plaintiffs upon their mortgage was Rs. 11,900. There was also a large sum due to the first three defendants in respect of their prior mortgage of the 7th September, 1885, and the deed of further charge.

The plaintiffs alleged in the plaint that the first three defendants were desirous to obtain the property for themselves, and in collusion with the mortgagors were endeavouring to depreciate its value and were thereby lessening the security of the plaintiffs. They stated that the first three defendants had in the previous year advertised the property for sale on

(1) 10 Jur. (N.S.) 330.

1893
JUNE 12.
ORIGINAL CIVIL.
17 B. 711.

four different occasions, and then, without any reason, postponed the sale, thereby disappointing intending purchasers.

They further stated that on the 18th November, 1892, they had by letter offered to transfer their mortgage to the first three defendants, or to join with them in selling the property. In the event of the defendants being unwilling to accept either of these proposals. the plaintiffs requested that first three defendants to render an account of the sum due to them, in order that their mortgage might be redeemed. The said defendants, however, had not complied with any of these proposals.

The plaintiffs further alleged that the first three defendants, ostensibly in exercise of their power of sale under their mortgage [714] of 7th September, 1885, and in collusion with the mortgagors, for the purpose of defrauding the plaintiffs, had again recently advertised the property for sale on Thursday, the 27th April, 1893. The plaintiffs received no notice of the intended sale.

The plaintiffs alleged that the time of year chosen by the said first three defendants was exceedingly unfavourable for the sale of the property, and that the notice of sale was far too short and was otherwise wholly insufficient, and that, if the sale were allowed to take place on the 27th April, the property would certainly be sold far below its value and at a price wholly inadequate to pay off the mortgages, and that they would thereby suffer a heavy loss.

The plaint prayed for redemption, for accounts, and for a sale if necessary, &c.

The plaint was presented on the 27th April, and on the same day a rule *nisi* was obtained by the plaintiffs calling on the first three defendants to show cause why they should not be restrained from selling the said property. An *interim* injunction against the intended sale was granted at the same time.

The rule now came on for argument.

Macpherson, for the first three defendants, showed cause. He cited Kerr on Injunctions (3rd Ed.), pp. 524, 525; *Hill* v. *Kirkwood* (1); *Hickson* v. *Darlow* (2); *Prichard* v. *Wilson* (3).

Inverarity, for plaintiffs, in support of the rule. He cited *Naran Purshótam* v. *Dolatram Virchand* (4); *Mohan Manor* v. *Togu Uka* (5); *Rhodes* v. *Buckland* (6); *Hoole* v. *Smith* (7); Coote on Mortgage, p. 274; *Tommey* v. *White* (8).

JUDGMENT.

STARLING, J.—The plaintiffs in this suit are mortgagees of a property in Bombay, known as the Imambara, and their mortgage, which was made on the 3rd September, 1891, is subject to certain mortgages in favour of the first three defendants. The property had been advertised for sale by these defendants several times before the plaintiffs took any step in the matter. At [715] the end of 1892 certain correspondence took place between the solicitors of the plaintiffs and the defendants, which seems to have come to an end in December of that year. In April, 1893, the defendants advertised the mortgaged properties for sale on the 27th idem, and on that day the plaintiffs filed a suit and obtained a rule *nisi* with an *interim* injunction restraining the defendants from proceeding

(1) 28 W. R. 358.
(2) 23 Ch. D. 690.
(3) 10 Jur. (N. S.) 330.
(4) 6 B. 538 (540).
(5) 10 B. 224.
(6) 16 Beav. 212.
(7) 17 Ch. D. 434.
(8) L. R. 3 H. L. 49.

1893
JUNE 12.
ORIGINAL CIVIL.
17 B. 711.

with the sale, and the question I have to determine is whether that rule and injunction should be discharged or not.

Mr. Inverarity, for the plaintiffs argued that the defendants at the present time had no power to sell at all, because, the mortgage deed providing that notice should be given to the mortgagors or their *assigns*, they had not given notice to the plaintiffs, who as subsequent mortgagees were assigns of the equity of redemption, citing on that point *Hoole* v. *Smith* (1), in which Fry, J., held that in such a case it was impossible to hold that it was sufficient to go on serving the mortgagor after he had assigned his equity of redemption. It appears, however, that the defendants gave a notice of sale to the mortgagors on the 31st August, 1891. *i.e.*, three days before the plaintiffs had any interest in the equity of redemption; and as that appears to me to be a proper notice, I do not think that any further notice would be required to be given to any person who at that time was not an assign, in order to enable the defendants to sell under that notice; because I am of opinion that an assign must take things in the state in which he finds them, and cannot claim to alter rights which have accrued before he has any authority to interfere.

It has been, however, argued for the plaintiffs that the notice of the 31st August, 1891, has been rescinded, and consequently a fresh notice was required. In support of that the case of *Tommey* v. *White* (2) was cited. In that case, a debtor had assigned his house and business for the payment of his debts, the debtor being left in possession, and a power given to the trustee to sell the property on giving notice to the debtor. The trustee gave a proper notice, which was subsequently withdrawn by the consent of the creditors and the trustee, and the Court held that under such circumstances the trustee could not subsequently sell **[716]** without giving a fresh notice. The mere fact of a long delay having taken place between the maturing of the notice for sale and the actual sale does not make a fresh notice necessary—see *Metters* v. *Brown* (3), where the delay was nearly four years; consequently to make *Tommey* v. *White* (2) applicable, it must, in my opinion, be shown that there was an actual withdrawal of the notice of the 31st August, 1891; but I can find no evidence of this having been done. All that the defendants did was at the request of the mortgagors and in consideration of their promising to do certain acts to postpone the sale in some instances, and in one instance to stop a particular sale. I can find no case which lays down the principle that postponing or even stopping a sale effects a withdrawal of the notice under which the sale is about to take place; and I should be surprised if such a case were to be cited, seeing that mortgagees ordinarily are given full power to buy in, or rescind, or vary, any contract for sale and to resell, without being responsible for any loss occasioned thereby; and if the mortgagee can stop a sale by buying in or by rescinding a contract, I fail to see why he should not be authorized to stop one by giving notice to the auctioneer not to proceed with it. Consequently, I am of opinion that the defendants did not rescind their notice of sale, and were not bound to give a fresh notice before the sale intended to have been held on the 27th April last, at which time a notice to the mortgagors and the plaintiffs, or at any rate to the plaintiffs, would have been necessary if a fresh notice had to be given.

It was then argued, on the authority of *Rhodes* v. *Buckland* (4), that as the plaintiffs are willing to redeem, and the defendants had refused to

---

(1) 17 Ch. D. 434. (2) L.R. 3 H.L. 49. (3) 33 L. J. (Ch.) 97. (4) 16 Beav. 212.

1893

JUNE 12.

ORIGINAL CIVIL

17 B. 711.

accept their offer and threatened to sell, the Court would restrain the sale. Now I am not at all sure that the plaintiffs were willing (which must also include able) to redeem. It was admitted by Mr. Inverarity in the course of his argument that the plaintiffs had not the money in hand, and would have to make arrangements in order to obtain it, and I should be very sorry to interfere with a mortgagee's right to sell on the mere chance of the plaintiffs being able to make arrangements to pay the amount due at some uncertain time. In *Rhodes* v. [717] *Buckland* (1), the plaintiff gave notice (notice of intended payment being necessary) that at a particular time she would be ready to pay the amount which might be due; but what the plaintiffs here did on the 18th November, 1892, (and that only in the alternative) was to ask for accounts to enable them, "if so advised, to redeem," which is a very different thing; and on the 3rd December, 1892, the plaintiffs only inquired whether the defendants were willing to reconvey the mortgaged property on the payment of a certain sum named therein, which is less than the amount claimed by the defendants, and do not positively offer to pay the defendants either that amount or the amount which might appear to be due. In my opinion, however, the plaintiffs were never willing and ready to redeem, but, fearing that they would not realize the full amount due on their mortgage, they wanted to induce the defendants to pay them off and take an assignment of their security. This appears to be the main object of the letter of the 18th November, 1892. There is, however, another objection to this rule being made absolute. The mortgage-deed provides that "the remedies of the mortgagors, their heirs, administrators, *and assigns* in respect of any breach of the clauses or provisions lastly hereinbefore contained (*i.e.*, with regard to notices and sales) or of any impropriety and irregularity whatever in any such sale shall be in damages," and the case of *Prichard* v. *Wilson* (2) lays down the rule that in such a case a Court of Equity will not grant an injunction to stop a sale.

The result is that the rule and the *interim* injunction of 27th April last ought to be discharged, but as the defendants are willing to accept an offer now made by the plaintiffs to pay them Rs. 1,20,000 within a fortnight, the rule and the *interim* injunction will stand over for that time, and in the event of the said sum being paid within that time the rule will be made absolute. Plaintiffs paying their own costs, first three defendants' costs to be costs in the cause. If the said sum be not paid within the time limited, the rule will be discharged with costs.

Attorneys for the plaintiffs :—Messrs. *Framji and Moos.*

Attorneys for the defendants :—Messrs. *Thakurdas, Dharamsi and Cama.*

(1) 16 Beav. 212.

(2) 10 Jur. (N.S.) 330.

17 B. 718.

1893
JULY 29.

ORIGINAL CIVIL.

17 B. 718.

[718] ORIGINAL CIVIL.

Before Mr. Justice Starling.

COOVERJI HIRJI (*Plaintiff*) *v.* DEWSEY BHOJA (*Defendant*) AND NEBHA DEWSEY AND OTHERS (*Claimants*).* [29th July, 1893.]

Hindu law—Joint family—Ancestral property—Father's debt—Decree against father—Execution—Liability of family property—Purchaser—Civil Procedure Code (XIV of 1882), ss. 318, 332, 333.

In a suit for specific performance of a certain contract for the sale of land which the defendant had failed to complete, the plaintiff obtained a decree against the defendant for the repayment of the earnest money and his costs of suit. In execution of this decree the plaintiff attached the whole of the property which the defendant had agreed to sell. A warrant for sale was duly issued, and claims were advertised for. The sons of the defendant thereupon appeared before the Commissioner and claimed to be entitled to three-fourths of the property, which they alleged was ancestral. Their claim was not investigated, but to save time it was agreed that a note should be made in the proclamation of sale, that the sons claimed to be interested in the said lands and premises on the ground that they were ancestral, and that the one-fourth share of the defendant only could be sold by the attaching creditor. Under this proclamation the right, title and interest of the defendant in the property were sold. At the sale the sons gave notice of their claim. The property was duly sold and the purchaser was put into possession, the claimants being dispossessed. The claimants then took out a summons under s. 332 of the Civil Procedure Code (XIV of 1882), calling upon the purchaser to show cause why they should not be restored to possession.

Held—(1) that the judgment-debt due by the defendant was one which the plaintiff could enforce, if necessary, against ancestral property in the hands of the defendant to the extent of the whole interest therein of the defendant and his sons, as it was not an immoral or illegal debt;

(2) that, assuming that the property in question was ancestral, what the purchaser bought was the whole property and not merely the right which the defendant might have as the father of the family to a share of it on partition. The plaintiff evidently did not acknowledge any right in the claimants, but intended to sell the very largest right the defendant might have in the property, which, as the judgment-debt was one for which the family property was liable, was the whole estate of the joint family;

(3) that the purchaser, who had bought the whole of the rights of the family in the property was entitled to the possession of what he bought, and was not required to file a suit for partition, because the shares of all the co-parceners had passed to him;

(4) Assuming that the property was ancestral, the claimants were not in possession on their own account, and were, therefore, not entitled to be restored under s. 332 of the Civil Procedure Code (XIV of 1882). A member of a joint Hindu family cannot say that he is in possession of any particular portion of the joint property on his own account. His possession is the possession of the family.

[719] (5) That all the sons were entitled to, was to try the fact or nature of the debt due to the plaintiff in a suit of their own. In such suit they would have to prove that the debt was not such as to justify the sale.

[R., 25 B. 478 (492); 3 Bom. L.R. 322 (356); 11 C.L.J. 61 (64)=14 C.W.N. 298=5 Ind. Cas. 298; **Commented upon,** 18 C.L.J. 138=18 C.W.N. 695=20 Ind. Cas. 253.**]**

IN chambers. On the 2nd April, 1892, the plaintiff Cooverji Hirji obtained a decree against the defendant for Rs. 2,905-5-9. In execution of the decree a certain oart situate at Matunga, in Bombay, was attached. The claimants, who were the sons of the defendant, thereupon lodged a claim to the oart. They alleged that it had formerly been a part of the

* Suit No. 380 of 1890.

1893
JULY 29.
ORIGINAL CIVIL.
17 B. 718.

family property belonging to themselves and their father, but that a partition had been effected, and that the oart in question had been allotted to them.

On the 5th October, 1892, the Sheriff of Bombay sold by auction, in execution of the said decree, the right, title and interest of the first defendant in the said oart to one Damji Jaitha for Rs. 2,601. At the sale, the claimants (the sons) gave notice to the bidders of their claim.

On the 6th February, 1893, the sons were dispossessed by the Sheriff in execution of the decree, and possession was given to the purchaser Damji Jaitha.

The claimants (the sons) then took out a summons under s. 332 of the Civil Procedure Code (XIV of 1882), calling upon the purchaser to show cause why the property in dispute should not be re-delivered to them.

Inverarity, for the claimants, in support of the summons.

Macpherson, for the plaintiff and the purchaser, showed cause.

Reference was made to *Rai Babu Mahabir Pershad* v. *Rai Markund Nath* (1).

JUDGMENT.

STARLING, J.—In this case the defendant, a Hindu, having a family of sons, entered into a contract with the plaintiff and another, the rights under which eventually became vested in the plaintiff, to sell a certain piece of land at Matunga, and received the sum of Rs. 1,000 as earnest-money. That contract was not carried out by the defendant, and the plaintiff filed a suit against the defendant for specific performance of the contract, or else for return of the earnest-money with interest.

[720] When the case came on for hearing, Farran, J., refused to grant specific performance, but passed a decree in favour of the plaintiff for the amount of earnest-money and interest, and the costs of the suit. The result was that the defendant became indebted to the plaintiff in the sum of Rs. 2,905-5-5; and this was a debt which, in my opinion, the plaintiff could enforce, if necessary, against ancestral property in the hands of the defendant, to the extent of the whole of the interest therein of the defendant and his sons, as it was not an immoral or illegal debt.

Subsequently to the passing of this decree, the plaintiff caused the whole of the property which the defendant had agreed to sell, to be attached in execution of the decree. On that attachment being placed on the property, the present claimants did not appear and apply to have the attachment in any way restricted in its operation, as they might have done. In due course a warrant for sale was issued, and on the usual advertisement being issued for claims on the property, the claimants, who are the sons of the defendant, appeared before the Commissioner and claimed that the defendant was only entitled to one-fourth of the property, and that they were as his sons, the property being ancestral, entitled to three-fourths thereof. Whether the property is ancestral or not is open to doubt The defendant, in his written statement, says it is his self-acquired property, and the claimants now assert it to be ancestral, but I do not find any proof in their affidavits of their assertion. I, however, proceed on the assumption that it is ancestral. The claim of the claimants was not investigated and allowed by the Commissioner, but, to save time, it was agreed that a note should be made in the proclamation of sale that

(1) 17 I. A. 11.

1893
JULY 29.
ORIGINAL CIVIL.
17 B. 718.

they " claim to be interested in the said lands and premises, on the ground that they are ancestral, and that the one-fourth share of the defendant only can be sold by the attaching creditor." Under this proclamation, the property was sold to one Damji Jaitha.

The sale was not made subject to the claim of the claimants, and it is evident that the plaintiff did not acknowledge any right in the claimants, but intended to sell the very largest right the defendant might have in the property, assuming him to be the [721] father of a joint Hindu family in possession of ancestral property, which, as this debt was one for which the family property was liable, was the whole estate of the joint family. Consequently, I hold that what Damji Jaitha bought was the whole property, and not merely the right which the defendant might have, as the father of the family to a share of it on partition.

Subsequently the purchaser was put in possession of the property by the Sheriff, and in carrying this out the claimants were dispossessed, and now claim under s. 332 of the Civil Procedure Code (XIV of 1882) to be restored to possession.

Now it seems to me that the auction-purchaser, who has bought the whole of the rights of the family in the property, is *prima facie* entitled to possession of what he bought. Mr. Inverarity referred me to s. 329 of Mayne's Hindu Law, as showing that the purchaser in this case ought to have filed a suit for partition, but that section only deals with cases in which the share only of the father has been sold, and not to cases, like the present, where the rights of the whole family have been sold. In the former class of cases a suit for partition is the only available remedy, as the share of the father must first be ascertained before it can be awarded to the purchaser, but in this case there is no necessity to ascertain the shares of the co-parceners, because the right of all of them has passed to the purchaser.

It was further argued that the claimants were in possession on their own account, and must, therefore, be restored to possession. I do not think they were. A member of a joint Hindu family cannot say that he is in possession of any particular portion of the joint property on his own account. His possession is the possession of the family, unless there is evidence to show that he had set up a right to a particular piece of land adversely to the family, which it has always been held must be very strictly proved. Consequently I hold that the claimants were not in possession of the land, of which they were dispossessed, on their own account within the meaning of s. 332 of the Civil Procedure Code.

The result is (in the words of the Privy Council in *Deendyal's* case(1)) that all the sons can claim is that they ought not to be [722] debarred from trying the fact or nature of the debt in a suit of their own ; and assuming they have such a right, it will avail them nothing unless they can prove that the debt was not such as to justify the sale.

Hitherto I have discussed this case as if the defendant and his sons were members of a joint and undivided Hindu family, and this was the footing on which it was argued by Mr. Inverarity ; but this was not the case made by the claimants when they obtained their summons. Then they claimed possession on the ground that there had been a partition between them and their father, and that they were in possession of a divided share of the ancestral property. They do not, however, allege that

(1) 13 I.A. 18.

1893
JULY 29.
ORIGINAL CIVIL.
17 B. 718.

there were any conveyances or releases evidencing the partition, and it appears that the partition, if there ever was one, which I very much doubt, took place after the property was attached, in fact after the proclamation of sale was issued (see their letter to the Sheriff of 1st February, 1893, annexed to Nebha Dewsey's affidavit of March, 1893), in which case s. 333 of the Civil Procedure Code prevents s. 332 applying, because, if there was a partition at the time alleged, the judgment-debtor must have transferred his interest, his undivided share in the property claimed, and released his claim over the undivided shares of the claimants in such property after the institution of the suit in which the decree was made. Section 318 of the Civil Procedure Code relied on by Mr. Macpherson, for the purchaser, also provides that a purchaser shall be entitled to be put in possession of the property bought by him, if it is in the possession of a person claiming under a title created by the judgment-debtor subsequent to the attachment of the property.

Under these circumstances, the summons must be dismissed, unless the claimants file a suit within one month.

Attorneys for claimants :—Messrs. *Daphtary and Ferreira.*

Attorneys for purchaser :—Messrs. *Wadia and Ghandy.*

---

17 B. 723.

[723] ORIGINAL CIVIL.

Before Mr. Justice Starling.

RAISETT CHANDMULL HAMIRMULL AND ANOTHER (*Plaintiffs*) *v.* GREAT INDIAN PENINSULA RAILWAY COMPANY (*Defendants*).*

[25th, 27th and 29th July, 1893.]

Railway company—Indian Railway Act (IV of 1879), s. 11—Loss of goods—Liability of company—Carrier—Bailment—Declaration of nature and value of goods and payment of increased charge, effect of—Contract Act (IX of 1872), s. 151—Limitation Act (XV of 1877), art. 30, sch. II.

In respect of goods for which, under s. 11 of the Indian Railway Act IV of 1879, a railway company is under no liability unless "an increased charge" is paid, the payment of an increased charge puts them under the same liability as they are under with respect to goods not specially provided for by that section, *viz.*, the liability of ordinary bailees. The payment of "an increased charge" is not equivalent to insurance.

In January, 1890, a box containing silver specie was delivered by the plaintiffs to the defendant company in Bombay to be carried to Saugor. At the time of such delivery the contents of the box were declared, and an increased charge above the charge for ordinary parcels was paid. The box was lost during its transmission to Saugor, but no evidence was called by the defendants to show what was done with the box between Itarsi and Saugor. In 1893 the plaintiffs sued the defendants to recover its value.

Held, that the defendants had not discharged the *onus* which lay upon them of showing that they had fulfilled the duties of a bailee as laid down in s. 151 of the Contract Act (IX of 1872), and that they were liable for the amount claimed.

Held, also, that the suit was not barred by limitation, and that art. 30 of sch. II of the Limitation Act (XV of 1877) did not, as was contended, apply to the case.

THE plaintiffs sued to recover from the defendants Rs. 6,000, the value of a box delivered to the defendant company at Bombay to be carried by them to Saugor, but which had been lost.

---

* Suit No. 636 of 1892.

1893
JULY 29.
ORIGINAL CIVIL.
17 B. 723.

The plaintiffs alleged that the box in question contained Rs. 6,000, and that on the 3rd January, 1890, they delivered it to the defendants, consigned to Raghunathdas Amermull at Saugor. The box weighed over two maunds, and was duly sealed and addressed both in English and Marathi.

Saugor is a station on the Indian Midland Railway, about 654 miles from Bombay, and is the terminus of a branch line running from Bina junction on the main line of the said railway, midway between Bhopal and Jhansi.

[724] On delivering the box to the defendants, its contents were declared and an increased charge above the charge for ordinary parcels was paid for the carriage, and a railway receipt was duly handed to the plaintiffs. In the plaint the plaintiffs stated that no intimation was given to them that the increased charge was not for the insurance of the box and its contents; and that they would have paid any further sum required by the company if they had been informed that any further payment was necessary.

The defendants (*inter alia*) pleaded that, under the provisions of s. 11 (1) of Act IV of 1879, they were not liable for the loss of the box in question; that if the box, when delivered, contained specie as alleged by the plaintiffs, the specie was lost either while in transit or at Saugor station. Diligent search had been made for the specie, but none had been found. They also pleaded limitation.

Inverarity and *Russell*, for plaintiffs:—They cited the Indian Railway Act IV of 1879, s. 11; *Secretary of State for India* v. *Budhu Nath Poddar* (2); *Irrawady Flotilla Company, Limited* v. *Bhugwandas* (3); *Bradbury* v. *Sutton* (4); *Gill* v. *The Manchester, Sheffield, &c., Railway Company* (5); Starling on Limitation (2nd Ed.), p. 152.

Lang (Acting Advocate-General) and *Macpherson*, for defendants:—They cited *Venkatachala* v. *South Indian Railway Company* (6); *Robinson* v. *The South-Western Railway Company* (7); **[725]** *Laljibhai* v. *The Great Indian Peninsula Railway Company* (8); Statute 12 and 13 Vict., c. 83.

JUDGMENT.

STARLING, J.—In this case the plaintiffs sue the defendants to recover from them the sum of Rs. 6,000, being the value of a box of silver specie alleged to have been delivered at the Byculla Station for carriage to Saugor on the 3rd January, 1890, but which never reached its destination. The first point to be determined is whether such a box was delivered to the defendants to be carried to Saugor. (His Lordship referred to the evidence and continued:—) I must come to the conclusion that the box for which Ex. B is the receipt, was delivered to the defendants

---

(1) Section 11 of Act IV of 1879:—

When any property mentioned in the second schedule hereto annexed is contained in any parcel or package delivered to a carrier by railway, the carrier shall not be liable for loss, destruction or deterioration of, or damage to, such property, unless at the time of delivery the value and nature thereof have been declared by the person sending or delivering the same, or an engagement to pay such charge has been accepted by some railway servant specially authorized in this behalf.

When any property of which the value and nature have been declared under this section has been lost, destroyed or damaged, or has deteriorated, the compensation recoverable for such loss, destruction, damage or deterioration shall not exceed the value so declared.

(2) 19 C. 538. (3) 18 I.A. 121=18 C. 620. (4) 19 W.R. 800=21 W.R. 128.
(5) L.R. 8 Q B. 186. (6) 5 M. 208.
(7) 34 L.J. (C.P.), 234. (8) 15 B. 537.

1893
JULY 29.
ORIGINAL CIVIL.
17 B. 723.

and did contain Rs. 6,000 in silver coin. That box did not arrive at Saugor, but when the agent of the addressee went to the Saugor Station on the morning of the 6th January with Ex. B, he was tendered a box packed in gunny, with no seals on it, weighing only 36 seers, and which was afterwards discovered to contain nothing but a quantity of black cotton soil and two large iron hammer heads. The box despatched not having been delivered at its destination, the question arises whether the defendants are liable for its non-delivery.

The first defence relied upon by the defendants is that of limitation, they alleging that art. 30 of sch. II of the Limitation Act (XV of 1877) applies, and that, as this suit is not brought within two years from the date of loss, it is barred; but there are a number of cases, all of which are cited at page 132 of Starling's Limitation Act, which show that that article does not apply to a case like the present, and that this suit, having been brought within three years, is in time.

The defendants then say that as the contents of the box were silver coin, and it was sent uninsured, they are not liable for its loss under any circumstances. The determination of this point requires the discussion of the liability of railway companies under Act IV of 1879 in respect of goods delivered to them for carriage.

For the purposes of this judgment I assume that the decision in *The Secretary of State* v. *Budhu Nath* (1) is unaffected by the judgment of the Privy Council in *Irrawady Flotilla Co.* v. *Bhugwandas*(2) so far as railways in India are concerned, and that the **[726]** ordinary liability of such companies was in January, 1890, only that of bailees, and that they were bound to take as much care of goods delivered to them for carriage as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quantity and value as those delivered for carriage, and no more. Then s. 11 provides that, with respect to certain classes of goods, among which are silver or silver coin, no liability whatever shall attach to them in respect of the loss, &c., of such goods, unless at the time of delivery for despatch the value and nature of the goods shall have been declared, and an increased charge for the safe conveyance of the same, or an agreement to pay the same, have been accepted by the railway company. The ordinary state of the company with regard to such goods being therefore entire freedom from liability, what liability attaches to them if the requisite declaration is made, and the extra charge paid? In England the point is easier to decide, because carriers are insurers and are absolutely liable for the safety of goods in general entrusted to them for carriage, unless exempted from such liability by law, which is the case in respect of certain special goods unless certain conditions are fulfilled; but if those conditions are fulfilled, then their ordinary liability attaches, which is that of insurers. In this Presidency railway companies were in 1890 under the ruling of this Court (*Kuverji Tulsidas* v. *G. I. P. Railway Company* (3)) entirely exempted from the liability of insurers, and were only subject to the ordinary liabilities of bailees, But if, in England, the fulfilment of certain conditions in respect of certain goods relegates carriers to their ordinary liability as insurers, I do not see why in this country the fulfilment of similar conditions should not relegate railway companies back to their ordinary liability as bailees, because the section does not provide that, if the prescribed conditions be fulfilled, the railway company shall become an insurer, but only that the ordinary liability

(1) 19 C. 538. (2) 18 I.A. 121 = 18 C. 620. (3) 3 B. 109.

shall not attach unless those conditions are fulfilled. I am of opinion, therefore, that if the conditions prescribed by s. 11 be fulfilled by the consignor of goods referred to in that section, the railway company will then become liable for such goods in the same way as for those classes of goods which are not specially [727] provided for by that section, *viz.*, as bailees. Then, what is meant by "an increased charge"? I do not think that a charge for insurance is "an increased charge" within the meaning of this section. A contract of insurance, unless it is otherwise provided for therein, implies an absolute guarantee for the safe arrival of the goods insured at the place of their destination; but, if I am right in holding that the fulfilment of the conditions specified in s. 11 relegates the company to its ordinary position as bailees, their liability is certainly not that of insurers: consequently "an increased charge" cannot be a payment which imposes upon them liabilities larger than those of ordinary bailees.

Let us now look at what happens when a parcel is taken to one railway station for conveyance to another. In ordinary cases, the booking clerk asks no questions, and the consignor gives no information as to the contents of the parcel, but the ordinary charge for a parcel is made (which in the present case would have been Rs. 9) and a receipt is given for the parcel, in respect of which the railwary company is bound to exercise the care which an ordinary bailee should exercise, and is not liable at all in respect of any articles referred to in s. 11 which may be in it. If the booking clerk, however, is informed that the parcel contains certain specific articles, he would at once look up the rates in the coaching tariff-book, and would charge the proper rate for those articles, it might be less or more than the ordinary parcel rate. If the rate was more than the ordinary rate, and the contents of the parcel such as fell under the exceptions in s. 11, I think that rate would be "an increased charge" within the meaning of s. 11. The actual cost to the railway company of receiving, carrying and delivering a maund of silver is no greater than that of a maund of iron. Why, then, should a larger sum be charged, unless it is to compensate the company for the increased risk they run in consequence of the greater value of the same weight and bulk or, in respect of other articles, of their greater liability to damage? To hold otherwise would be to hold that for a parcel in respect of which the company ran no liability whatever, and for the carriage of which they were put to no extra expense, they might charge a larger sum than for one in respect of which they were subject to liability, [728] and that before they incurred any liability at all in respect of the former, they were entitled to make two increased charges, *viz.*, the higher rate for carriage and insurance, and not merely "an increased charge." That the acceptance of a higher rate for excepted articles might possibly subject the company to their ordinary liability was present to the minds of the framers of the rates in the present case, is evident from the fact that on page 67 of the book of rates put in evidence, it is expressly stated that uninsured treasure is carried at owner's risk. That declaration would have been unnecessary if "increased charge" was equivalent to insurance. A similar remark is made with regard to opium, though not in such explicit terms, and a reference is also made to the page where the charges for insurance may be found. So, too, in rule 41, at page 70 where mention is made generally of the articles excepted by s. 12, although the company do not categorically state that all such articles are at owner's risk unless insured, they seem to infer it, as they there refer to the place where the insurance rates are to be

1893
JULY 29.
ORIGINAL CIVIL.
17 B. 723.

found. Such specific limitations of liability, however, if beyond what the law actually gives, and if reducing the liability of the company below that of bailees, are of no avail unless there is an agreement to that effect which must (*inter alia*) be in writing signed by or on behalf of the consignor (s. 10). This attempted limitation, by the defendants, of their liability cannot shield them in this case, as there is admittedly no agreement for limitation of the company's liability signed by or on behalf of the consignor. The defendants must, therefore, stand or fall on the decision of the question whether "an increased charge" is equivalent to insurance. I have shown that, in my opinion, it is not. Consequently as, according to the evidence of the booking clerk Fonseca, those who brought the parcel told him that it contained *chandi rokra*, or silver coin, and paid an increased charge for it, *viz.*, Rs. 18-1-0 instead of Rs. 9, I am of opinion that the defendants are liable for the non-delivery of the parcel, unless they can show that they have taken that care of it required by s. 151 of the Contract Act (IX of 1872). I may add that I have come to the opinion that those who handed the parcel to Fonseca also told him that it contained Rs. 6,000. Motilal and Buria say they did this, and **[729]** Fonseca admits he heard them talking about the box containing Rs. 6,000, although he denies that they actually told him; but, unless for the purpose of informing him what the contents were, I cannot conceive why they should mention the matter. I have not gone into the question as to whether the rates charged are lawful, as Farran, J., did in *Laljibhai* v. *G. I. P. R. Company*(1), because the legality of the amount is not in dispute here. The only question is what liability the defendants are under when they accept certain rates. The Exs. Nos. 4 to 9 only settle the amount chargeable for the carriage of certain classes of goods, and do not determine what the liability of the defendants is in respect of those goods; that had already been provided for by the Act of the Legislative Council, and no resolution of Government could alter or modify the liability so provided, as the Act does not permit such an alteration.

Now, what is the evidence as to the care taken of the parcel by the defendants? The proper place for a parcel of coin such as this to be carried in, as appears from the book of rates put in evidence, was the brake-van in charge of the guard, where he would be able to keep an eye on it, and thus see that it was not meddled with; but at Byculla it was put into a road van, which was not locked, and was away from the constant direct superintendence of the guard. Fortunately, however, the parcel arrived safely at Itarsi and was there transferred to the Midland train. Then comes an entire blank; no evidence whatever is given as to what was done with the parcel, or what care was taken of it between Itarsi and Saugor, although in the ordinary course of business it would have to be taken out of one van at Bina and put into another for Saugor, which is on a branch line, and it appears from Ex. Y that at Bina there was a period of some hours during which the parcel would be lying at the station, or in the van, possibly at some distance from the platform, waiting for the train to start for Saugor, and, if the evidence of the parcel clerk and station master at Saugor is to be believed, the parcel had already been tampered with when it arrived there. In the absence of any evidence as to how the parcel was treated between Itarsi and Saugor, it is impossible to **[730]** hold that the defendants have discharged the *onus*, which lay upon them, of showing that they had in respect thereof fulfilled the duties of a bailee as laid down in s. 151 of the Contract Act.

(1) 15 B. 537.

1893
JULY 29.
ORIGINAL CIVIL.
17 B. 723.

It will be seen that I have not discussed the effect of the case of *The Secretary of State* v. *Budhu Nath* (1). I have not done so, because it seemed to me that I could dispose of the case in favour of the plaintiff on the assumption that the case of *Kuverji Tulsidas* v. *The G. I. P. Railway Company* (2) was good law. and as the view of the law contained therein has been adopted by the Legislature in the Railway Act of 1890, I thought a decision on those lines would be useful at the present time. If, however, it be held that the case of *The Secretary of State* v. *Budhu Nath* (1) has overruled that of *Kuverji Tulsidas* v. *The G. I. P. Railway Company* (2), then, on the payment by the consignor of the "increase dcharge" as before explained, the railway company would have at once become insurers, and there would be no necessity to enquire what amount of care they had taken of the parcel. I must, therefore, pass a decree for the plaintiffs for Rs. 6,000, and by way of damages for the non-delivery of the parcel award them interest at 6 per cent. on such amount from the 6th January, 1890, till this day. Costs and interest on judgment at 6 per cent.

Attorneys for the plaintiffs :—Messrs. *Crawford, Burder, Buckland and Bayley.*

Attorneys for the defendants :—Messrs. *Little, Smith, Nicholson and Bowen.*

---

17 B. 731.

[731] CRIMINAL REFERENCE.

Before Mr. Justice Birdwood and Mr. Justice Parsons.

MUNICIPALITY OF AHMEDABAD *v.* JUMNA PUNJA.*

[22nd January, 1891.]

Bombay Act VI of 1873, *s.* 84—*Proceedings taken under s.* 84 *for the recovery of municipal taxes—Such proceedings are judicial and not ministerial—Magistrate's duty under the section.*

A proceeding before a Magistrate for the recovery of municipal cesses and taxes instituted under s. 84 of Bombay Act VI of 1873, is a criminal prosecution, and must be conducted in the manner prescribed for summary trials under Chapter XXII of the Code of Criminal Procedure (Act X of 1882).

In such a proceeding a Magistrate is not bound to order payment of the full amount claimed by the municipality, but must satisfy himself as to the extent of the defaulter's legal liability before passing any order against him.

[**F.**, 30 B. 241 (244)=7 Bom. L.R. 951 ; Rat. Unr. Cr. Cas. 559 (561) ; **Appr. and D.**, 23 B. 446 (448) ; **R.**, 11 Cr. L.J. 87=4 Ind. Cas. 951=2 P.R. 1910 (Cr.)=109 P.L R. 1909=23 P.W.R. 1909 ; **D.**, 22 A. 111 (112).]

THIS was a reference under s. 438 of the Code of Criminal Procedure (Act X of 1882).

The accused was charged by the Municipality of Ahmedabad a cess rate of one rupee per annum for the removal of sullage water. He refused to pay the rate, and thereupon the Municipality prosecuted him under s. 84 of Bombay Act VI of 1873.

The trying Magistrate held that the accused was liable to pay only one-half of the rate charged, and ordered him to pay that amount.

---

* Criminal Reference, No. 138 of 1890.

(1) 19 C. 538.

(2) 3 B. 109.

1891
JAN. 22.
CRIMINAL REFERENCE.
17 B. 731.

The District Magistrate thereupon made the following reference to the High Court:—

"The Honorary Magistrate has, instead of issuing the warrant applied for, for the levying of arrears of taxes, taken evidence on the point whether or not the persons concerned have been rightly assessed,—that is, whether they have been placed in the proper lists or grades, and he has found that they have been assessed too highly, and he has ordered the recovery of a lesser, amount.

"Looking to the meaning of s. 84 of the Municipal Act, it appears to me that the Honorary Magistrate has altogether exceeded his powers. Otherwise the Honorary Magistrate becomes the appellate authority in all cases of municipal taxation, [732] and every case can be taken before him by the simple expedient of not paying the tax.

"This result is not contemplated by the Municipal Act, which provides other means for hearing appeals against municipal taxation.

"A ruling on the point is urgently and speedily required, as the action of the Honorary Magistrate has brought the collection of the tax for the removal of sullage water in Ahmedabad to a dead-lock—some 19,000 cases of refusal to pay the tax having been brought into his Court."

The reference was argued before Birdwood and Parsons, JJ.

Shantaram Narayan, Government Pleader, for the Crown.

Chimanlal H. Setalvad, for the accused.

JUDGMENT.

Per Curiam:—The accused in this case was charged by the Ahmedabad Municipality a cess rate of one rupee per annum for the removal of sullage water under class F of the cess rates sanctioned by Government Resolution No. 1886 of the 1st June, 1888 (see the rules of the Ahmedabad Municipality, p. 51). He refused to pay the rate for the year 1889-90, and the municipality applied to the Magistrate to recover it under s. 84 of Bombay Act VI of 1873. The Magistrate found that the accused was liable under class F, sub-s. 1, to only one-half of the rate charged. The District Magistrate has referred the case to the High Court, as he is of opinion that a Magistrate, dealing with an application under s. 84 of the Municipal Act, has no jurisdiction to question the propriety of any claim made by the municipality, but must issue his warrant for the full amount of rate charged upon the defaulter. It is argued that in such cases the Magistrate acts ministerially and not judicially. We cannot accept this interpretation of the law. The Magistrate is empowered under s. 84 to recover rates by a "summary proceeding" in the manner provided in the Code of Criminal Procedure (X of 1882). "This summary proceeding" must be the proceeding for which provision is made in chap. XXII of the Code of Criminal Procedure. There is no other provision in the Code which appears to be applicable to the case. The [733] Government Pleader contends that the proceeding referred to is that contained in s. 386, which provides that, when an offender is sentenced to pay a fine, the Court passing the sentence may, in its discretion, issue a warrant for the levy of its amount by distress and sale of any moveable property belonging to the offender, although the sentence directs that, in default of payment of the fine, the offender shall be imprisoned. But this view is not consistent with the ruling of this Court in *Imperatrix* v. *Karmashankar Bhaishankar* (1), which shows that proceedings before a Magistrate under s. 84 of the Municipal Act are

(1) Cr. Rul. 86 of 3rd December, 1888.

criminal prosecutions. Such prosecutions must be conducted according to the rules applicable to summary trials. The Magistrate is bound, therefore, before sentencing a defaulter to pay a rate, to satisfy himself as to the extent of his legal liability, and did not, in the present case, act without jurisdiction by enquiring into its merits. He has, however, reduced the rate without first finding on evidence, duly recorded, that the accused had no *khalkundi* and no tub on his premises. It was only on such a finding that he could legally hold that the case fell under class F, sub-s. 1, of the rules and not under the first part of class F. We reverse the Magistrate's order and direct him to re-hear the case.

1891
JAN. 22.
CRIMINAL REFERENCE.
17 B. 731.

Order reversed.

---

17 B. 733.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Candy.

PARVATISHANKAR DURGASHANKAR (*Original Plaintiff*), *Appellant v.* BAI NAVAL (*Original Defendant*), *Respondent.** [4th October, 1892.]

Civil Procedure Code (*Act XIV of* 1882), s. 562—*Remand—Practice—Procedure.*

The defendant in a suit on a mortgage applied, on the day fixed for the hearing, for an adjournment on the ground of illness. Her application was refused, and the Court heard the case *ex parte* and passed a decree for the plaintiff. The defendant appealed to the District Judge, who reversed the decree and remanded the case, on the ground that the defendant's application for an adjournment ought to have been granted. On appeal to the High Court.

[734] *Held*, discharging the order of remand, that the suit having been tried on the merits, the District Judge could not remand the case under s. 562, but ought to have proceeded under ss. 568 and 569.

[Diss., 30 M. 54=16 M.L.J. 479 (486)=1 M.L.T. 263; **R.**, 1 Ind. Cas. 329=12 O.C. 25 (28).**]**

THIS was an appeal from a remand order passed by J. B. Alcock, District Judge of Surat.

Suit to recover Rs. 1,199 due upon a mortgage.

The defendant, Bai Naval, widow of Bhavanising Gumansing, applied for an adjournment on the ground that she was ill and had not been able to file her written statement. The Court granted a month's adjournment. On the appointed day the defendant applied for a further adjournment, pleading continued illness and want of assistance as an excuse. The Court rejected the application and proceeded to hear the case. A decree was passed for the plaintiff.

The defendant appealed, and the District Judge reversing the decree remanded the case for trial, on the ground that the defendant's application for adjournment ought to have been granted.

The plaintiff appealed.

Nagindas Tulsidas Marphatia, for the appellant:—The Judge was wrong in remanding the case. A remand can only be made under s. 562 of the Civil Procedure Code (XIV of 1882). The lower Court did not decide the case on a preliminary point. The case was heard, the mortgage was proved by evidence, and the plaintiff's claim on the mortgage

---

* Appeal No. 28 of 1891.

1892
OCT. 4.

APPELLATE CIVIL.

17 B. 733.

was allowed. If there was any defect in the trial, the District Judge ought to have cured that defect himself.

Kalabhai Lallubhai, for the respondent:—The case was decided *ex parte*, and, therefore, it cannot be said to have been decided on the merits.

JUDGMENT.

SARGENT, C. J.—As the Subordinate Judge decided the suit on the merits, and not on a preliminary point, the District Judge could not remand the case under s. 562 of the Civil Procedure Code (XIV of 1882), but ought to have proceeded as directed by ss. 568 and 569. He must, therefore, discharge the order of the Court below, aud send back the case for disposal by the lower appeal Court according to law. Costs to abide the result.

Order discharged.

---

17 B. 735.

[735] APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Candy.

ORIENTAL LOAN ASSOCIATION, LIMITED (*Plaintiffs*) *v.* GEORGE PELHAM HATCH AND ANOTHER (*Defendants*).*

[6th October, 1892.]

Civil Procedure Code (Act XIV of 1882), s. 617—Reference in execution of a decree—Final decree.

A question arising in execution of a decree cannot be referred for the decision of the High Court under s. 617 of the Civil Procedure Code (Act XIV of 1882) except where the decree is final.

THIS was a reference made by W. B. Cracknell, Judge of the Consular Court at Zanzibar, under s. 617 of the Civil Procedure Code (Act XIV of 1882).

In execution of a decree (No. 461 of 1891) dated the 17th November, 1890, passed by the High Court of Judicature at Bombay (Original Sides) against George Pelham Hatch and another, a moiety of the pay which Hatch received from the Navab of Zanzibar as the commander of the army and police at that time, was sought to be attached at Zanzibar at the instance of the plaintiffs. The defendant contended that the decree of the High Court was a decree of a foreign Court under s. 14 of the Civil Procedure Code (Act XIV of 1882), and that, therefore, it could not be executed, but that the plaintiffs' proper course was to bring a suit upon it at Zanzibar. The Judge of the Consular Court of Zanzibar was of opinion that the decree could be executed by his Court, but submitted the question for the decision of the High Court.

Rivet-Carnac (with *Chalk*), for the plaintiff:—By s. 8 of the Zanzibar Order in Council of 1884, † the provisions of the Civil Procedure Code (Act XIV of 1882), have been made applicable to Zanzibar, and by s. 21 of the Code the Court at Zanzibar is constituted a District Court of that place under the jurisdiction of the High Court at Bombay. That

---

* Civil Reference No. 14 of 1892.

† See *Bombay Government Gazette* for 1885, Part I, p. 533.

Court was, therefore, bound to execute the decree passed by the High Court.

Manekshah J. Taleyarkhan, for the defendant:—Assuming that the Court at Zanzibar is a District Court, the Judge of that Court [736] was wrong in making this reference under s. 617 of the Civil Procedure Code (Act XIV of 1882). For a reference under that section lies only where the decree is final. But this decree, which was sent for execution to Zanzibar, was not a final decree. It was a decree of a division Court against which there might be an appeal. And an order made in execution of that decree would be a decree under s. 244 against which an appeal would lie. The question, therefore, ought not to have been referred.

1892
OCT. 6.
APPELLATE CIVIL.
17 B. 735.

ORDER.

SARGENT, C. J.—The question referred by the Judge of the Consular Court is one arising in execution of a decree. But s. 617 of the Code of Civil Procedure (Act XIV of 1882) only allows of a reference for the decision of this Court in the execution of a decree when the decree was final—which was not the case here. The Judge of the Consular Court must, therefore, decide the question for himself and dispose of the application for execution. The party aggrieved by it will then have his appeal to this Court. Costs to be costs in the case.

Order accordingly.

---

17 B. 736.

APPELLATE CIVIL.

Before Mr. Justice Bayley, Chief Juctice (Acting) and Mr. Justice Candy.

DATTATRAYA RAYAJI PAI (*Original Plaintiff*), *Appellant v.* SHRIDHAR NARAYAN PAI (*Original Defendant*), *Respondent.** [7th October, 1892.]

Landlord and tenant—Tenant expending money on land with landlord's knowledge and consent—Standing by—Estoppel—Right of tenant on eviction to be recouped the money so expended—Buildings erected on land held under lease—Removal of such buildings.

The defendant entered into occupation of certain land with the permission of the plaintiff, who was the owner, and erected buildings and otherwise expended money upon it. The plaintiff and the defendant were relations and lived near each other. The plaintiff constantly visited the land and knew what the defendant was doing, but made no objection. Subsequently the plaintiff, being anxious to obtain from the defendant an acknowledgment of his (the plaintiff's) title, induced (but without misrepresentation or fraud) the defendant to sign a rent-note. The Court found that although this rent-note was, in terms, a lease for one year, yet the intention of the [737] parties was not that the defendant should at the expiration of the year, or on any subsequent demand, hand over to the plaintiff the land with the buildings which had been erected by the defendant with the plaintiff's implied consent, without bring recouped for the expenditure thus incurred; that subsequently to the execution of the rent-note the defendant had erected other buildings, and that the plaintiff knew of this, and made no objection.

Held, that the plaintiff could not recover possession of the land, or require the removal of the buildings, without recouping the defendant the money he had expended. The plaintiff was estopped from denying the claim of defendant. He had stood by in silence while his tenant had spent money on his land.

[R., 20 B. 1 (6); 20 B. 298 (300); 22 B. 1; 27 M. 211 (222)=14 M.L.J. 25; 7 Ind. Cas. 202 (208)=8 M.L.T. 258; 18 Ind. Cas. 799=63 P. R. 1913=113 P.L.R. 1913=112 P.W.R. 1913; D., 27 C. 570 (586); 1 Bom. L. R. 191 (199).]

---

* Second Appeal No. 398 of 1891.

1892
OCT. 7.
APPELLATE CIVIL.
17 B. 736.

THIS was a second appeal from the decision of H. Batty, Acting District Judge of Ratnagiri.

The plaintiff sued to recover from the defendant certain land with arrears of rent for three years. He alleged that the said land formed part of his Inamat Mirache Bag, and that he had let it to the defendant under a rent-note dated 12th April, 1881, for one year; that after the expiration of that period the defendant continued to occupy it with his (the plaintiff's) consent, and had erected buildings upon it; that he had subsequently requested the defendant to remove the buildings and to give up the land, but the defendant refused.

The defendant answered (*inter alia*) that the rent-note sued on had been obtained by the plaintiff through misrepresentation. He denied that he was a yearly tenant of the plaintiff and alleged that he was a joint owner of the land with the plaintiff. He stated that he had built two houses and a stable and had sunk a well on the land with the knowledge of and without objection from the plaintiff, who was, therefore, estopped from requiring the removal of the buildings. He admitted that the stable was erected after the execution of the rent-note sued on, but stated that the other buildings had been erected previously. He contended that the plaintiff was not entitled to possession unless he paid the value of the buildings.

The Subordinate Judge found that the rent-note sued on had not been obtained by any misrepresentation or fraud on plaintiff's part, and he allowed the claim for possession and arrears of rent, with liberty to the defendant to remove the buildings from the land.

[738] The defendant appealed, and the acting District Judge varied the decree by declaring the plaintiff to be entitled to possession and removal of the buildings only on payment to defendant of Rs. 1,200, the approximate cost of the buildings. In his judgment the District Judge observed:—

"Defendant's witnesses allege that the house was built a long time previous to the rent-note, and the variations and uncertainty among the plaintiff's witnesses render this not improbable. The bare fact of the value of these buildings seems to this Court to render it very improbable that defendant would have erected them *after* he had not only received a warning from plaintiff, but had consented to execute a *kabulayat*. It is difficult to believe that defendant would expend, as plaintiff's witnesses admit, as much as Rs. 3,000 on land which defendant knew was not his, unless "in the hope or encouragement" by the real owner that he would be allowed to remain in possession long enough to get a return on his expenditure. Plaintiff, in the circumstances of the case, being near at hand and constantly visiting the spot, must have known of the erection of these buildings, as would appear from witnesses adduced on his behalf, yet he took no objection. If the buildings were subsequent to the rent-note (which plaintiff says was intended to prevent unauthorized buildings), then the plaintiff's acquiescence would in the case of buildings of such value be evidence of implied contract. * * In the present instance the land does not appear to have been available for agricultural purposes. The buildings were not of a temporary nature, but included a dwelling-house and a well. The works were going on under the plaintiff's eyes. He knew that they were going on and watched their progress. He took no objection. They were not easily removable. He could not suppose that defendant meant them to be only temporary. They lasted at least for eight years, and yet plaintiff did not insist on defendant's giving up the land (*cf.* 17 W.R. 467). There was not space available

for agriculture. And though it seems that, if they were erected after the execution of the rent-note, defendant could only have acted on the belief, which plaintiff did not by any proved objection or notice of ejectment disturb, that there was no intention to prevent their erection. If [739] the buildings were, as defendant alleges, erected before the rent-note was passed, then it would seem that before the defendant recognised the plaintiff's title, plaintiff had allowed him to com plete those buildings without raising objection, and the acquiescence and the implied consent of the plaintiff would estop him from asking their removal without giving full compensation (6 Bom.H.C. Rep. 80, and 15 W. R. 161)."

The plaintiff preferred a second appeal.

Daji Abaji Khare, for the appellant (the plaintiff) :—The Judge has not distinctly found the date at which the buildings were erected by the defendant, and has held that the plaintiff is estopped because he stood by when those buildings were erected. But the mere standing by does not create an estoppel—*Shiddhesvar* v. *Ramchandrarav* (1) ; *Onkarapa* v. *Subaji Pandurang* (2) ; *Basawantapa* v. *Ranu* (3) ; *Ramsden* v. *Dyson* (4) is in the plaintiff's favour. The lower Court ought to have found as a fact whether the plaintiff did encourage the defendant to erect the buildings. A tenant is bound to give back the land to his landlord in the same condition in which it was when he entered upon it.

Manekshah J. Taleyarkhan, for the respondent.—The plaintiff's case was that the defendant built upon the land after the execution of the rent-note, but the lower Court has not placed any reliance upon this contention. We say that when a landlord stands by and allows his tenant to erect a substantial building on his land, he cannot subsequently insist upon the tenant's removing the building. He is estopped. In such cases the landlord is entitled only to compensation—*Banee Madhub* v. *Joy Kishen* (5). The effect of the lower Court's finding is that the defendant built upon the land in the *bona fide* belief that the plaintiff would allow the buildings to stand. It is true that when a person wrongfully builds upon another man's land, he should be compelled to remove the buildings ; but here the defendant cannot be said to have built wrongfully. It is important to remember that the parties are not strangers to each other. They [740] belong to the same family and live close to each other. In his written statement the defendant says that the *bona fide* believed that the land belonged jointly to him and to the plaintiff.

Daji Abaji Khare in reply.—Even supposing that the defendant erected the houses before the execution of the rent-note, still the very fact that he executed the rent-note ought to have put him on his guard and ought to have prevented him from erecting any new building afterwards. When he passed the rent-note, he then at all events became aware that he was merely a tenant, and ceased to labour under a mistake as to his title to the land. If he erected the buildings after the passing of the rent-note, then there is no equity in his favour—*Pilling* v. *Armitage* (6) ; *Plimmer* v. *Mayor &c., of Wellington* (7).

JUDGMENT.

CANDY, J.—We think that the District Judge must be taken as having found that the defendant entered into occupation of this land

(1) 6 B. 463. (2) 15 B. 71. (3) 9 B. 86. (4) L. R. 1 H. L. 170.
(5) 12 W.R. 495. (6) 2 Vesey, 78. (7) 9 App. Cas. 699 (711).

1892
OCT. 7.
APPELLATE CIVIL.
17 B. 736.

with the permission of the plaintiff; that while he was thus in possession he erected a house at a cost of Rs. 500, and built a well at a cost of Rs. 200; that the plaintiff being a relative of the defendant, and living close at hand, and constantly visiting the spot, knew of the building of the house and well, yet took no objection; that subsequently the plaintiff being anxious to obtain from the defendant an acknowledgment of his (the plaintiff's) title to the land, induced the defendant to sign the rent-note of 12th April 1881; that in this there was no misrepresentation or fraud on the part of the plaintiff, but that, though the rent-note was, in terms, a simple lease of the land with trees for one year, the intention of the parties could not have been that the defendant should at the expiration of the year, or on any subsequent demand, hand over the land with the buildings, which had been made by defendant with the implied assent of the owner of the land, without being recouped for the expenditure thus incurred; that subsequently to the execution of the rent-note the defendant had erected a "manager" (stable) on the land at a cost of Rs. 500, and that the plaintiff knew of the erection of this building, but made no objection. On these facts the District Judge found that the plaintiff was estopped from denying the [741] claim of the defendant to be recouped the expenditure incurred on the buildings, which must have been built in the hope or encouragement from the landlord. He, therefore, declared the plaintiff entitled to possession and removal of the buildings only on payment to defendant of Rs. 1,200.

We think that the facts thus found by the District Judge do bring the case within the principles as explained by Lord Kingsdown in *Ramsden* v. *Dyson* (1) and subsequently expounded by the Privy Council in *Plimmer* v. *Mayor, &c., of Wellington* (2). Here there are special circumstances—the near relationship of the parties, their residing in close vicinity to each other, their ownership of the surrounding lands—pointing to the presumption that the plaintiff by his conduct sanctioned the construction of the building and well, and afforded hope and encouragement to the defendant that he would be allowed to remain in peaceable possession of the same, or at least would not be ejected without a reasonable return for the expenditure incurred by him.

We think, therefore, that the present case is one in which an equity can be claimed, because the landowner has stood by in silence, while his tenant has spent money on his land; and as there is no dispute as to the way in which the equity should be satisfied, we confirm the decree of the District Judge with costs.

Decree confirmed.

(1) L. R. 1 H. L. 170.

(2) 9 App. Cas. 710.

17 B. 741.

1892
OCT. 12.

APPELLATE CIVIL.

APPELLATE CIVIL.

17 B. 741.

Before Sir Charles Sargent, Kt., Chief Justice and Mr. Justice Candy.

NARAYAN LAKSHMAN (*Original Plaintiff*), *Appellant v.* BAPU VALAD HAIBATRAV AND OTHERS (*Original Defendants*), *Respondents.**

[12th October, 1892.]

Registration—Vendor and purchaser—Priority—Notice —Possession—Subsequent purchaser with notice obtaining possession and paying off mortgage—Right to recover sum applied in paying off mortgage.

The plaintiff sued to recover land purchased by him in 1886 from the first defendant, and which was in possession of defendants Nos. 2, 3 and 4. The conveyance to **[742]** the plaintiff was duly registered. The third defendant claimed part of the land under a previous sale to him in 1885 by the first defendant, the conveyance to him being also duly registered. The fourth defendant claimed the rest of the land under a sale to him by the first defendant subsequent to the sale to the plaintiff of which he had no notice. He relied upon the fact of his having got possession, and he alleged that the purchase-money which he had paid for the land had been applied by the first defendant in paying off a mortgagee who at the date of his purchase was in possession. He claimed, at all events, the repayment of this sum.

Held—(1) that the plaintiff was not entitled to the lands in the hands of the third defendant, the latter being a prior purchaser with a deed of conveyance duly registered;

(2) that the plaintiff was entitled to the land in the possession of the fourth defendant, who must be taken to have purchased with notice of the plaintiff's prior purchase, inasmuch as the deed of conveyance to the latter was registered;

(3) that, if the fourth defendant's purchase-money was applied to pay off a mortgage which plaintiff would otherwise have had to pay, the plaintiff could not equitably recover the land without paying the fourth defendant so much of the purchase-money as was so applied.

[R., 26 B. 538 (541); 134 P.L.R. 1904; **Disappr.**, 7 C.W.N. 11.**]**

SECOND appeal from the decision of G. C. Whitworth, District Judge of Khandesh.

The plaintiff sued to recover certain land in the possession of defendants Nos. 2, 3 and 4. He alleged that he had purchased it from the first defendant under a registered deed dated 16th July 1886.

The first and second defendants did not appear.

The third defendant alleged that he had purchased part of the said land on 2nd September 1885 under a registered deed of that date, from one Bhauprasad Khankaria, to whom the land had been formerly sold by the son of the first defendant.

The fourth defendant alleged that he had purchased the rest of the land in December 1887 from the first defendant and his son for Rs. 550 and had got possession; that he had no notice of the plaintiff's purchase, and that the purchase-money which he had paid had been applied by the first defendant in paying Bhauprasad Kankaria, who had been a mortgagee in possession.

The Subordinate Judge held that the sale to the plaintiff in 1886 was proved, but that the plaintiff could not recover possession as against the third defendant, inasmuch as the latter was in possession under a prior sale to him, and that he could not recover **[743]** as against the fourth defendant, because the latter, although a subsequent purchaser, had obtained possession.

* Second Appeal No. 470 of 1891.

1892
OCT. 12.
APPELLATE CIVIL.
17 B. 741.

The plaintiff's claim was, therefore, rejected.

On appeal by the plaintiff the District Judge confirmed the decree.

The plaintiff preferred a second appeal.

Manekshah J. Taleyarkhan, for the appellant (plaintiff).—Both the lower Courts erred, in law, in holding that so far as defendant No. 4 was concerned we are not entitled to priority, because our purchase, though registered, was not accompanied with possession. Our sale-deed is dated 16th July, 1886, and was registered the next day. The sale-deed being registered, the defendant had, when he purchased the property in December, 1887, notice of the sale to us, and consequently we are entitled to priority —*Lakshmandas* v. *Dasrat* (1); *Radhabai* v. *Shamrav* (2); *Agarchand* v. *Rakhma* (3).

Respondents Nos. 1 and 2 (defendants Nos. 1 and 2) did not appear.

Mahadeo Chimnaji Apte, for respondent No. 3 (defendant No. 3).—Both the lower Courts have found that our purchase was proved and was prior to that of the plaintiff. Therefore, he cannot recover the land in our possession.

Dhondu Shamrav Garud (with *Daji Abaji Khare*), for respondent No. 4 (defendant No. 4).—According to Hindu law a title which is accompanied with possession cannot be over-ridden by a prior title not accompanied with possession. With repect to possession, gift and sale stand on the same footing—*Lallubhai* v. *Bai Amrit* (4); *Kali Das Mullick* v. *Kanhaya Lal Pandit* (5). Registration is not equivalent to possession—*Vasudev Bhat* v. *Narayan Daji Damle* (6).

We have paid off the mortgage of Bhauprasad with our money and, therefore, the appellant should not be allowed to recover possession without repaying us what we have paid. If we had not **[744]** paid off the mortgage, the appellant would have had to pay it—*Mahomed Shumsool* v. *Shewukram* (7).

Manekshah J. Taleyarkhan, in reply.—In *Lakshmandas* v. *Dasrat* (1) the question of possession and registration was fully considered, and it was held that registration was equivalent to possession.

Respondent No. 4 is merely a stranger, and it was not incumbent upon him to pay the mortgage. Further, he has not taken an assignment from the mortgagee. Therefore he cannot insist that he should be paid the mortgage amount.

JUDGMENT.

SARGENT, C. J.—The Full Bench decision in *Lakshmandas Sarupchand* v. *Dasrat* (1) followed in *Agarchand Gumanchand* v. *Rakhma Hanmant* (3), shows that, as the plaintiff's purchase-deed was registered when the fourth defendant purchased, the latter must be taken to have had notice of it, and cannot claim priority by reason of the plaintiff's purchase not having been accompanied with possession. We may remark that in *Lalubhai Surchand* v. *Bai Amrit* (4), the earlier purchase without possession was not registered until after the later purchase, so that the effect of registration as giving notice did not arise. However, if the fourth defendant's purchase-money was applied in part in paying off Bhauprasad's mortgage of 1881, which the plaintiff would otherwise have had to meet, the plaintiff cannot equitably recover the property without paying the fourth defendant so much of the purchase-money as was so applied. See *Mahomed Shumsul* v. *Shewukram* (7).

(1) 6 B. 168. (2) 8 B. 168. (3) 12 B. 678. (4) 2 B. 299.
(5) 11 I.A. 218. (6) 7 B. 131. (7) 2 I. A. 7.

We must, therefore, reverse the decree, except as regards the third defendant, as to whom it must be confirmed, and send back the case for a fresh decision as regards the other defendants. Appellant to pay the third defendant his costs. The other costs of the appeal to abide the result.

Decree partially reversed.

1892 OCT. 12. — APPELLATE CIVIL. — 17 B. 741.

---

17 B. 745.

[745] APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice and Mr. Justice Candy.

NAIK PARSOTAM GHELA (*Original Plaintiff*), *Appellant v.* GANDRAP FATELAL GOKULDAS (*Original Defendant*), *Respondent.**

[17th October, 1892.]

Easement—Right of way—Prescription—Prescriptive right of the defendant to have branches of his trees overhanging the plaintiff's land—Right of the defendant to go on to the plaintiff's land to collect the fruit of the trees distinct from and not accessory to the right to have the branches overhanging.

The defendant having acquired a prescriptive right to have the branches of his trees overhanging the plaintiff's land, the lower Courts held that he had a right to go on to the plaintiff's land for the purpose of gathering the fruit of trees, on the ground that the prescriptive right to have the branches of his trees overhanging the plaintiff's land carried with it an "accessory" right to enjoy the profits of the branches in the best way possible.

Held, (reversing the lower Courts' decree) that the right to go on the plaintiff's land to pick the fruit off the branches was perfectly distinct from the prescriptive right to have the branches overhanging the land, and could not be said to be accessory to the latter right in the sense of being within the limits of that right.

SECOND APPEAL from the decision of Venkatrao R. Inamdar, Acting Joint Judge of Ahmebadad.

The plaintiff sued for (1) a declaration that the defendant was not entitled to enter upon the plaintiff's land for the purpose of inspecting his own wall recently erected by him and of taking the fruit of his trees, the branches of which were hanging over the plaintiff's land, and for (2) an injunction restraining the defendant from going upon the land for the aforesaid purposes.

The defendant contended that he had acquired by long user a right of way over the land in question, and that there was no other passage by which he could go and inspect his wall and take the fruit of the trees.

The Subordinate Judge (Rao Saheb N. N. Nanavati) made a decree in the following terms:—

"The defendant has no right to enter the plaintiff's land at all times and on all occasions except during the fruit season and when the necessity arises of removing the branches or wood or repairing the wall, &c., and that the defendant do enter the plaintiff's land [746] at such times with plaintiff's permission which the plaintiff should not refuse."

Against the above decree the plaintiff appealed to the District Court, and the defendant preferred cross-objections under s. 561 of the Civil Procedure Code (Act XIV of 1882).

The Acting Joint-Judge found on the issues that (1) the defendant had a right to pass over the plaintiff's ground, and that (2) with respect to the

---

* Second Appeal, No. 473 of 1891.

1892
OCT. 17.

APPELLATE CIVIL.

17 B. 745.

nature of that right there were "no sufficient materials on the record to prove the absolute right alleged by the defendant."

The Judge, therefore, confirmed the decree, observing: —

"The trees in question are very old ones, and their branches have been extending far over the plaintiff's land for upwards of forty or fifty years. * * His predecessors in title were entitled to prevent the extension of these, branches on the plaintiff's land. This right carried with it the accessory right to enjoy the profits of the branches in the best way possible, and this right could not be enjoyed except by passing over the plaintiff's land when necessary. In this view I think that the defendant is entitled to pass over plaintiff's ground for the purpose of exercising the above right, and for inspecting his walls, &c., on that side, and such other rights as might be necessary. * *."

The plaintiff preferred a second appeal.

Chimanlal H. Setalvad, for the appellant (plaintiff).—We allowed the branches of the defendant's trees to hang over our land, because they caused no inconvenience to us; but our allowing the branches to overhang cannot give to the defendant the right to come on our land to pluck fruit and inspect his wall. The wall was built by the respondent on his own land so late as 1882. The wall belongs to him exclusively, and if he wishes to inspect it, he may do so without coming on our land.

Rao Saheb *Vasudev Jagannath Kirtikar* (Government Pleader), for the respondent (defendant).—The lower Courts held that we are entitled to go on the plaintiff's land as an accessory right to enjoy our property. If we have acquired a right—and the lower Courts have found that we have—to have our branches overhanging [747] the plaintiff's land, then we say that we have also acquired the right of going over his land to remove fruit from the overhanging branches—*Esubai* v. *Damodar* (1). In fact, we claim a right of way over the appellant's land.

User amounting to a license would be in the nature of an easement, though it cannot amount to an easement strictly so called.

JUDGMENT.

SARGENT, C. J.—Both the Courts below have found that the defendant had acquired a prescriptive right to have the branches of his trees overhanging the plaintiff's land, and that the evidence failed to establish any prescriptive right of way in defendant over the plaintiff's land; but they have held that he has a right to go on plaintiff's land for the purpose of gathering the fruit of the trees, on the ground that the prescriptive right to have the branches of his trees overhanging the plaintiff's land carried with it as "an accessory" the right to enjoy the profits of the branches in the best way possible, which could not be done except by passing over the plaintiff's land. We cannot agree in this conclusion. The right to go on the land of the plaintiff to pick the fruit off the branches is perfectly distinct from the prescriptive right to have those branches overhanging the land, and cannot be said to be accessory to the latter right in the sense of being within the limits of that right, however useful and even necessary it might be to the defendant in order to obtain the full enjoyment of the profit of the branches so overhanging.

As to the right of the defendant to go on the land to repair the wall, it is not apparent on what ground the lower Court of appeal has granted it. The wall is not a common wall or a wall which plaintiff is bound to

(1) 16 B. 552.

keep in repairs, and if defendant wishes to repair it he must do so without trespassing on his neighbour's land.

We must, therefore, reverse the decree of the Court below and make a declaration as prayed for, and restrain the defendant by injunction from entering the plaintiff's land for the purposes mentioned in the plaint. Appellant to have his costs throughout.

Decree reversed.

1892
OCT. 17.
APPELLATE CIVIL.
17 B. 745.

17 B. 748.

[748] CRIMINAL REVISION.

Before Mr. Justice Parsons and Mr. Justice Telang.

In re RATANLAL RANGILDAS.* [17th October, 1892.]

Criminal Procedure Code (Act X of 1882), ss. 517 and 523—Property seized by the police pending an inquiry or trial under a search-warrant issued by the Court—Magistrate's power to deal with such property where no offence is committed.

Section 523 of the Code of Criminal Procedure (Act X of 1882) does not apply to property which is produced before a Court in the course of an inquiry or trial under a search-warrant issued by itself under s. 96 of the Code. To such property s. 517 alone would apply ; and if no offence is found in respect thereof, the Court can make no order. The property must be given back into the possession from which it came.

The scope of s. 523 must be confined to property seized by the police of their own motion in the exercise of the powers conferred on them by law : for instance, under ss. 51,54,164 or 165 of the Code of Criminal Procedure.

Per TELANG, J.—Under s. 523 of the Code of Criminal Procedure, a Magistrate is bound to institute an inquiry before making any order touching the right, not of property, but of possession to the property, seized by the police.

[N.F., 12 Cr.L.J. 103=9 Ind. Cas. 634=5 S.L.R. 4 ; **F.**, Rat. Unr. Cr. Cas. 981 (982) ; **R.**, 22 B. 844 (846) ; 28 B. 314 (325) ; 29 M. 375 (377)=4 Cr.L.J. 233 ; 14 C.P. L.R. 60 (61) ; L.B.R. (1893—1900) 324 (326) ; **Doubted**, 26 B. 552 (557).**]**

APPLICATIONS under s. 435 of the Code of Criminal Procedure (Act X of 1882).

The facts of the case were as follows :—One Bai Gulab filed a complaint in the Court of the First Class Magistrate of Surat against Itcharam Rasikdas and Utamram Itcharam, charging them with criminal breach of trust in respect of certain ornaments and jewellery which had been entrusted to them for sale.

In execution of a search-warrant issued by the Magistrate under s. 96 of the Code of Criminal Procedure (Act X of 1882) the police seized certain jewellery which was in the possession of one of the applicants, Ratanlal Rangildas.

The other applicant, Itcharam Valabh, made over to the police, as soon as they appeared with a search-warrant, certain gold ornaments which he alleged had been pledged with him by one of the accused.

The Magistrate, after trying the case, discharged the accused, finding, on the evidence before him, that there had been a trust, but no criminal breach of trust committed by the accused.

[749] As regards the property produced seized by the police, the Magistrate in the course of the trial, and without holding any inquiry, passed an order, under s. 523 of the Code of Criminal Procedure, that it should be delivered to the complainant.

* Criminal Review No. 313 of 1892.

1892
OCT. 17.
CRIMINAL REVISION.
17 B. 748.

The order was as follows:—

"I now proceed to dispose of the property seized by police under circumstances which create suspicion of the commission of an offence under s. 523 of the Criminal Procedure Code. All the property seized is amply proved to belong to complainant, and most of it, especially the jewellery, has been admitted to be complainant's property. I therefore order the whole of the property produced in Court should be restored to the complainant after one month, *i. e.*, after the expiry of the period of appeal."

Against this order the applicants, from whose possession the property had been taken by the police, appealed to the Sessions Judge, but he declined to interfere, on the ground that the Magistrate was right in making the order under s. 523 of the Code of Criminal Procedure.

Thereupon the applicants applied to the High Court under its revisional jurisdiction.

Ganpat Sadashiv Rao, for applicants.—Section 523 of the Code of Criminal Procedure does not apply to the present case. It does not apply to property seized by the police under a search-warrant issued under s. 96 of the Code. In such a case the seizure by the police need not be reported to the Magistrate, as the seizure is made under his own orders. Section 523 applies only to the cases expressly specified therein. The present is not one of those cases. That being the case, the property should be restored to the persons from whose possession it was taken in the course of the trial—*In re Annapurnabai* (1); *Queen-Empress* v. *Kusakom Lakshman* (2); *Queen-Empress* v. *Ahmed* (3). But, assuming that s. 523 governs the present case, the Magistrate is bound under the section to make an inquiry as to the person who is entitled to possession before making any order for the disposal of the property. This inquiry has not been made in the present [750] case. The Magistrate has ordered the property to be given to the complainant, merely because he finds she is the owner of it. This is clearly wrong. Under the section, the Court has to determine who has the right to the possession of the property. In the present case the right to the possession is vested in the applicants, who have a lien on the property in dispute.

Branson (with him *Nagindas Tulsidas*), for opponent.—The Magistrate was right in ordering delivery of the property to the complainant, who is the owner. She alone is entitled to the possession of the property—*Queen-Empress* v. *Joti Rajnak* (4). The ruling in *In re Annapurnabai* (1) was passed under the old Code of Criminal Procedure. Section 523 of the new Code is wider than s. 415 or 416 of the old Code. Under the new enactment the Magistrate is at liberty to make an order for delivery of the property to the person he thinks entitled. If s. 523 does not apply, then I contend s. 517 is applicable. Under both these sections the Magistrate has a wide discretion in making an order for the disposal of property. With that discretion this Court will not interfere in the exercise of its revisional jurisdiction, but will leave the aggrieved party to assert his rights in a Civil Court. Refers to *Queen-Empress* v. *Tribhovan* (5).

JUDGMENT.

PARSONS, J.—The facts are these. Bai Gulab brought a charge of criminal breach of trust against certain persons. The Magistrate, to whom the complaint was made, issued search-warrants under s. 96 of the Code

(1) 1 B 630. (2) Cr. Rul. 24th April, 1884. (3) 9. M. 448.
(4) 8 B. 338. (5) 9 B. 131.

1892
OCT. 17.

CRIMINAL REVISION.

17 B. 748.

of Criminal Procedure (X of 1882), and the property now in question was found in the possession of the applicants and produced before the Magistrate. The Magistrate, though the persons in whose possession the property was found were not the accused persons, and though he found that no offence had been committed regarding it, ordered it to be delivered to the complainant. He held no independent inquiry, and he does not find that the complainant was entitled to the possession, but merely that she is the owner of the property.

The first point that arises is whether his order was made with jurisdiction? For if it was not, we are bound to interfere and set it aside; whereas if it was, other points may have to be [751] considered. The order was not and could not have been made under s. 517 of the Code, but it is sought to be supported under s. 523, under which section it purports to be made. In my opinion, this section is in no way applicable. It cannot, I think from its very words, be held to apply to property which is produced before a Court in the course of an enquiry under a search-warrant issued by that Court. Its scope must be confined to property seized by the police of their own motion, in the exercise of powers conferred on them by law, and which seizure requires to be reported to a Magistrate, since otherwise the Magistrate would have no knowledge of it. For instance, the seizure of articles found on an arrested person searched under s. 51, the seizure under s. 54 (4) of property suspected to be stolen or with which an offence is suspected of having been committed, the seizure of property under s. 165 or under a search-warrant issued under s. 165 or s. 166 would have to be reported. But there would be no necessity to report the seizure of peoperty found under a search-warrant issued by a Magistrate, since, by the terms of the search-warrant itself, the property has to be placed before the Magistrate. Section 523 is silent as to any such property. Strictly speaking, s. 517 and s. 523 cannot both apply to the same property. Section 517 ought to apply to all property produced before a Court in an inquiry or trial, while s. 523 would apply to property not so produced, but still in the possession of the police who had seized it, but to whom the Legislature did not see fit to entrust the disposal thereof, and so conferred that power on the Magistracy alone. The Calcutta High Court has ruled apparently that s. 523 does not apply to any property which has been the subject of a criminal trial (Ruling of September 7th, 1885, quoted in Prinsep's 9th edition of Criminal Procedure Code, page 358). I will not, however, go so far as that. It is unnecessary to do so in the present case, and possibly, I think, at the end of an enquiry or trial, there might be some property seized by the police to which s. 523 might apply. Our criminal ruling (No. 7: *Imperatrix* v. *Gopala*) of 12th February, 1891, appears to imply that. I have no doubt that s. 523 can have no application to property produced in the course of an [752] enquiry or trial before a Court under a search-warrant issued by itself. To such property s. 517 alone would apply, and if no offence is found in respect thereof, the Court can make no order; it must be given back into the possession from which it came. I find, therefore, that the order was made without jurisdiction, and my learned colleague agrees with me. We, therefore, reverse the order of the Magistrate respecting the property in the case in question. The effect of this will be that the property must be restored to the possession of those persons who gave it up, or from whom it was taken.

TELANG. J.—These were applications made in the extraordinary jurisdiction of this Court for the purpose of obtaining revision of certain

1892
OCT. 17.
—
CRIMINAL REVISION.
—
17 B. 748.

orders for the custody of property made by the First Class Magistrate of Surat under s. 523 of the Criminal Procedure Code. The principal prosecution in which the question regarding the property in dispute arose was one instituted by Bai Gulab against Itcharam Rasikdas and Utamram Itcharam for criminal breach of trust, and the Magistrate being of opinion that though a trust was proved, a dishonest breach of it was not proved, discharged the accused persons. The applicant in the first of these cases was the partner of one of the accused persons, and the property in question on his application was found by the police in the course of a search held under a search-warrant granted by the Magistrate in accordance with the provisions of s. 96 of the Code of Criminal Procedure. In the second case the applicant was the pledgee of certain articles of jewellery from a person to whom they had been pledged by one of the accused persons. The complainant had applied to the Magistrate for a search-warrant as regards him also, but the order of the Magistrate was that he should in the first instance be asked to hand over the things, and in the event of his refusal the search-warrant should be executed. The applicant, it was stated before us, produced the things to the police on their demanding the same, and they went in due course to the Magistrate's Court. Under these circumstances the Magistrate ordered that the various articles and things taken from the possession of the applicants should be handed over to the complainant, Bai Gulab, and he made the order under the provisons of s. 523.

[753] I am of opinion that s. 523 has no application to such a case as the present. Comparing the provisions of that section with those of s. 96 and other sections of the Criminal Procedure Code, I am of opinion that s. 523 only deals with cases in which the police seize property, as they are in some cases authorised to do, by virtue of their own powers, and not in carrying out any order of a Magistrate. The general nature of the provisions of that section coupled with the specific provision for a report to a Magistrate points, I think, most strongly to a seizure by the police of their own authority. The seizures in the present cases were clearly not of that character. That in the case of Ratanlal was under a search-warrant granted by the Magistrate under s. 96, which contains its own special enactment as to the nature of the proceeding to be taken before the Magistrate on the finding of the property under the warrant. That in the case of Itcharam Valabh was also a seizure under the order of the Magistrate made apparently under s. 94 of the Code. In both cases I think the s. 523 under which the Magistrate professed to act, was inapplicable.

But it was said that s. 517 in any event afforded adequate authority for the order made by the Magistrate. I do not, however, perceive how s. 517 could be applied to the case. That section, in terms, deals with property in respect of which an offence may appear to have been committed. In this case the Magistrate by discharging the accused on the ground that no criminal breach of trust had been proved to his satisfaction must be taken clearly to have found that no offence had been committed. Mr. Branson argued that the Magistrate's finding was illogical, and that one could see from his judgment that he thought the accused had not dealt properly with the complainant. I do not think, however, that there is anything necessarily illogical in the judgment of the Magistrate. He apparently seems to have thought that the accused had not dealt properly with the complainant, but that their acts amounted

not to a criminal offence but to a civil wrong. But in any event it is plain, I think, that the property in this case cannot be treated as property in respect of which an offence appears to have been committed, **[754]** because the only persons charged or chargeable with the offence have, in fact, been discharged and that finding which we have already refused to disturb is, while it stands, equivalent to a finding that no offence has been committed.

It was, however, further argued by Mr. Branson that, even if neither s. 523 nor s. 517 applied to these cases, this Court should not now interfere in its revisional jurisdiction, as there is a remedy open to the aggrieved parties in the Civil Courts. But that principle has not, that I am aware of, been applied in the form thus indicated in criminal or *quasi*-criminal proceedings. It has been applied to some extent in cases coming under s. 622 of the Civil Procedure Code. But the present proceedings, though dealing with questions of possession of property, and, therefore, in their nature, perhaps of a civil rather than a criminal nature, are nevertheless not to be disposed of under s. 622 of the Civil Procedure Code. Besides, it may be that the Court ought to apply different principles of interference in revision, where a subordinate Court deals with matters which lie within its habitual jurisdiction, and where such a Court deals summarily with matters entrusted to it by the Legislature for special reasons and under special circumstances. In this case, however, the matter appears to me to be one which specially calls for interference. The only section under which it can be said that the Court had any authority to make such an order as it has here made has been shown to be inapplicable. And it therefore, was the duty of the Court to apply the general rule laid down in *In re Annapurnabai* (1), there being no scope under the law for the exercise of any judicial discretion by the Magistrate in such a case. If there had been a discretion to be exercised, we should probably have been disinclined to interfere with its exercise by the Court below, although it is to be remarked that in these cases there would have been one strong circumstance in favour of interference even from that point of view, *viz.*, that the Magistrate did not lay the basis for the orders he has made any specific investigation such as he ought to have instituted before making those orders touching the rights *not* of **[755]** property but of possession claimed by the applicants, who were, in the eye of the law, strangers to the criminal proceedings tried by him. But however that may be, these cases being, as I have pointed out, not of the classes contemplated by ss. 523 and 517 and there being, therefore, no provision of the law authorising the Magistrate to depart from the general rule, that property taken under the authority of the law for a particular purpose should on the fulfilment of that purpose go back to the custody whence it was taken. I think the Magistrate had no jurisdiction to do otherwise than direct the restoration of the several articles and things to the persons in whose possession they were respectively when seized under his orders. I may perhaps add one word more in regard to Mr. Branson's argument. It may be, though there is no evidence to enable this to be found with certainty, that in this particular case the applicants might not sustain any actual damage by having to sue in a Civil Court to establish their civil rights to the property in question. But one can well conceive cases in which great and even irreparable harm may

(1) 1 B. 630.

1892
OCT. 17.
—
CRIMINAL REVISION.
—
17 B. 748.

result from the actual custody of property being lost in this way. And it would not be safe, therefore, to lay down any such general rule as was indicated in Mr. Branson's argument. Upon the whole I have come to the conclusion that the order of the Court below must be reversed.

Order reversed.

---

17 B. 755.

APPELLATE CIVIL.

Before Sir Charles Sargent Kt., Chief Justice, and Mr. Justice Candy.

NABAB MIR SAYAD ALAMKHAN (*Original Defendant No.* 1), *Appellant v.* YASINKHAN *and others*, (*Original Plaintiffs*), *Respondents.**

[18th October, 1892.]

Adverse possession—Manager during minority—Limitation Act (*XV of* 1877), *sch. II, arts.* 91 *and* 144.

The plaintiffs sued to recover lands which they claimed as their own and of which they alleged the defendant to have had the management during their minority, he having been appointed manager of all their (the plaintiffs') property by their mother and grandmother, who were dead at the date of suit. The defendant alleged that the land in question had been sold to him, and produced a deed of sale, dated 3rd October, 1876, purporting to have been executed by the deceased **[756]** ladies and by the plaintiffs. The plaintiffs denied all knowledge of the deed, and prayed that it might be cancelled. The defendant (*inter alia*) contended that the suit was barred by limitation, and pleaded adverse possession.

Held that the suit was not barred, and that the plaintiffs were entitled to recover, (1) supposing the deed not to have been executed at all, the possession of the manager would not become adverse until he distinctly repudiated the management; (2) if the deed were executed by the ladies only, then art. 144 and not art. 91 of the Limitation Act (XV of 1877) would apply; (3) even if the minors, whose names appeared in the deed, did actually execute it, nevertheless as the defendant did not get into possession under it, but only used it to defend his position, art. 91 would not apply (*Bai Jivatbai* v. *Shiv Nigar* (1).

[F., 13 Ind. Cas 852 (853) = 138 P.L.R. 1912 = 9 P.W.R. 1912; R., 32 M. 72 (76) = 5 M.L.T. 99.]

SECOND APPEAL from the decision of T. Hart-Davies, Assistant Judge of Poona.

The plaintiffs sued to recover certain lands, which they claimed to be their own, from the defendant. They alleged that during their minority their mother and grandmother, who were *purdanashin* ladies, had entrusted the management of their (the plaintiffs') property to the defendant, who was a near relation; that after the death of the ladies the plaintiffs had demanded possession of the lands from the manager (the defendant), but he alleged that they had been sold to him, and produced a deed of sale purporting to be executed by the deceased ladies and by the plaintiffs. The plaintiffs denied all knowledge of the deed, which they prayed might be cancelled. The defendant answered (*inter alia*) that on the 3rd October, 1876, the deceased ladies and the plaintiffs, who had then attained majority, passed a sale-deed to him of the property in dispute and of a house which was in the possession of the plaintiffs; that the deed was genuine and was passed for valuable consideration, namely, Rs. 1,500, and that since the date of the sale the defendants had enjoyed

---

* Second Appeal, No. 559 of 1891.

(1) 11 B. 78.

the lands and the profits thereof as owner. They further contended that the claim for the cancellation of the deed was time-barred.

The Subordinate Judge found that the defendant was a trustee for the plaintiffs; that they were minors at the time when the deed was alleged to have been executed, and that the deed was invalid, there being no consideration for it. The claim of the plaintiffs, was, therefore, allowed.

[757] On appeal by the defendants the District Judge confirmed the decree with the following remarks:—"As to the sale to the deceased defendant, there is no doubt it took place, but the consideration is doubtful, the witnesses know nothing of this consideration, nor can they distinctly state that the ladies were actual executants of the sale-deed. * * On the whole I think that the lower Court was correct in holding that the deceased defendant was actually a trustee in charge of the property, so that the claim is not time-barred, that the sale to him can be set aside as invalid and fraudulent, as having been made to the trustee himself while the owners were minors, and on this view the appeal is dismissed."

Defendant No. 1 preferred a second appeal.

Vasudeo Gopal Bhandarkar, for the appellant (defendant):—The sale-deed to the defendant is dated 6th October, 1876, and he has ever since been in adverse possession. The suit is now barred. The defendant was not a trustee. The plaintiffs should have sued to cancel the deed within three years after they attained their majority. He cited *Ram Janki Kunwar* v. *Raja Ajit Singh* (1) and *Hasan Ali* v. *Nazo* (2).

Mahadeo Chimnaji Apte, for the respondents (plaintiffs):—Both the lower Courts have found that the defendant was a trustee, and that there was no consideration for the deed. The defendant being a relation, the property was given into his management. There was no adverse possession until the year 1888, when the deceased defendant declined to give the plaintiffs possession.

Vasudeo Gopal Bhandarkar in reply:—The deed being executed by the minors and registered, it would be binding upon them until it is formally set aside. A deed executed by a minor is no doubt, voidable, but unless and until he avoids it, it is binding upon him—*Hanmant* v. *Jayarao* (3); *Sashi Bhusan Dutt* v. *Jadu Nath Dutt* (4); *Mahamad Arif* v. *Saraswati Debya* (5); Pollock on Contracts, (5th Ed.), pp. 55, 60.

JUDGMENT.

[758] SARGENT, C.J.—Supposing the deed not to have been executed at all, as the Subordinate Judge has found, the period for recovering possession by the minors would not run until the possession by the manager became adverse, and that would not be until the manager distinctly repudiated the management. Again, if it was executed by the ladies only, art. 144, and not 91, of the Limitation Act would apply. See *Sikherchand* v. *Dulputty* (6) and *Bhagvant Govind* v. *Kondi valad Mahadu* (7). And even if the minors, whose names appear on the deed, actually executed it, still as the defendant did not get into possession under it, and only uses it to defend his position, art. 91 would not apply, on the authority of *Boo Jinathoo* v. *Sha Nagar Valab Kanji* (8). Therefore, in any case the suit would not be barred, and the decree must, therefore, be confirmed with costs.

Decree confirmed.

(1) 14 I. A. 148. (2) 11 A. 456. (3) 13 B. 50. (4) 11 C. 552.
(5) 18 C. 259. (6) 5 C. 363 (370). (7) 14 B. 279. (8) 11 B. 78.

1892
OCT. 19.

APPELLATE CIVIL.

17 B. 758.

17 B. 758.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Telang.

MANILAL REWADAT (*Original Defendant*), *Appellant v.* BAI REWA (*Original Plaintiff*), *Respondent.** [19th October, 1892.]

Hindu law—Inheritance—Stridhan, *devolution of—Woman's estate apart from* stridhan, *devolution of, according to Mayukha—Property inherited by a woman from a male owner—Property not of the class called "* stridhan *proper "—Reversion on her death to heir of last male owner—Theory of such reverter not to be extended to* stridhan*—Meaning of expression "sons and other heirs" used in Mayukha, ch. IV, s.* 10, *pl.* 26*—" Sons and the rest," meaning of—Decree for maintenance obtained by wife against her husband—Appeal by husband against decree—Death of wife pending appeal—Daughter to be legal representative of the deceased for the purpose of the appeal—Practice—Procedure.*

In cases to which the Vyavahara Mayukha is applicable, a woman's daughter and not her husband is the heir to her property, although not of the kind belonging to the class of '*stridhan* proper.'

The doctrine that property which has been inherited by a woman should revert on her death to the heirs of the last male owner is not to be extended to the devolution [759] of *stridhan*. The heirs to succeed are the heirs to the woman herself, though her heirs in the husband's family.

The phrase "sons and the rest" in ch. IV, s. 10, placitum 26 of the Mayukha means merely "sons, grandsons and great grandsons," and the phrase "daughters and the rest" in placita 14, 23 and 24 means "daughters and their issue" as contrasted with "sons, grandsons and great-grandsons."

As regards property which does not class as woman's property in the technical sense, the "sons and the rest" take precedence over the "daughters and the rest." Failing both sons and daughters the heirs to "*stridhan* proper" and "*stridhan* improper" are identical, save that as between male and female offspring the latter have a preferential right as regards "*stridhan* proper," while the former have a similar right as to "*stridhan* improper."

The author of the Mayukha, like the author of the Mitakshara, does not regard the enumeration of specific kinds of *stridhan* in the old Smriti texts as exhaustive. He includes under the name all that by law becomes the property of the woman, only (unlike the author of the Mitakshara) he distinguishes the specific kinds enumerated in the texts from those which are not so enumerated for purposes of inheritance. In doing this it seems quite reasonable to lay down that, as regards that class of property which is emphatically woman's property being expressly so named by the old sages, the female offspring should take precedence over the male; while as regards that which is not such, the general preference given to male offspring over female by Hindu law should have effect. On the other hand there is no obvious reason why in the case of collateral relations any similar distinction should be maintained between the two classes.

Under the rule of succession above stated, the woman is recognized as a fresh source of devolution. It is to be remembered that the property with which the rule in question deals, is not merely that which the woman obtains by inheritance, but may include that which has never belonged to her husband or any other relation, either on the husband's or the father's side, but is her own original acquisition. Such property is the woman's property; it is not the husband's property. Why, then, should it go on her death to any one except to those who are the woman's heirs, and how can the rule about the last male owner be made applicable to such property at all?

A Hindu wife obtained a decree against her husband for maintenance. He appealed, and while the appeal was pending the wife died, leaving two daughters. The question then arose whether her husband or his daughters should represent the deceased in the appeal.

Held, that the daughters of the deceased were the legal representatives for the purposes of the appeal.

---

* Appeal No. 27 of 1891.

[F., 31 B. 453 (455)=9 Bom.L.R. 834 ; 5 M.L.T. 169 (179) ; **R.**, 25 A. 468 (474) ; 21 B. 739 (746) ; 34 B. 385=12 Bom. L.R. 386 (388) ; 40 C. 650=17 C.L.J. 438=17 C.W.N. 679=19 Ind. Cas. 129 ; 19 M. 110 (119) ; 28 M. 1 (8) ; 5 Bom. L.R. 244 (245) ; 5 Ind. Cas. 426=6 N.L.R. 3 (4) ; 1 N.L.R. 154 (157) ; 4 N.L.R. 31 (35) ; 20 Ind. Cas. 557=9 N.L.R. 102 ; 2 S.L.R. 59 (63) ; **Cons.**, 36 B. 339=14 Bom. L.R. 89=14 Ind. Cas. 438 (439).]

THIS was an appeal from an order passed by E. M. H. Fulton, District Judge of Ahmedabad.

The plaintiff sued her husband to recover arrears of maintenance and also to obtain an order for future maintenance for herself and her two minor daughters, Divali and Rukmini. The Subordinate **[760]** Judge awarded the claim, directing the defendant to pay the arrears and to continue to pay maintenance in future at a certain rate.

The defendant appealed, and pending the appeal the plaintiff recovered the amount of the maintenance on giving security in execution of the decree. Before the appeal came on for hearing, the plaintiff (respondent) died. The appellant (defendant) then applied to have her (the respondent's) surety placed on the record as her representative, but the application was refused.

The appellant then applied to place on the record the names of the respondent's two daughters as her representatives on the ground that they were entitled to succeed to her *stridhan*, if any. This application was also refused, the Judge being of opinion that under the Mayukha, which was the authority applicable to this case, the daughter inherited the *stridhan* of the mother only when it belonged to one of the six classes specially mentioned, and that the right to maintenance, which was the alleged *stridhan* in this case and which was the subject of the appeal, did not belong to any of those classes and, therefore, did not descend to the daughters, but to the husband. In his judgment he said :—

"Before the hearing of the appeal which her husband had brought she (Bai Rewa) died. He then applied to have her surety made respondent for the purpose of carrying out the appeal, but the application was refused * * *

"He has now applied to enter the names of the deceased's minor daughters on the ground that they are entitled to succeed to her *stridhan* if she has any. It is not, however, alleged in the application that any such *stridhan* exists. In Gujarat, according to the Mayukha, the *stridhan* to which a daughter is entitled in preference to other heirs is sixfold property specially enumerated. In respect of other property, the husband and not the daughters (*sic*) the heirs, the presumption being (in the absence of allegation or proof to the contrary) that the marriage was in one of the approved forms. The subject-matter of this suit, namely, money to which the wife may have been entitled as maintenance, is property of that other kind of which the husband is the heir. **[761]** The daughters, therefore, are not the legal representatives of the wife for the purposes of this suit."

The defendant appealed against this order.

Gokuldas K. Parekh, for the appellant :—The Judge was wrong in holding that the daughters are not the legal representatives of the deceased with respect to the property in dispute. The sum awarded for the maintenance of a female may or may not be included in the category of *stridhan* technically so called ; still it is *stridhan*, and being *stridhan* the persons entitled to succeed to it are her heirs and not the heirs of her husband—Vyavahara Mayukha, ch. IV, s. 10, pl. 24—28. The Mayukha is not

1892
OCT. 19.
—
APPEL
LATE
CIVIL.
—
17 B 758.

quite explicit on the point. For the purpose of determining what is meant by the expression "legal representative" of a female, the passages from the Mitakshara and the (Mayukha) bearing on the point may be read together.

Chimanlal H. Setalvad, for the minor respondents (the daughters) :— We rely upon *Vijiarangam* v. *Lakshuman* (1) ; West and Buhler, pp. 150, 151 ; Banerji's Law of Marriage and Stridhan, p. 443. The words in the Mayukha are *putradayah* (sons and others), that is, sons and other heirs succeed in the case of a non-technical *stridhan*. This excludes the idea of daughters coming in. There is a distinction as to succession in the case of a technical *stridhan* and non-technical *stridhan*. The amount of *stridhan* being not a technical *stridhan*, the daughters cannot succeed. In the present case there being no sons, the husband is the heir of the deceased. The daughters being expressly excluded by the expression *putradayah*, they cannot succeed under the rules relating to non-technical *stridhan*, but they may come in as heirs to such property under the general law relating to inheritance if there is no other heir in existence.

JUDGMENT.

TELANG, J.—The question which directly arises in this case is as to the person entitled to represent a deceased woman in an appeal filed by her husband against a decree for maintenance obtained by her. The right to such representation would depend on the right of inheritance. And the maintenance money being admitted on both sides not to be of the class called "*stridhan* [762] proper" by the Vyavahara Mayukha, which is the authority applicable to the case, the question to be decided assumes this form : Is the husband of a deceased woman, or her daughter, the preferential heir, according to the Vyavahara Mayukha, to that woman's property, not being property of the kind which classes as "*stridhan* proper?"

The solution of this question depends on the true construction of the Vyavahara Mayukha, ch. IV, s. 10, placitum 26 (2), a passage which must be at once admitted to be extremely obscure, and which two of our most important text-books on Hindu law have proposed to interpret in two absolutely irreconcileable ways. In West and Buhler's Digest, pp. 150-1, the opinion expressed on the point is identical with that which in *Vijiarangam* v. *Lakshuman* (1), West, J., put forward when he spoke as follows in regard to the construction of that passage : "Inherited property, Nilakantha says, though it is *stridhan*, not being one of those kinds

---

(1) 8 B. H. C. R. O. C. J. 244 (260).

(2) Placita 24 and 26 of the chapter of the Mayukha referred to run as follows :—

The right of the daughters and their issue confined to the six kinds of property.

24. This right of inheritance, of daughters and the rest, in the mother's property, exists only in the wealth given before the nuptial fire (Adhyagni), and in the bridal procession (Adhyavahanika) and the other (kinds) above recorded in the texts (paras. 1-2-3) specifying woman's property ; for, if relating to all wealth in which their mother has any property, it would go to set aside those texts (limiting it to six).

Woman's property is an exception to the general right of sons CLIX.

26. However, the text of Yajnavalkya, "Let sons divide equally both the effects and the debts, after (the demise of) their two parents," relates to (what is) acquired by the act of partition and the like with the exception of that declared in the above texts (as woman's property). From this it is clear that, if there be daughters, the sons or other heirs even succeed to the mother's estate, distinct from that part before described (as woman's property).

of *stridhan* for which express texts prescribe exceptional modes of descent, goes, on the woman's death to her sons and the rest, as if she were a male, and this too notwithstanding her having left daughters (Vyav. May., ch. IV, sec. X, pl. 26)." The passage which sets forth this doctrine being somewhat obscure in Mr. Borradaile's translation, it may be as well to say that its true purport is this :—"It is clear **[763]** that although there be daughters, the sons or other heirs still succeed to the mother's estate, so far as it is distinct from the part already described (as subject to peculiar devolution under texts applicable to particular species of *stridhan*").

On the other hand, Mr. Mayne says that "it is very questionable whether Nilakantha meant anything of the sort," and he states his own interpretation of Nilakantha's views in the following words :—The meaning of this appears to me to be, "the mother's estate does not descend according to the rules applicable to *stridhan ;* but is taken by such heirs, being sons or otherwise, as would have taken it, if the accident of its falling to a woman had never occurred. Where, therefore, the property had come to the mother from a male, it would return to the heirs of that male." On the best consideration that we have been able to bestow on this subject, we have been compelled to come to the conclusion, that neither of these interpretations of the Vyavahara Mayukha is correct.

Dealing first with Mr. Mayne's view, we confess, we are unable to see in the opinion of Nilakantha anything whatever to show that he regarded the devolution of property on a woman as an "accident," or that he adopted the doctrine that on that accident ceasing by the death of the woman, the property should revert to the heirs of the last male owner. This doctrine of reverting to the heirs of the last male owner is one which is nowhere expressed, as far as we are aware, in either the Mitakshara or the Mayukha. It appears to be a doctrine of Jimutavahana. And although, in consequence, probably, of the early Privy Council decisions pronounced in Bengal cases having been applied to cases arising in other provinces, this theory of reverting has been authoritatively laid down in one or two other instances, we do not think that it is necessary or allowable to introduce that conception into the theory of *stridhan*, without some basis for it being found in the original authorities. We are not aware of any such basis. On the contrary, we are of opinion that Nilakantha, at all events, discards that conception in one passage in clear and express terms. In ch. IV, s. 10 placitum 28, in dealing with devolution of *stridhan* in default of the **[764]** husband, Nilakantha states the view of the Mitakshara, which might be supposed to be that it goes to the husband's relations as such, and then proceeds to point out that such a supposition would be incorrect, and finally lays it down that the Mitakshara must be construed in the sense identical with his own opinion, which is that the heirs to succeed are the heirs to the woman herself, though her heirs in the husband's family. He expressly refers to the general rule laid down by Manu in ch. IX, placitum 187, and deduces from it the conclusion that it is propinquity to the deceased which creates the right to take the property of the deceased. It appears to us that this conclusion and the grounds on which it is rested are alike inconsistent with the theory propounded by Mr. Mayne. Again, it is to be remarked that, on Mr. Mayne's construction, as far as we are able to make it out with precision, the phrase used by Nilakantha "the sons or other heirs," which Mr. Mayne paraphrases by "such heirs, being sons or otherwise,"

1892
OCT. 19.
APPEL-
LATE
CIVIL
17 B. 758.

is not to be understood as expressing the relationship to the "mother" whose estate is in question, but to a previous male holder. Unless this is so, we cannot perceive how the theory of a reverter can be spelt out of the passage under discussion. But if this is the true interpretation of Mr. Mayne's view, we are bound to say that it is, in our opinion, entirely inconsistent with the actual language here used by Nilakantha, which necessarily requires that the relationship of "daughters" on the one hand and of "sons or other heirs" on the other, must be traced to the same propositus, *viz.*, the "mother" whose estate is in question. Further, it is not unworthy of note that, *as expressed*, this rule of Nilakantha, on Mr. Mayne's construction as above interpreted, can only apply where a woman has succeeded by inheritance to the property of a previous holder, to the exclusion of the other "heirs, being sons or otherwise" of such previous holder. But ordinarily the only case in which such an exclusion of sons, &c., by a female heir would occur, would be in the case of property descending, as *stridhan* for example, to one woman from her mother or grandmother. If there are other cases, they must be very rare indeed. If so, this passage affords an extremely narrow foundation, if it affords any foundation at all, for a rule about a reverter to the **[765]** heirs of the last *male* holder. On such grounds as these, we are unable to accept the interpretation put by Mr. Mayne on the passage under consideration.

As regards the other interpretation, it must be observed, in the first place, that we are told in the Digest itself, that how the rule "is to be worked out in detail is not laid down." And it is obvious that at the very outset we are encountered by a difficulty. The list of heirs referred to for the purposes of the rule comprises a widow. When, therefore, the rule is to be applied to a female propositus, a modification of this becomes absolutely essential, and the suggestion has then to be made, that that word should be taken to signify the analogous relationship, and must be held to mean "husband" for the purposes of this adaptation of the rule. This, we confess, appears to us to be a great difficulty, and we are unable to recall any similar case of the use in any of our books of a class name with the word "*adi*," &c., where any similar modification is found to be necessary. Secondly, it is to be noted, that the words "as if she were a male" are *not* Nilakantha's. We presume that they are introduced as explanatory of the phrase "the sons and the rest," which is understood as referring to the whole group of heirs of a separated male householder from "sons" down to the end of the so-called "compact series." We shall, in the sequel, show that it is unnecessary to interpret the words "the sons and the rest" with reference to the list of heirs of a separated householder. But here we may point out one slight difficulty in addition to that already indicated in the way of that interpretation. The whole succession of heirs comprised under that phrase is not, in fact, grouped together as one class by the Vyavahara Mayukha in the place where it is first laid down for its principal and direct purpose. The lineal male descendants, who come at the head of that line of succession, are dealt with separately and by themselves under the head of unobstructed heritage, which is laid down as a separate branch of heritage. The succession of a widow and the subsequent heirs is dealt with separately under the head of obstructed heritage, and in the Vyavahara Mayukha itself these two parts of the line of succession are separated by a discussion of questions connected with partition and with impartible property. **[766]** We do not think this circumstance to be by any means conclusive, but we think it is of some importance in deciding whether, as supposed, Nilakantha had in mind an

1892
OCT. 19.

APPELLATE CIVIL.

17 B. 758.

ideal group which he has not himself described or treated of as one integral group anywhere else.

We think that, looking at the whole course of the discussion, of which chap. IV, s. 10, placitum 26, forms a part, the phrase "sons and the rest" has really a much narrower scope and extent than is attributed to it in the interpretations proposed by Mr. Mayne and in West and Buhler's Digest. The phrase appears to us to mean "sons, grandsons and great-grandsons," and no more. From placitum 13 of s. 10 the discussion commences with respect to succession to a woman's property. And down to placitum 27 various points relative to such succession as between the offspring of the deceased woman *inter se* are considered. In some cases, it is said the male offspring or sons inherit jointly with the female offspring; in others the latter entirely exclude the former; in still others, the former exclude the latter. This will be seem to be the main topic discussed in the placita referred to. Doubtless some minor matters are also considered. But that is the main point. And after exhausting that part of the discussion Nilakantha, in the later placita from placitum 27 onwards, proceeds to deal with the rights to woman's property of other heirs than the lineal descendants, male or female, of the deceased woman. It seems to us that this general view of the scope of the different parts of the section under consideration shows that the phrase referred to is probably confined in its intention to the limits above indicated. An examination of the placitum in detail supports that conclusion. Placitum 13, adverting to two particular species of *stridhan*, lays it down that the woman's "children" succeed to it. Down to placitum 16 this general rule is explained and certain distinctions and modifications are stated. In placitum 17 a rule is laid down about another of the specific classes of *stridhan*, giving it to the unmarried daughter alone. In placitum 18 all classes of woman's property other than those specifically provided for in the previous placita are dealt with, and said to go to the daughters. The subsequent placita down to placitum 25 state the necessary **[767]** details connected with that topic, and in placitum 25 it is distinctly pointed out that all these rules relate to *stridhan* technically so called. In placitum 26 woman's property not of the technical class is dealt with, and it is said that here the sons and the rest take it even if there are daughters. Placitum 27 then proceeds to give the rules regarding the devolution where there is no offspring of either sex; thus further implying what has been already shown, that the previous placita were intended to deal only with the respective rights of offspring male or female, where they exist.

Again, if we look at the use of the word "*adi*" in the course of this discussion, we shall find the same conclusion strengthened. In placitum 14 we have the phrase "daughters and the rest;" in default of them we are told sons are to succeed. Clearly the word *adi* there must, in our opinion, be limited to the issue of the daughters in the sense elsewhere explained. In placitum 23, we have the phrase "daughters and the rest" again; and again it can, we think, be only interpreted in the limited sense here indicated. We have in the same placitum the phrase "sons and grandsons and the rest take the property," and the authority cited for the proposition only refers in terms to "sons." It seems, therefore, to follow that the phrase there can only mean "sons, grandsons and great-grandsons." Again, in placitum 24 we have "daughters and the rest" once more. And the context shows that that means daughters and their issue as contrasted with sons, grandsons and great-grandsons. Lastly, we have "sons and the rest" in placitum 26. And we can see no reason why the phrase should

1892
OCT. 19.

APPELLATE CIVIL.

17 B. 758.

be construed differently from "sons, grandsons and the rest" in placitum 23, while on the other hand the whole context, we think, requires that construction to be adopted.

Again it is to be observed that the rule under consideration is deduced by the author of the Mayukha from the text of Yajnavalkya quoted in placitum 26, in which only sons are named. That text, in its application to the estate of the father, is quoted by the Vyavahara Mayukha at chap. IV, s. 4, placitum 17 (Stokes, p. 52). That passage occurs in the section relating to unobstructed heritage, and is, therefore, confined to the rights of the lineal male descendants—sons, grandsons and great-grandsons. [768] It has no connection there with the succession of the heirs comprised in the "compact series" beginning with the widow. That circumstance also appears to us to afford some indication of the limits within which the meaning of the word *adi* in placitum 26 must be confined.

It would thus appear, that in the passage under consideration, what Nilakantha intends to lay down is that as regards property which does not class as woman's property in the technical sense, the "sons and the rest" take precedence over "the daughters and the rest." The question, however, remains as to who are the other heirs to such property, failing both sons and daughters. On Mr. Justice West's construction, no doubt, as well as on Mr. Mayne's, no such question would arise, as the whole of the series of heirs defined elsewhere are thereby held to be the series of heirs to a deceased woman. But on the construction now put forward, it seems to us the answer to the question above formulated must be, that the heirs to *stridhan* proper and *stridhan* improper are identical, save that as between male and female offspring the latter have a preferential right as regards *stridhan* proper, while the former have a similar right as to *stridhan* improper. It must be admitted, no doubt, that there is some little difficulty created in the way of the adoption of this view, by the circumstance that the Vyavahara Mayukha in dealing with the later stages of the devolution only mentions *stridhan* proper, whereas on this view one would expect that he should there mention both classes of *stridhan*. This is true, but we think the difficulty is not insurmountable in the case of a work constructed as the Mayukha is, when it is remembered that the author's aim throughout is to evolve his propositions from the texts of older writers. In this particular case, for instance, while it is true that in placitum 27 the rule laid down relates in terms only to *stridhan* proper, though on the view here expressed it is really intended to apply to both classes of *stridhan*, still that circumstance may be said to be to some extent explained by this, that that placitum is only a reproduction of a text of Yajnavalkaya with a short introductory comment of Nilakantha's, and no more. As Nilakantha understood that text only to refer to *stridhan* proper, he could only use it as an authority for a proposition [769] limited to that class. And if he does not go on at the same time to point out that that proposition should also be applied to *stridhan* improper, this is probably because he must have supposed that as he was laying down no other rule about it, this general rule must be treated as applicable; and further because he probably thought that he had to all intents and purposes already indicated that the difference between the lines of inheritance to the two classes of *stridhan*, was limited to the one point already mentioned by him in that connection. Independently of these considerations we think that as we have here to find out a rule for the devolution of one class of *stridhan*, where no express rule is stated in distinct terms, it is more likely that the author intended it to be found in the rule laid

down as regards another species of the same genus of property, especially as all the species of that genus are dealt with in one and the same section, than that he intended to refer us for guidance to a rule laid down as regards an entirely different kind of property, the succession to which is laid down in an entirely different section of the work, and laid down in a manner which, without modification, is admittedly not applicable to the species of property here under consideration. If the latter rule was intended by Nilakantha to be applied in this case, we think we might fairly expect that to be stated much more explicitly than it has been in fact in the passage under discussion.

On general grounds, too, we think it may be said that the rule, as now stated, is in harmony with the doctrines of the Mayukha. The author of that work, like the author of the Mitakshara, declines to look upon the enumerations of specific kinds of *stridhan* in the old Smriti texts as exhaustive. He includes under the name all that under the law becomes the property of the woman (1); only unlike the author of the Mitakshara, he distinguishes the specific kinds enumerated in the texts from those which are not so enumerated, for purposes of inheritance (2). In doing this, it seems quite reasonable to lay down that as regards that class of property which is emphatically woman's **[770]** property, being expressly so named by the old sages, the female offspring should take precedence over the male; while as regards that which is not such, the general preference given to the male offspring over female by Hindu law should have effect. On the other hand, there is no obvious reason why in the case of collateral relations any similar distinction should be maintained between the two classes. Of course, if the woman whose property is in question is not to be treated as a fresh source of devolution at all—which is Mr. Mayne's view as regards *stridhan* improper—all these considerations are beside the question.

But, apart from the points already discussed, we confess it seems to us that once we recognise the woman's ownership in the property in the way it is recognised by Nilakantha, it is a matter of course recognising her as a fresh source of devolution, unless some powerful considerations can be urged on the other side. We can see none such here, but rather the contrary. For it must be remembered that the property with which the rule in question deals is not merely that which the woman obtains by inheritance, but may include that which has never belonged to her husband or any other relation either on the husband's or the father's side, but is her own original acquisition(3). Such property is the woman's property; it is not the husband's property. Why, then, should it go on her death to any one except to those who are the woman's heirs? And how can the rule about the last male owner be made applicable to such property at all?

On these grounds we are of opinion that the daughters of the deceased Bai Rewa are her legal representatives for the purposes of this appeal, and that, therefore, the order of the Court below should be reversed and the appeal remanded for disposal by the lower Court. Costs to abide the result.

Order reversed.

---

(1) Ch. IV, s. 10. pl. 2. See stokes' Hindu Law Books. p. 98.
(2) Stokes' p. 104 (pl. 24); and Stokes, p. 105 (pl. 26), where a word in the original is omitted in the translation; see Mandlik's Mayukha, p. 97.
(3) Ch. IV, s. 10. pl. 3—12; Stokes, pp. 99—102.

1892
OCT. 19.

APPEL-
LATE
CIVIL.

17 B. 771.

17 B. 771.

[771] APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Candy.

GOVIND VENKAJI KULKARNI (*Original Plaintiff*), *Appellant v.* SADASHIV BHARMA SHET *and another* (*Original Defendants*), *Respondents.** [19th October, 1892.]

Encroachment on land—Injunction—Damages—Legal rights of owner of land—Owner not compellable to accept compensation instead of removal of encroachment.

In a suit to recover land adjacent to a temple belonging to the defendants, on which land the defendants had encroached by building verandahs, the lower Courts found that the land sued for was the property of the plaintiff subject to the defendants' right of access to the temple, and directed the defendants to pay compensation to the plaintiff for the encroachment. The plaintiff appealed to the High Court.

Held, that the land being found to be the plaintiff's, the Courts could not compel him to part with his legal rights and accept compensation against his will, however reasonable it might appear to be. The defendants were accordingly ordered to remove the verandahs complained of.

[R., 28 B. 298=6 Bom. L. R. 86 (88).]

THIS was a second appeal from the decision of Dr. A. D. Pollen, District Judge of Belgaum.

The plaintiff sued to establish his title to and recover possession of certain portions of land adjacent to a temple on which land the defendants had encroached by building verandahs; the temple belonging to the defendants, and the land all around it belonging to the plaintiff.

The defendants denied plaintiff's title and pleaded limitation.

The Subordinate Judge found that the land in dispute belonged to the plaintiff, and directed the defendants to pay compensation to the plaintiff for their encroachment.

Plaintiff appealed, and the District Judge having found that the ground round the temple belonged to the plaintiff, subject to defendants' right of access to and of using the temple, passed a decree in the following terms:—

"I vary the decree by finding that plaintiff is the owner of the land in dispute on the north and east sides of the temple as claimed in the plaint, and by awarding his costs throughout. I otherwise confirm the decree."

[772] The plaintiff preferred a second appeal.

Balaji Abaji Bhagvat, for the appellant.

P. M. Mehta (with *B. N. Bhajekar*), for the respondents.

JUDGMENT.

SARGENT, C. J.:—Both the Courts below have found that the land in question belongs to the plaintiff; but subject, as the Court of appeal has found, to a right of access to the temple. Such being the findings as to the property in the land, the Courts could not compel the plaintiff to part with his legal rights and accept compensation against his will, however reasonable it might appear to be.

---

* Second Appeal, No. 429 of 1891.

We must, therefore, reverse the decree of the Court below, except as to the order as to costs, and order the defendants to remove the verandahs complained of by the plaintiff. Defendants to pay plaintiff his costs of this appeal.

Decree reversed.

N.B.—After the High Court's judgment was delivered, the plaintiff presented a petition of review praying for a direction in the decree for delivery of possession. The Court, thereupon, on the 20th April, 1893, amended the decree by adding "and to restore possession of the land to plaintiff" after the words "remove the verandahs complained of by the plaintiff."

1892
OCT. 19.
APPELLATE CIVIL.
17 B. 771.

---

17 B. 772.

APPELLATE CIVIL.

Before Sir Charles Sargent Kt., Chief Justice, and Mr. Justice Candy.

IRANGOWDA (*Original Defendant*), *Appellant v.* SESHAPA (*Original Plaintiff*), *Respondent.** [19th October, 1892.]

Practice—Procedure—Suit by decree-holder to declare a house subject to attachment in execution as being the property of the judgment-debtor—Decree for plaintiff on ground that judgment-debtor, though not the owner of the house, had an attachable interest in it as permanent tenant—Court cannot make out a new case for plaintiff.

The plaintiff's case being that a certain house was the absolute property of his judgment-debtor, and that, therefore, he (the plaintiff) was entitled to attach it in execution of his decree, the Subordinate Judge found that the judgment-debtor was not the owner of the house, and rejected the plaintiff's claim. The appellate Court held that (though the judgment-debtor was not the owner) he had an attachable interest in the house as permanent tenant, and allowed the plaintiff's claim. On appeal to the High Court by the defendant,

[773] *Held*, that the order of the appellate Court made out an entirely new case for the plaintiff which he had not made himself at any period of the trial, and that the decree of the lower appellate Court should be reversed.

SECOND APPEAL from the decision of Rao Bahadur Kashinath Balkrishna Marathe, First Class Subordinate Judge, with appellate powers, of Dharwar.

Suit to set aside an order removing attachment.

The plaintiff alleged that he had obtained a decree against one Sanganbasapa and in execution thereof attached the house in dispute as the property of Sanganbasapa. The defendant, thereupon, presented an application for the removal of the attachment on the ground that the house belonged to him and not to Sanganbasapa and got an order for the removal of the attachment. The plaintiff then brought the present suit to set aside that order, and for a declaration that the house was liable to be attached and sold as the property of Sanganbasapa in execution of the plaintiff's decree against him.

The defendant alleged that the house was his ancestral property and Sanganbasapa his tenant; it was therefore, not liable to be attached and sold for Sanganbasapa's debt.

The Subordinate Judge found that the house was not the property of Sanganbasapa, and that, therefore, it was not liable to be sold in execution of the plaintiff's decree.

On appeal by the plaintiff that Sanganbasapa was the owner as admittedly he was in possession, the Subordinate Judge with appellate

* Second appeal, No. 744 of 1891.

1892
OCT. 19.
APPEL-
LATE
CIVIL.
17 B. 772.

powers found that the house belonged to the defendant, who had reserved to himself a right to rent only, that Sanganbasapa was permanent tenant, and that permanent tenancy was "such a title as the plaintiff must be permitted to attach and sell." He, therefore, reversed the decree of the Subordinate Judge making the declaration sought for by the plaintiff.

The defendant preferred a second appeal.

Narayan Ganesh Chandavarkar, for the appellant (defendant).—The plaintiff did not allege in his plaint that his judgment-debtor had a right to live in the house as a permanent tenant, and that that right should be sold in execution of the decree. His case was that his judgment-debtor was absolute owner of the [774] property, and that the right of absolute ownership should be sold. The first Court rightly rejected the claim. The lower appellate Court was wrong in making out for the plaintiff a case which was never alleged by him, and with respect to which no issue was asked for in the first Court. The lower Court could not dispose of the case on a ground not raised in the plaint, in the issues or the pleadings.

Vishnu Krishna Bhatavdekar, for the plaintiff.

JUDGMENT.

SARGENT, C. J.—The plaintiff's case as made by his plaint was that he was entitled to attach the house as the absolute property of Sanganbasapa. The first issue was framed by the Subordinate Judge on that assumption, and the fourth ground of objection in plaintiff's own appeal to the Court below was that the first Court was wrong in not holding that Sanganbasapa was the owner of the house. The case has, therefore, been tried exclusively on the basis of determining whether Sanganbasapa was the owner of the house. However, the lower Court of appeal has found that, although defendant is the owner, Sanganbasapa had an attachable interest in it as a permanent tenant; but this is to make an entirely new case for the plaintiff, which he never made himself at any period of the trial.

We must, therefore, reverse the decree of the Court below and restore that of the first Court, with costs on plaintiff here and in the Court below.

Decree reversed.

18 B. 1.

1893
APRIL 18.

ORIGINAL CIVIL.

18 B. 1.

ORIGINAL CIVIL.

Before Mr. Justice Starling.

BYRAMJI JEHANGIR LAMNA AND OTHERS (*Plaintiffs*) *v.* RATNAGAR JAMSETJI RATNAGAR AND OTHERS (*Defendants*).*

[18th April, 1893.]

Will—Construction—Gift of income for life with power to appoint—Power of appointment—Invalid power of appointment—Gift over in default of appointment—Gift of residue equally between two sons and then to next of kin—Construction.

A Parsi by his will devised a certain house to his executors on trust after payment of repairs, &c., out of the income thereof to pay the balance of such income to his daughters Cuverbai and Jerbai in equal moieties and after their death "to the use of such of the issues only of the said Cuverbai and Jerbai as they should respectively appoint, such appointment to affect their own respective moiety only and not that of the other of them," and in default of appointment on trust to sell the house and divide the proceeds as directed in the will.

Held, that each daughter took half the house in question for her life with power to appoint it among her children as she thought fit. Even if the power to appoint had been invalid, the gift over on default should be upheld on the authority of *Peacock* v. *Frigout* (1).

A Parsi testator by his will bequeathed the residue of his moveable property to his executors in trust out of the income thereof to apply the sum of Rs. 50 for the maintenance of his son Ratnagar until he should attain 21 years of age and to invest the surplus of such income in Government securities, which should be added to the original *corpus* of his moveable property for the benefit of his said son Ratnagar, and upon his attaining the age of 21 to pay over to him "the whole of the interest, dividends and produce only of the *corpus* of the whole of the moveable property," and after the death of Ratnagar in trust to divide the said *corpus* of the moveable property with all its additions and accumulations among the next of kin of the said Ratnagar. By a codicil subsequently executed the testator directed that the above bequest should extend and be applicable to his son Nusserwanji and that the executors should divide the income of the moveable property between [2] Ratnagar and Nusserwanji instead of giving the whole to Ratnagar. The Court was of opinion that under the will and codicil Ratnagar and Nusserwanji were each to have a moiety of the income for their respective lives, and that on their death one moiety of the *corpus* was to go to their next of kin. The Court, however, declined to make a declaration to that effect, as Ratnagar, who, at the date of suit, was unmarried, might afterwards marry and have children, who would not be bound by a declaration made in this suit.

SUIT by executors for the construction of a will.

Jamsetji Ratnagar, a Parsi, died at Bombay on the 21st May, 1877. He left a will, dated the 31st January, 1874, and two codicils, dated, respectively, the 25th March 1875 and the 20th May, 1877; and his executors, the plaintiffs, duly obtained probate on the 19th September 1877.

The first plaintiff was the son-in-law, and the second plaintiff (Nusserwanji Jamsetji Ratnagar) was the eldest son of the testator.

---

* Suit No. 114 of 1893.

(1) L.R. (1893) 1 Ch. 54.

1893
APRIL 18.
ORIGINAL CIVIL.
18 B. 1.

The will, after appointing executors and making certain bequests, contained a clause whereby the testator devised to the executors a certain house situated at Breach Candy on trust, out of the income thereof to keep it in repair, &c., and after such payments—"to pay and divide the net rent of the said house to and amongst my daughters, Cuverbai, wife of the said Byramji Jehangir Lamna, and Jerbai not yet married during the term of their respective natural life as tenants in common for their sole use and benefit on their own respective receipts only, free from the control, debts and marital rights of their respective husbands, and after the death of the said Cuverbai and Jerbai to the use of such of the issues only of the said Cuverbai and Jerbai respectively and for such estate and estates, uses, ends, intents and purposes of such issues only as they, the said Cuverbai and Jerbai, notwithstanding their or her coverture and whether they or she shall be sole or covert shall respectively from time to time by any deed or deeds, instrument or instruments, in writing, with or without power of revocation to be by them respectively sealed and delivered in the presence of and attested by two or more credible witnesses or by their respective last will and testament, in writing, direct, limit or appoint—such direction, limitation or appointment to affect their own respective moiety or share only, and not that of the other of them, and in default of such direction, limitation or appointment upon trust to sell or dispose of the said house and to pay and divide the proceeds thereof equally to and among their respective lawful issue *per stirpes* and not *per capita* according to the law then in force relating to intestate succession among the Parsis, &c."

As to the residue of his estate the testator directed as follows:—

"And I give and bequeath all my Government promissory notes or loans of the Government of India, Bombay municipal debentures, post bills, or drafts of the local or any other banks, money deposited in any such banks on current or fixed deposit [3] account, money lent on the mortgage or security of immoveable properties, ready cash, and all the rest residue and remainder of my personal and moveable estate whatsoever and wheresoever of which I may be possessed at the time of my decease and not otherwise disposed of by this my will, unto the said Hormusji Dadabhoy Parnik, Dosabhoy Dadabhoy Parnik, Byramji Jehangar Lamna and Nusserwanji Jamsetji Ratnagar or the survivor of them and the executors, administrators of such survivors, upon the trusts and for the intents and purposes, hereinafter expressed and declared, of and concerning the same,—that is to say, upon trust to deposit all such Government promissory notes, municipal debentures, post bills, drafts, ready cash, &c., in the new Bank of Bombay, Limited, or any other bank constituted under the Royal Charter or formed and registered under the Indian Companies Act for safe custody and to pay and apply, out of the interest, dividends, produce or income of such moveable estate, the sum of Rs. 50 for the maintenance and education or otherwise for the benefit of my son, Ratnagar Jamsetji, until he shall attain the age of 21 years, and in the meantime to accumulate and invest the surplus of such interest, dividend and produce in the promissory notes of the Government of India or such other securities as may have been guaranteed by such Government, such investment to be made through or by the hands of the banks aforesaid in which the said moveable property may have been deposited at that time for safe cutody as hereinabove directed and to be added to the original or *corpus* of the said moveable property for the benefit of my said son, Ratnagar Jamsetji, and on his attaining the age of 21 years to pay over to him the whole of the interest, dividends and produce only

of the *corpus* of the whole of the moveable property as well as the interest, dividend, and produce of all the accumulations and additions which may have been made to the original or *corpus* of the said moveable property in the manner aforesaid or howsoever otherwise made or which may be then due and accrue thereon, and upon and after the death of my said son, Ratnagar Jamsetji, upon trust to deliver over, pay and divide the original *corpus* of the said moveable property with all its accumulations, additions and further interest, dividends and produce accrued and due thereon to and among all the lawful issues of the said Ratnagar Jamsetji according to the statute or law then in force in Bombay relating to intestate succession among the Parsis, but if there be only one issue then to such one issue only, but in the event of the death of the said Ratnagar Jamsetji without any lawful issue then upon trust to give, deliver over, pay and divide the whole of the said moveable property with all its accumulations and additions, &c., to the rightful heirs of my body, share and share alike."

The second codicil, dated the 20th May, 1877, after reciting this last mentioned clause of the will, continued:—

"Now I hereby declare and direct that the bequest, which I have made as aforesaid of the whole of my moveable property to the executors and trustees of my said will upon the several trusts and declarations therein made on behalf and for the benefit of my said son, Ratnagar Jamsetji, shall extend to and be applicable and be also for the benefit of my said son, Nusserwanji Jamsetji Ratnagar—that is to say, that the executors and trustees of my said will shall pay and divide in equal shares and proportions the whole of the income of all my moveable property to and amongst my said sons, the said Ratnagar Jamsetji Ratnagar and Nusserwanji Jamsetji Ratnagar **[4]** in lieu of paying the same over to the said Ratnagar Jamsetji only, and that the payment of the moiety of such income and produce to the said Nusserwanji Jamsetji Ratnagar shall be in addition to what I have already by my said will and first codicil given and bequeathed to him."

The suit now came on as a short cause. The questions submitted to the Court were the following :—

(1) Whether the power of appointment conferred by the said will and codicils on the defendants Cuverbai and Jerbai of the rents of the house No. 692, Breach Candy, in favour of their issues respectively and the limitation, in default of exercise of such power, of the said house in favour of the said issues are respectively valid and effectual, and if so, what is the true construction and legal effect of the same ?

(2) What is the true construction and legal effect of the dispositions contained in the said will and codicils of the testator's moveable property, and in particular whether the minor defendants Meherbai Nusserwanji Ratnagar, Aimai Nusserwanji Ratnagar, Jamshedji Nusserwanji Ratnagar, Shapurji Nusserwanji Ratnagar, Banubai Nusserwanji Ratnagar, Buchubai Nusserwanji Ratnagar and Kharsedbai Nusserwanji Ratnagar take any and what benefit under and by virtue of such disposition?

The above-mentioned minors were the children of Nusserwanji Jamsetji Ratnagar, the testator's eldest son.

Macpherson, *Raikes* and *Lowndes* appeared for the various parties.

They referred to the Indian Succession Act (X of 1865), ss. 100 and 103; and *In re Abbott*; *Peacock* v. *Frigout* (1).

(1) L. R. (1893), 1 Ch. 54.

1893

APRIL 18.

ORIGINAL CIVIL.

18 B. 1.

JUDGMENT.

STARLING, J.—This is a suit brought for the purpose of obtaining from the Court a declaration of the meaning and effect of two portions of the will and codicil of one Jamsetji Ratnagar who died on the 21st May, 1877. This will and the codicils thereto appear to have been drawn by some person who had an extensive acquaintance with legal phraseology, but a very limited one with the way in which it ought to be employed.

The first question arises on the bequest of a house at Breach Candy to his executors and trustees upon certain trusts. The [5] words of the will are as follows :—(His Lordship read the clause of the will above set forth (1), and continued :—)

In these provisions there is, in the first instance, a devise of the whole estate of the testator in the said house to his executors and trustees upon certain trusts, *viz.*, out of the income thereof to keep the same in repair and to effect insurance thereon and to pay the net balance of the income to his daughters Cuverbai and Jerbai in equal moieties and after their death "to the use of such of their issues as they should appoint," *i.e.*, the *whole house* is devised to the executors and trustees to the use of some one else upon the death of Cuverbai and Jerbai. Now it seems to me that this is practically equivalent to a devise to the trustees upon trust to pay the net income to Cuverbai and Jerbai for life, and on their death to stand possessed of the *corpus* for the benefit of some one else. The only difference the employment of the words "to the use of" would make would be that probably those words would be held to vest the *corpus* at the appointed time in the beneficiaries without any conveyance from the trustees. Then, the provision that the beneficiaries shall be "such of the issues only of the said Cuverbai and Jerbai and for such estate, &c., as Cuverbai and Jerbai by deed or will shall appoint," seems to me to create a good and valid power of appointment, and I do not understand that counsel have suggested that so far it is not valid. The difficulty seems to have arisen on the next clause :—"Such direction, limitation or appointment to affect *their own respective moiety or share* only, and not that of the other of them." It has been argued that this clause renders the power of appointment invalid, on the ground that as Cuverbai and Jerbai only had a life-interest, neither of them had a moiety or share in the *corpus*, and that consequently the only power of appointment, in view of their death, was a power to appoint an interest which ceased at their death, and, therefore, was a power of appointing nothing. In my opinion this is far too technical way of reading and interpreting this provision. Among ordinary laymen these two ladies would be looked upon as each having the usufruct of half the house, and thus, in ordinary though somewhat [6] unprecise language, it might be said that half the house belonged to each of them ; and this is what I think the testator intended, and that the limitation of the power of appointment should be read as if it were provided that the said Cuverbai and Jerbai should respectively be entitled to appoint one moiety only of such house and no more. I consequently hold that the power of appointment is valid, and that Cuverbai and Jerbai are each of them entitled to appoint by deed or will one moiety of the *corpus* of the trust property among their respective children in such way as she may think fit according to the provisions of the will. If I had come to the conclusion that this power was invalid, I should nevertheless

(1) 18 B. 2.

uphold the gift over on failure of the exercise of the power. I need not do more than say that I fully agree with and follow the decision on this point of Stirling, J., in *Peacock* v. *Frigout* (1).

The next point is a much more complicated one and arises on the bequest by the will of the residue for the benefit of the testator's son Ratnagar, and a direction in the second codicil directing that Nusserwanji shall share equally in that bequest. The direction of the will is as follows :—(His Lordship read the clause of the will above set forth (2) and continued :—)

Then in the second codicil the testator recites fully the provision that he has made for Ratnagar, and proceeds :—(His Lordship read the codicil as above(3), and continued :—)

This, to may mind, clearly amounts to a devise of the income of the residue to Ratnagar and Nusserwanji in equal moieties for their respective lives ; but no provision is expressly made in this codicil as to what is to happen to a moiety of the *corpus* on the death of Nusserwanji ; whereas there is in the will full provision made for the application of the *corpus* after the death of Ratnagar. Taking everything into consideration, however, I am of opinion that what the testator meant by the will and codicil was that Ratnagar and Nusserwanji were each to have a moiety of the income for their respective lives, and that on their respective deaths one moiety of the *corpus* was to go to their next-of-kin under the Parsi Succession Act (XXI of 1865). I do not, however, [7] think I can make a declaration to that effect. Ratnagar has no children at present, but he is a young man and may marry and have children, and the effect of such a declaration would be to limit the right of such children to half the *corpus* of the residue : consequently, as they cannot be represented in this suit, they would not be bound by any declaration I might make affecting their intrests, and I must refrain from doing more than express any opinion on the point.

Attorney for all parties :—Mr. *Darashai Bazonji.*

---

18 B. 7.

ORIGINAL CIVIL.

Before Mr. Justice Starling.

TRIBHUVANDAS RUTTONJI MODY *and another* (*Plaintiffs*)
v. GANGADAS TRICUMJI *and another* (*Defendants.*)* [15th August, 1893.]

Will—Construction—Gift to a class—One member of such class in existence at date of gift—Will directing deed to be executed—Date of deed is date of gift.

One Ruttonji Rupji Mody died in 1856 leaving a will whereby he directed his widow and executrix Ladcore to purchase an estate worth Rs. 20,000 for his grandson Tricumji, and that this estate should be conveyed to trustees, to be held by them in trust for Tricumji for his life or until his insolvency, and after his death for his son or other male heir. At the time of the testator's death Tricumji had no son. The executrix purchased the estate, but no trust-deed was executed. Tricumji, therefore, brought a suit in 1871 to have the will carried out and a trust-deed executed. Tribhuvandas Ruttonji (the plaintiff herein), who was Tricumji's uncle, was made a party to that suit and a consent decree was passed which ordered that the executrix Ladcore and Tribhuvandas should execute a trust-deed in accordance with the directions in the will. A deed was

---

* Suit No. 190 of 1893.

(1) L. R. (1893), 1 Ch. 54. (2) 18 B. 2. (3) 18 B. 3.

1893

AUG. 15.

ORIGINAL CIVIL.

18 B. 7.

accordingly executed in 1876 whereby the property was conveyed to trustees on the trusts declared in the will. At the time of the testator's death Tricumji had no son, but at the date of the deed in 1876 he had one son Chunilal; and in 1883 another son Gangadas (the defendant) was born to him. Tricumji died in 1890. Chunilal died childless in 1891. The plaintiffs, who were the son and grandson of the testator, now claimed the property. They contended that as neither of Tricumji's sons were in existence at the date of the testator's death they could not take under his will or under the deed which was afterwards executed to carry out the will; that although at the date of the deed in 1876 one of the sons (Chunilal) was in existence, nevertheless he could only claim as one of a class, and that class was not ascertained or ascertainable at the date of the testator's death, nor at the date of the deed, Gangadas not having been born until 1883. The whole class was, therefore, excluded, and the property after Tricumji's death was undisposed of.

[8] *Held*, that, in view of the direction of the will that a deed was to be executed which should declare the trusts of the property, it was the date of the deed subsequentlly executed which should be regarded in order to determine the validity of the limitation of the property bequeathed, and not the date of the testator's death, and that under the deed on the death of Tricumji his son Chunilal became entitled to the property.

In the case of a gift to a class, if there is a person in existence at the time of the gift capable of taking and whom undoubtedly the donor intends to benefit, he is entitled to take, although others of the same class subsequently come into existence whom the donor meant the gift also to benefit, but who cannot take because of their non-existence at the date of the gift.

[F., 32 C. 992 (1010) = 1 C.L.J. 482 = 9 C.W.N. 749; **Appl.**, 20 B. 571 (592); **R.**, 22 B. 533 (538).**]**

THE first plaintiff was father of the second plaintiff and the first defendant was the grandson of the first plaintiff's brother. The plaintiffs sued to recover from the defendants certain property situate in Bombay.

On Ruttonji Rupji Mody had two sons, *viz.*, Tribhuvandas Ruttonji (the first plaintiff) and Premji Ruttonji. The latter died in his father's lifetime and left a son named Tircumji Premji. Tricumji died in 1890, leaving two sons, Gangadas (the first defendant) and Chunilal, who died in 1891, leaving his widow Kasturbai, the second defendant, him surviving.

Ruttonji Rupji Mody had died long previously, *viz.*, in 1856. He left a will, dated the 10th June, 1856, whereby he demised the residue of his property to his son Tribhuvandas (the first plaintiff) and to his (testator's) widow Ladcore, and appointed the latter to be his executrix. By this will he directed that an estate of the value of Rs. 20,000 should be purchased for his grandson Tricumji Premji, and that it should be conveyed to trustees to be held by them in trust for Tricumji Premji during his life or till his insolvency, and after his death for his sons or male heirs.

The words of the will were as follows:—

"Landed estate of the value of Rs. 20,000 shall be purchased in Bombay. Bhai Tricumji shall receive the rents thereof, and in the deed thereof it should be provided that it shall not be claimable by any of Bhai Tricumji's creditors. A deed of such tenor shall be caused to be made and delivered . . . The above-mentioned property shall be given to Bhai Tricumji. And, in the event of Bhai Tricumji departing this life, Bhai Tricumji's son, who may be the *waist chain* (1), is to enjoy the property, and should he have no son the whole shall belong to Bhai Tribhuvan."

[9] In pursuance of the direction of the will, Ladcore purchased the estate, but no trust-deed was executed. Tricumji Premji accordingly

(1) *I.E.*, succeed his father as male heir and representative.

brought a suit (No. 817 of 1871) against her, in which he prayed that Ruttonji's will should be carried out and a trust-deed executed, and for an account, &c. The first plaintiff Tribhuvandas was made a party to that suit, which was finally settled by agreement between the parties, and a consent decree was taken, one of the terms of which ordered that Ladcore and the first plaintiff Tribhuvandas should execute a trust-deed in accordance with the directions contained in the will.

In pursuance of this decree a trust-deed was executed on 21st June, 1876, by Ladcore and the plaintiff Tribhuvandas, and by this deed the property now in dispute (*inter alia*) was conveyed to trustees, and due provision made for carrying out the intentions of the testator.

At the date of Ruttonji's death, in 1856, Tricumji Premji had no children, but in 1867 his son Chunilal was born, and in 1883 another son Gangadas (the first defendant) was born. Tricumji died in April, 1890, and Chunilal, as above stated, died in May, 1891, leaving his widow Kasturbai (defendant No. 2) him surviving. Ladcore died in 1879.

In the present suit the plaintiffs contended that on Tricumji's death the property which had been purchased as directed by the will was undisposed of and became part of the testator's estate to which they were entitled; that as Tricumji's sons were not born at the date of the testator's death they could not take either under the will or under the deed which was afterwards executed to carry out the will; that although at the date of the deed (1876) one of the sons (Chunilal) was in existence, nevertheless his claim was only as one of a class which was not finally ascertained or ascertainable at the testator's death or even at the date of the deed, Gangadas not having been born until 1883. The whole class was, therefore, excluded, and the property after Tircumji's life-interest was undisposed of. The plaintiffs further contended that the whole of the testator's property was ancestral, and that the will was, therefore, inoperative.

In their written statement the defendants denied that the property of Ruttonji Rupji was ancestral, and they contended [10] that he had full power to dispose of it by will. They further alleged that the first plaintiff had acquiesced in, and acted upon, the said will, and had recognized it as valid, and they contended that he was now estopped from disputing it.

They further pleaded that the consent decree in suit No. 817 of 1871 was a good and valid compromise of the disputes between the parties thereto and did not depend on the validity or invalidity of the will; that the deed of 1876 carried out the terms of the compromise, and that the plaintiffs were barred by it; that, apart from the compromise, the bequest in Ruttonji's will was valid, and enured for the benefit of Tricumji Premji for life, and after his death for his son Chunilal Tricumji; that Chunilal and his brother Gangadas (defendant No. 1), lived together as a joint family, and that on Chunilal's death the property survived to Gangadas (defendant No. 1).

At the hearing a number of issues were framed with reference to the will and the effect of the consent decree, but in the first instance only the following two were disposed of, *viz.*:—

Whether, in the events that had happened, the property comprised in the trust-deed of the 21st June, 1876, had not reverted to the estate of Ruttonji Rupji? and

Whether the first plaintiff was not estopped from disputing the title of Chunilal Tricumji to the said property?

Lang (Acting Advocate-General) and *Inverarity*, for plaintiffs.

1893

AUG. 15.

ORIGINAL CIVIL.

18 B. 7.

Macpherson and *Scott*, for the defendants.

The following authorites were referred to:—The *Tagore Case*(1); *Mangaldas* v. *Tribhuvandas*(2); *Ram Lal Sett* v. *Kanai Lal Sett* (3); *Manjamma* v. *Padmanabhaya* (4); Mayne's Hindu Law (5th Ed.,) para. 354.

JUDGMENT.

STARLING, J.—In this case one Ruttonji Rupji, who died in 1856, made a will of which he appointed one Ladcore executrix. By that will he (*inter alia*) directed as follows:—"Landed estate of the value of Rs. 20,000 shall be purchased in Bombay. Bhai Tricumji shall receive the rents thereof and in the deed **[11]** thereof it should be provided that it shall not be claimable by any of Bhai Tricumji's creditors. A deed of such tenor shall be caused to be made and delivered." Then, after enumerating certain other property, the will continues:—"As thus described the above-mentioned property shall be given to Bhai Tricumji, and, in the event of Bhai Tricumji departing this life, then Bhai Tricumji's son, who may be the *waist chain*, is to enjoy it; and should he have no son, the whole shall belong to Bhai Tribhuvan."

Ladcore purchased the property, but did not execute any deed, in reference thereto, as directed by the will, nor did she allow Tricumji to receive the rents thereof. Consequently Tricumji filed suit No. 817 of 1871 against Ladcore, praying (*inter alia*) that she should be ordered to execute a deed in terms of the said will, conveying the property to trustees. Subsequently, the first plaintiff was added as a party-defendant, and afterwards on the 16th July, 1874, a consent decree was passed whereby Ladcore and the first plaintiff were ordered to execute a deed in terms of the will.

On the 21st day of June, 1876, a deed was executed by Ladcore and the first plaintiff by which the said property was conveyed to trustees on certain trusts. The trusts are in more detailed terms than appear in the will, but it is admitted that they are proper for the due carrying out of the intention of the testator.

At the date of the testator's death, Tricumji had no children. A son, named Chunilal, was born to him in 1867, and he died in 1891, leaving him surviving his widow, Kasturbai, the second defendant. Another son was born to Tricumji in 1883, the first defendant Gangadas. Tricumji died in 1890.

To what date, then, are we to look in ascertaining the validity or otherwise of the limitations attaching to his property? The will of the testator does not directly devise the property to Tricumji upon certain limitations, but directs the executrix to buy property and to make a deed in respect thereof, in which it is to be provided that the property is to be held on the terms therein expressed. I am aware that in the will it is provided that Tricumji shall enjoy the rents of the property, and that on his death it should go to his son, but it is quite evident that the testator **[12]** intended a deed to be made in respect of the house, and I must hold that the meaning of the words is "I direct my executrix to purchase a property worth Rs. 20,000, and convey the same to trustees, to hold the same upon the trusts in the will set forth." Consequently, as the testator intended the trusts to be set out in a deed, I am of opinion that it is to

(1) 9 B. L. R. 377 (394). (2) 15 B. 652. (3) 12 C. 663. (4) 12 M. 393.

the date of the deed that we must look for the purposes of determining the validity of the limitations, and not to the date of the testator's death. The decree in suit No. 817 of 1871 has no effect upon this matter, as it does nothing more than direct Ladcore to carry out the terms of the will, and does not, in my opinion, otherwise determine the right of the parties.

At the date of the deed, Tricumji had a son Chunilal, and he consequently was capable of taking advantage of the gift of the property to him on the death of his father, and would undoubtedly be entitled to it, unless the gift to him is made bad by the subsequent birth of the first defendant. The deed provides that on the death of Tricumji the property is to go to his son, if only one, and to be divided among his sons, if more than one. As Chunilal was alive at the date of the deed, I must assume that it was intended that he should be benefited, although there might also be an intention that others should be benefited. Must I, therefore, hold that a limitation which was good at the date of the deed became bad by reason of others of the same class having subsequently come into existence, who could not take under the limitation? In my opinion, the cases of *Rai Bishen Chand* v. *Mussumut Asmaida Koer* (1), *Ram Lal Sett* v. *Kanai Lal Sett* (2), *Mangaldas* v. *Tribhuvandas* (3), *Manjamma* v. *Padmanabhayya* (4) show that, if there is a person in existence at the time of the gift capable of taking, and whom undoubtedly the donor intends to benefit, he is entitled to take, although others of the same class subsequently come into existence whom the donor *meant* the gift also to benefit, but who cannot take because of their non-existence at the date of the gift.

Therefore, I am of opinion that under the deed, on the death of Tricumji, his son Chunilal became entitled to the property in **[13]** dispute; and as he died without issue, on his death the property descended to the first or the second defendant, but to which of them it is unnecessary, in the present suit, to determine.

So far this judgment has proceeded on the assumption that the property of Ruttonji Rupji was self-acquired, the determination of the question as to whether it was self-acquired or ancestral having been reserved until the determination of the foregoing points. If it was ancestral, although the first plaintiff may not have had power to dispose of the property in question in the way he did, I see no reason why the deed should be not binding upon both plaintiffs, so far as the life-interest of the first plaintiff in the income of the half of the property in dispute, which would have come to him on partition with the second plaintiff, is concerned.

For the reasons above given I find that, in the events which have happened, the property comprised in the trust-deed has not reverted to the estate of Ruttonji Rupji. I also find on the fifth issue that the first plaintiff is estopped from disputing the title of Chunilal to the said property. I record no finding at present on the other issues, as they would be affected by the determination of the question whether the property of Ruttonji Rupji was ancestral or self-acquired.

Attorneys for the plaintiffs :—Messrs. *Edgelow and Gulabchand.*

Attorneys for the defendants :—Messrs. *Bhaishanhar and Kanga.*

---

(1) 11 I.A. 164. (2) 12 C. 663. (3) 15 B. 652. (4) 12 M. 393.

1893
AUG. 21.

ORIGINAL CIVIL.

18 B. 13.

18 B. 13.

ORIGINAL CIVIL.

Before Mr. Justice Starling.

HORMASJI MANEKJI DADACHANJI (*Plaintiff*) *v.* KESHAV PURSHOTAM AND ANOTHER (*Defendants*).* [21st August, 1893.]

Registration—Indian Registration Act (III of 1877), ss. 17 and 49—Decree—Attachment—Execution—Unregistered contract for sale of land subsequently attached in execution.

In execution of a decree against S and P, property was attached on the 11th February, 1891, and sold by auction to the plaintiff in July, 1892. The defendants, **[14]** however, alleged that at the date of attachment the property did not belong to S and P, as they had sold it to them (the defendants) on the 22nd January, 1891, under a contract of sale of that date. Their contract had not been registered.

Held, that by cl. (*b*) of s. 17 of the Indian Registration Act (III of 1877) the contract needed registration if it was intended that it should affect the land (s. 49). Not being registered it did not operate to transfer the ownership, and could not be received in evidence of any transaction affecting the land, *i.e.*, it could not be used to show that the ownership had passed from the vendor to the purchaser. The property in question was, therefore, at the date of attachment the property of S and P, and under the attachment and sale in execution it passed to the plaintiff.

A contract for the sale of immoveable property recited that, on the date thereof, Rs. 100 had been received as earnest-money, and provided that within two months the vendor would execute a proper conveyance, and thereupon receive the balance of the purchase-money and give up possession.

Held, that the document did not pass any right, title or interest in the property to the purchaser, but merely gave him a right against the vendor personally to call for a conveyance and possession on paying the balance of the purchase-money.

[D., 26 A. 266 (270) = 24 A.W.N. 8; 24 B. 400 (402) = 2 Bom. L.R. 220.]

SUIT by a purchaser at an execution sale for partition and possession of the property purchased.

The plaint set forth that in execution of a decree in suit No. 677 of 1890 passed against Shricrishna Janardan and Pandharinath Janardan on the 10th January, 1891, their right, title and interest in a certain immoveable property consisting of a house and land in 1st Carpenter Street, Bombay, was sold by public auction on the 27th July, 1892, and the present plaintiff Hormasji Manekji became the purchaser. The property had been attached on the 10th February, 1891.

At the time of the sale, Shricrishna and Pandharinath were entitled to a third share of the said property, and were in exclusive possession of (*inter alia*) the first floor of the house. On the 15th September, 1892, the plaintiff obtained a writ of possession, and in execution of it the defendants in this suit were removed from portions of the first floor into which they had entered in collusion with Shricrishna and Pandharinath, and the plaintiff obtained possession.

The defendants, thereupon, on the 20th September, 1892, took out a rule calling on the plaintiff to show cause why they should **[15]** not be put back into possession of the said first floor, and an order was made requiring the plaintiff to establish his right to possession of the first floor of the house in question.

---

* Suit No. 621 of 1892.

1893
AUG. 21.
ORIGINAL CIVIL.
18 B. 13.

The plaintiff then filed this suit. He prayed for a declaration that he was entitled to a third of the said house and land, and to possession of the first floor thereof, and that the defendants were not entitled to possession of the said first floor. He also prayed for possession of this first floor, and, in the alternative, in case the defendants should be held to have any right to the first floor, for a partition, &c.

In the written statement the defendants said that they and one Janardan Purshotam (the father of Shricrishna and Pandharinath) were the sons of one Purshotam Sakharam, to whom the property originally belonged. He died intestate, leaving these three sons him surviving. Janardan died in 1886, leaving two sons, the said Shricrishna and Pandharinath. They stated that the said property had never been divided between them and the said Janardan, but that by an agreement dated the 22nd January, 1891, Shricrishna and Pandharinath had sold their right, title and interest in the property to them (the defendants) and that since that time they (the defendants) had been owners of the whole of the property, but that by permission Pandharinath had occupied a part of the said first floor for a time. They contended that the first floor had been wrongfully taken possession of by the plaintiff.

At the hearing the only issue raised was whether at the time of the attachment (10th February, 1891) in suit No. 677 of 1890 Shricrishna and Pandharinath had any and what right, title and interest in the said premises.

It was admitted that prior to the 22nd January, 1891 they were entitled to a third share.

Macpherson and *Scott*, for plaintiff. They cited Dart's Vendors and Purchasers, p. 284 ; *Burjorji Cursetji* v. *Muncherji Kuverji* (1) ; *Tasker* v. *Small* (2) ; *Fox* v. *Pursell* (3).

[16] *Lang* (Acting Advocate General) and *Anderson*, for defendants. They cited *Balaji Anant* v. *Ganesh Janardan*(4) ; *Dhondu* v. *Ramji* (5) ; *Krishnapa* v. *Panchapa*(6) ; *Naigar Timapa* v. *Bhaskar Parmaya*(7) ; *Johur Mull* v. *Tarankisto Deb* (8).

JUDGMENT.

STARLING, J. :—In this case it is admitted that Shricrishna Janardan and Pandharinath Janardan were jointly entitled to an undivided third share of certain property in 1st Carpenter Street, Bombay, to the remaining two-thirds in which the defendants were entitled ; and it is also admitted that these two persons continued to be entitled to their one-third, unless their interest therein was divested by an agreement for sale of the said interest which was executed by them on the 22nd January, 1891.

On the 10th of January, 1891 a decree was passed against Shricrishna and Pandharinath in suit No. 677 of 1890. On the 10th February, 1891, their interest in the property was attached in execution of that decree, and on the sale of that interest on the 27th July, 1892, the plaintiff became the purchaser thereof, and the sale to him was duly confirmed. *Prima facie*, therefore, the plaintiff is entitled to a partition of the property, and, on such partition, to be allotted one-third thereof.

The defendants, however, say that at the time of the attachment Shricrishna and Pandharinath had no interest in the property, because on

---

(1) 5 B. 143.
(2) 3 Myl. &. C. 63.
(3) 3 Sm.& G. 242.
(4) 5 B. 500.
(5) 4 B,H.C. R. (A. C. J). 114.
(6) 6 B. H. C. R. (A.C.J). 258.
(7) 10 B. 444.
(8) 10 C. 252.

1893
AUG. 21.

ORIGINAL CIVIL.

18 B. 13.

the 22nd January, 1891, they had agreed to sell it to the defendants, and by such agreement all their interest had passed to the defendants.

There is no doubt that such an agreement was executed, though there are circumstances in the case from which it has been argued that it was never intended to operate at all, but was merely a contrivance to prevent the decree, which had been passed, being executed.

If that is the true view of the facts, then I think the agreement might be treated as non-existent, and a decree passed for the plaintiff; but I do not think it necessary to decide this point, [17] and will treat this case as if a good and *bona fide* contract for sale had been made on the 22nd January, 1891.

The question to be decided is, therefore what in this country is the effect of an unregistered contract for sale on an attachment on the property comprised therein placed subsequent to the date of the agreement. In England it would seem that if immoveable property be agreed to be sold, and subsequently judgments are entered up against the vendor, which would under ordinary circumstances bind the land, that circumstance does not in any way prevent the vendor from being able to make a good title to the land; see *Lodge* v. *Lyseley* (1). In England, however, there is no Registration Act, and this Act seems to me to make a great difference in the effect of a contract for sale of land in this country. In England a contract for sale of land in equity operates to transfer the ownership from the vendor to the purchaser. Under s. 17 of the Indian Registration Act (III of 1877), cl. (*b*), such an instrument must be registered, otherwise under s. 49, it will not affect the land, *i. e.*, it will not operate to transfer the ownership; and it cannot be received in evidence of any transaction affecting the land, *i. e.*, it cannot be used to show that the ownership has passed from the vendor to the purchaser. Consequently I am of opinion that in this country it is not open to a purchaser under an unregistered contract of sale to allege that after the contract the vendor has lost his right, title and interest in the land itself.

The contract in this case which was admitted in evidence, under cl. (*h*) of s. 17 of the Registration Act, as being an instrument which did not create, &c., any right, title or interest in immoveable property, but merely created a right to obtain another document, which, when executed, would create such a right, recites that on the date thereof Rs. 100 had been received as earnest-money, and provides that within two months the vendors would execute a proper conveyance, and thereupon receive the balance of the purchase-money and give up possession of the property sold. This document, therefore, on the face of it, clearly falls within cl. (*h*), and only gives the purchaser a right [18] against the vendor personally to call for a conveyance and possession on paying the balance of the purchase-money. Such a document might in England perhaps operate in equity to pass the land to the purchaser, but for the reasons already given I do not think that that is its legal effect in this country. Up to the date of the issue of the sale certificate to the plaintiff nothing was done to carry out this contract. In fact, after the attachment was placed on the property on the 1st February, 1891, s. 276 of the Civil Procedure Code (XIV of 1882) would have made any subsequent alienation void as against the attachment, and so, in any event, the defendants would have to rest their case upon the effect of the contract for sale. Consequently at the date of sale the defendants had

(1) 4 Sim. 70.

1893
AUG. 21.

ORIGINAL CIVIL.

18 B. 13.

nothing more than a right to call for a conveyance on payment of the balance of the purchase-money, and no right, title or interest in the land itself.

Under the circumstances I am of opinion that on the 10th February, 1891, Shricrishna and Pandharinath were the owners of their one-third share in the property in dispute, and that their share therein was capable of attachment and sale, and that by the sale on the 27th July, 1892, the ownership of that one-third passed to the plaintiff, who is consequently entitled to a decree for partition against the defendants. If I had not come to this conclusion I am of opinion that under the prayer for further and other relief I could have given the plaintiff a decree for Rs. 1,900, the balance of the purchase-money unpaid at the date of attachment, together with interest thereon, as the defendants have been in possession ever since the agreement according to their own account; and doubtless under the circumstances of this case, this is the decree which would have been most beneficial to the plaintiff.

Attorneys for plaintiff :—Messrs. *Nanu and Hormasji.*

Attorney for defendants:—Mr. *Khanderao Moroji.*

---

18 B. 19.

[19] APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Candy.

NAGUSHA (*Original Plaintiff*), *Appellant* v. MUNICIPALITY OF SHOLAPUR (*Original Defendant*), *Respondent.** [17th November, 1892.]

Municipality—Suit against municipality for ejectment—The Bombay District Municipal Act Amendment Act (Bombay Act II of 1884*)*, s. 48—*The Bombay District Municipal Act (Bombay Act VI of* 1873), s. 86.

The words "in the case of any such action for damages" in s. 48 (1) of the Bombay District Municipal Act Amendment Act (Bombay Act II of 1884) clearly show that it was contemplated that there might be actions of another description to which the provisions in the former paragraph would be applicable. The section does not contemplate only "suits to recover monetary compensation for a wrongful act." A suit in ejectment—not being a suit brought to recover damages "for an act done or intended to be done"—was excluded under s. 86 (2) of the

---

* Second Appeal No. 827 of 1891.

(1) Section 48 of the Bombay District Municipal Act Amendment Act (Bombay Act II of 1884)—

No action shall be commenced against any municipality, or against any officer or servant of a municipality, or any person acting under the orders of a municipality, for anything done or purporting to have been done, in pursuance of this Act, or of the principal Act, without giving to such municipality, officer, servant or person one month's previous notice in writing of the intended action and of the cause thereof, nor after three months from the date of the act complained of;

and in the case of any such action for damages, if tender of sufficient amends shall have been made before the action was brought, the plaintiff shall not recover more than the amount so tendered and shall pay all costs incurred by the defendant after such tender.

(2) Section 86 of the Bombay District Municipal Act (Bombay Act VI of 1873) :—

No action shall be brought against the municipality, or any of their officers, or any person acting under their direction, for anything done or intended to be done under this Act, until the expiration of one month next after notice in writing shall have been delivered or left at the office of the municipality, or at the place of abode of the intended defendant, stating with reasonable particularity the cause of action, and the name and place of abode of the intended plaintiff;

1892
NOV. 17.

APPELLATE CIVIL.

18 B. 19.

Bombay District Municipal Act (Bombay Act VI of 1873), but being an "action for an act done," that act, being the dispossession by the municipality with a view to being restored to possession, falls under the provisions of the first paragraph of s. 48 of Bombay Act II of 1884.

[**Overr.**, 22 B. 289 (297) (**F.B.**); **R.**, 19 B. 407 (418); 32 M. 371=4 Ind. Cas. 32=19 M.L.J. 333 (339)=4 M.L.T. 209; **Cons.**, 25 B. 142 (148); **D.**, 22 B. 283 (286).]

[20] SECOND appeal from the decision of S. Tagore, District Judge of Sholapur.

The plaintiff sued the municipality of Sholapur to recover possession of land and Rs. 15 as damages, alleging that the municipality on the 20th January, 1889, wrongfully pulled down certain huts on the land which belonged to him, and built new huts thereon and stored their materials therein. The plaintiff prayed that the municipality should be directed to remove the huts and the materials stored therein and to vacate the site and to deliver it to the plaintiff. It was further alleged in the plaint that the president of the municipality confirmed the order of the managing committee under which the huts originally standing were pulled down on the 15th May, 1889, and that the plaintiff gave notice to the municipality on the 25th May, 1889, of his intention to bring the present suit. The plaint stated that the cause of action accrued on the 20th January, 1889, and the suit was filed on the 15th July 1889.

The municipality claimed the property as its own.

The Subordinate Judge held that under s. 48 of the Amended District Municipal Act (Bombay Act II of 1884), which was applicable to the present suit, the claim was barred, as the action was not instituted within three months from the act complained of, as laid down in that section. He, therefore, rejected the claim.

The plaintiff appealed, and the District Judge concurring with the Subordinate Judge confirmed the decree.

Plaintiff preferred a second appeal.

Gokuldas K. Parekh, for the appellant:—The lower Courts were wrong in holding that the present suit was governed by s. 48 of Bombay Act II of 1884. The first paragraph of that section contemplates a suit for any act done or purporting [21] to have been done by the municipality. Our present suit is purely a suit in ejectment, and that being so, it is not a suit for any act done.

The second paragraph of that section is not applicable, because it relates to a suit for damages only. We, no doubt, seek to recover damages in the present case, and our claim for damages may be held barred under the clause, but not the claim for restoration of possession.

If s. 86 of the old Act (Bombay District Municipal Act VI of 1873) be read with s. 48 of the present Act, it will be found that s. 48 applies only to those cases in which monetary compensation for a wrongful act is claimed, and not to suits in ejectment.

Mahadeo Waman Bhat, for the respondent, was not called upon.

---

and upon the trial of any such action the plaintiff shall not be permitted to go into evidence of any cause of action, except such as is stated in the notice so delivered, and unless such notice be proved, the Court shall find for the defendant; and every such action shall be commenced within three months next after the passing of the final order by the municipality or officer having power to pass such order, and not afterwards;

and if any person to whom such notice is given shall, before action brought, tender sufficient amends to the plaintiff, such plaintiff shall not recover more than the amount so tendered, and shall pay all costs incurred by the defendant after such tender.

1892
NOV. 17.
APPELLATE CIVIL.
18 B. 19.

JUDGMENT.

SARGENT, C. J.—We agree with the lower Courts in their construction of s. 48 of Bombay Act II of 1884, the language of which is very different from that of s. 86 of Bombay Act VI of 1873. The words "in the case of any such action for damages" show clearly that it was contemplated that there might be actions of another description, to which the provisions in the former paragraph would be applicable. In other words, there is no reason for concluding, as was done in *Sorabji Nassarvanji Dundas* v. *The Justices of the Peace for the City of Bombay* (1) upon the language of the corresponding section of the former Act, that the section only contemplates "suits to recover monetary compensation for a wrongful act."

A suit in ejectment—not being a suit brought to recover damages "for an act done or intended to be done"—was excluded under that Act, but being an "action for an act done," that act being the dispossession by the defendant with a view to being restored to possession, must be held to fall under the provisions of the first paragraph of the section of the Act of 1884. We must, therefore, confirm the decree, with costs.

Decree confirmed.

---

18 B. 22.

[22] APPELLATE CIVIL.

Before Mr. Justice Bayley, Chief Justice (Acting), and Mr. Justice Candy.

SWAMIRAO AND ANOTHER (*Original Defendants*), *Appellants v.* PADAPA BIN BHUJANGRAV (*Original Plaintiff*), *Respondent.**

[18th November, 1892.]

Watan—*Watandar—Mortgage of* watan *property—Adverse possession of* watan *property—Limitation—Succession—Entry of* watan *in name of trespasser—Effect of Gordon Settlement effected with trespasser.*

Bhujangrav Desai died in 1847, leaving his two widows Kalova and Ramova. The plaintiff Padapa was born to Ramova in 1848, *i.e.*, the year after his death. Bhujangrav Desai's *watan* had been attached by Government in 1844, but in 1848 or 1849 Government restored a small portion of it, entering it in the name of Kalova and refusing to recognise the infant Padapa. In 1865 the Government restored the rest of the *watan*, again acknowledging Kalova as the holder, the agreement with her being under "the Gordon Settlement" (2). In 1865 Kalova mortgaged two villages (part of the *watan*) to one Shrinivas (father of the defendants), who was the *watani karkun*, for Rs. 9,900, which had been advanced by him to Kalova while the *watan* was under sequestration. Possession was given to Shrinivas, and the village officers were directed to pay him the revenues. Subsequently Kalova repented of her bargain, and directed the village officers not to pay the revenues to Shrinivas. He accordingly brought a suit against her for the revenues of 1869-70 and obtained a decree, in execution of which he sold the villages and bought them at the sale. In 1878, however, the Collector cancelled the sale under the Watan Act (III of 1874).

In 1873 Shrinivas obtained a further decree against Kalova for the revenue of two years (1870-72) and for possession as mortgagee. He got possession through the Court in 1875.

Kalova and Padapa, who had been on good terms, quarrelled, and on 16th March, 1872, Kalova adopted one Balapa as a son to her deceased husband

---

* Appeal No. 93 of 1889.

(1) 12 B.H.C.R. A. C. J. 250 (254).

(2) As to the nature of this settlement, see 15 B. 13.

1892
NOV. 18.

APPELLATE CIVIL.

18 B. 22.

Bhujangrav. In December, 1872, Padapa sued Kalova and Balapa, praying that he might be declared the son of Bhujangrav, and that the adoption of Balapa might be cancelled. In 1879 the High Court held that Padapa was the legitimate son of Bhujangrav, and that Balapa's adoption was invalid. The legitimacy of Padapa being thus established, the Collector, in 1878, entered the *watan* in his name. At that time and until 1880 Padapa and Shrinivas were on friendly terms, the two having joint possession of the mortgaged villages, Padapa being subsequently to October, 1878, the recognised occupant, and Shrinivas taking some, if not all, of the revenues of the two villages. In 1880 Shrinivas died, and his sons, the defendants, quarrelled with Padapa, who in 1881 obtained an order from the Collector directing the village officers to pay the revenues of the two villages to him and not to the defendants. This order was subsequently set aside, and thereupon Padapa in August, 1887, filed the present suit to have the mortgage executed by Kalova to **[23]** Shrinivas on 15th September, 1865, declared null and void, and to recover possession of the two villages. In the alternative, he prayed for redemption of the mortgage. The defendants pleaded (*inter alia*) that the villages were not *watan*; that they were entitled to the villages by reason of adverse possession; that the suit was barred by limitation, and that the plaintiff was estopped from disputing the mortgage, &c.

Held (1), on the evidence, that the property in question was part of a *desai watan* and as such was held on service tenure.

(2) That the property in question was subject to the rule which was in force in 1865 when the mortgage to Shrinivas was executed, *viz.*, that alienation by way of mortgage of any portion of *watan* property had no force beyond the life of the *watandar* who mortgages it.

(3) That the plaintiff having been declared to be the legitimate son of Bhujangrav he was, from the date of his birth in 1848, the rightful *watandar*, and Kalova, unless she was manager acting on his behalf, was a trespasser. The fact that Government had entered the *watan* in her name, and that the "Gordon Settlement" was effected with her, would not make her *watandar* as long as Bhujangrav's son (the plaintiff) was alive.

(4) That if Kalova was a mere trespasser, then the plaintiff's right to recover the lands free from incumbrance, on the ground that he was the *watandar*, had been lost by limitation, and the property had become Kalova's by adverse possession. The plaintiff, however, as her step-son, was heir. The mortgage was proved and was binding on him as heir, and as such he had a right to redeem it.

[Rev., 24 B. 556 (**P C.**)=27 I. A. 86=7 Sar. P. C.J. 710=4 C.W.N. 517=2 Bom. L. R. 548; **D.**, 1 O. C. 174 (176).**]**

FIRST appeal from the decision of Thomas Moore, First Class Subordinate Judge of Sholapur.

One Bhujangrav Desai, who owned service *watan* property in the Sholapur District, died on the 27th September, 1847, leaving two widows Kalova and Ramova. In the year 1844 the *watan* had been attached by the Government, because he declined to produce his *sanad* relating to the *watan* before the Inam Committee. After his death, *viz.*, on the 15th September, 1848, Ramova, one of the two widows, gave birth to the plaintiff Padapa.

During the year 1848-49 the Government restored a portion of the *watan* to the other widow Kalova, and placed the remaining *watan* property under sequestration, which continued until 1865. In the meanwhile, Ramova presented a petition to the Government on behalf of her minor son (the plaintiff), but on the 15th February, 1849, the Government rejected her petition and decided that Kalova should be allowed to retain possession of the *watan*.

[24] On the 15th May, 1850, Ramova applied on behalf of her son for permission to sue in *forma pauperis*, but the application was rejected on the 8th June, 1850, being opposed by Kalova, who disputed the son's rights as Bhujangrav's heir.

On the 9th May, 1864, the Government confirmed Kalova's right, and in 1865 restored the rest of the *watan* to her under the terms of the

Gordon Settlement (1), without any objection on the part of either Ramova or Padapa.

On the 15th September, 1865, Kalova mortgaged two villages, Areshankar and Wadwadgi (part of Bhujangrav's service *watan*), to the defendant Shrinivas, who was the *watani karkun*, for Rs. 9,900. Possession was given to the mortgagee, and the village authorities were also desired by Kalova on the 25th September to recognise him as mortgagee in possession, and he received the revenues. On the 15th April, 1869, Kalova executed a second mortgage of the same property to Shrinivas for Rs. 3,000. The mortgagee continued in possession for a time, but in that same year (1869-70), Kalova directed the village officers to stop paying revenue to the mortgagee, and recovered it herself. The mortgagee Shrinivas thereupon filed suit No. 203 of 1870 and got a decree for possession and for the revenues of 1869-70. Kalova appealed, and the decree was confirmed in appeal (No. 121 of 1871). As Kalova did not satisfy the decree, Shrinivas sold the two villages in execution and bought them himself at the sale. The sale, however, was set aside by the Collector. In the meanwhile, Shrinivas had to file another suit (No. 59 of 1873) against Kalova to recover the revenues of the years 1870-71, 1871-72 and for possession. He got a decree and obtained possession of the villages through the Court in 1875.

From the time of the mortgage of 1865 Kalova, Ramova and Padapa had been on good terms; but in the year 1872 differences arose between Kalova and Padapa. On the 16th March, 1872, Kalova adopted one Balapa as son to Bhujangrav. Padapa in consequence on the 4th December, 1872, filed a suit against Balapa and Kalova praying that he might be declared to be the son of the deceased Bhujangrav and the adoption of Balapa **[25]** by Kalova be set aside. The suit came up to the High Court (see I.L.R., 1 Bom. 248), and after remand was finally decided by that Court on the 21st January, 1879, in favour of Padapa. In November, 1877, while the above proceedings were pending, Kalova died. In 1878, the suit being decided by the lower Courts in Padapa's favour after the remand by the High Court, the Collector entered the *watan* in his name.

Shrinivas, the mortgagee, died in the year 1880, and after his death, his elder son, the first defendant Swamirao, applied to the Collector to transfer the two mortgaged villages to his name. The Collector rejected the application on the 4th April, 1881, and directed the village officers to pay the revenue of the two villages to Padapa. Swamirao appealed to the Revenue Commissioner, who in February, 1886, passed an order directing that the revenue of the two villages should be given to Swamirao until Padapa obtained a decree of a competent Court to the contrary. Against this order Padapa appealed to the Government, which confirmed it on the 7th January, 1887. Thereupon, Padapa filed the present suit on the 16th August, 1887, for a declaration that the mortgage-deed executed by Kalova to Shrinivas on the 15th September, 1865, was null and void, and to recover possession of the two villages, and, in the alternative, for the redemption of the mortgage.

The defendants Swamirao and Devrao, the sons of Shrinivas, replied (*inter alia*) that the villages in dispute did not appertain to the service *watan* of Bhujangrav, but had been conferred on him for his maintenance; that the cause of action (if any) had accrued to the plaintiff in the year 1850, when Ramova's application to sue in *forma pauperis* was rejected in

(1) As to the nature of this settlement see 15 B. 13.

1892
NOV. 18.
APPELLATE CIVIL.
18 B. 22.

consequence of the opposition of Kalova; that the claim was barred by defendant's adverse possession for about twenty-five years and by Kalova's adverse possession for about forty years; that the claim was also barred by reason of the plaintiff having failed to bring the suit within one year from the date at which he attained majority; that they (the defendants) had thus become the owners of the village; that if their ownership were not held to be established, they were willing to allow the plaintiff to redeem on payment of Rs. 66,000 on account of the mortgage; that the mortgage-deed executed [26] by Kalova in the year 1865 was valid, and that the money had been advanced to pay off debts, and to defray the expenses incurred in getting the *watan* released from attachment; that, after Bhujangrav's death, the *watan* was managed by Kalova as owner, and that the plaintiff was bound by her acts; that her possession of the estate was adverse to the plaintiffs, and that, besides the mortgage-bond for Rs. 9,900, there was another mortgage-bond of Rs. 3,000 executed by Kalova on the 15th April, 1869, stipulating to pay both the amounts at once: therefore, unless the debt of Rs. 3,000 was paid, the plaintiff was not entitled to redeem the mortgage of Rs. 9,900.

The Subordinate Judge found (1) that the mortgage of Rs. 9,900 relied on by the defendants was not proved; (2) that the mortgage-debt was not proved to have been contracted by Kalova for lawful and necessary purposes: (3) that the property mortgaged was *watan*, and was not liable for the debt, and that the plaintiff's cause of action arose in the month of February, 1886, when the Revenue Commissioner's rdero was passed. He, therefore, allowed the claim.

The defendants appealed.

P. M. Mehta (with *Shamrao Vitthal*), for the appellants (defendants):—The property in dispute is not service *watan*, as is shown by the original *sanad* dated 1762. It is, therefore, alienable like any other property. Even admitting that the property is service *watan*, still the service being commuted, and the summary settlement being made applicable, it has lost its characteristics of inalienability—*Radhabai* v. *Anantrav* (1); *Vishwanath* v. *Bagubai* (2).

The lower Court was wrong in holding that the mortgage of Rs. 9,900 was not proved. There is abundant evidence in the case to prove it. (Evidence referred to.)

The plaintiff has never until now repudiated the mortgage, although there have been several judicial proceedings in connexion with it. He cannot repudiate it now.

Further we say the suit is barred by limitation. The plaintiff claims as the son of Bhujangrav. Therefore, his right came into [27] existence in 1848, when he was born. The possession of his step-mother Kalova was from the beginning adverse to him, because she claimed to hold the property as that of the deceased Bhujangrav and not as that of the plaintiff whose legitimacy she denied. Again, in the year 1850, when Ramova applied to sue in *forma pauperis* on behalf of the plaintiff, Kalova disputed his right as heir of Bhujangrav. Kalova's possession, therefore, has been adverse, at least from the year 1850, with respect to that portion of the *watan* property which was then already restored to her. The plaintiff attained his majority, according to Hindu law, in the year 1864, and, giving him the benefit of three years under the Limitation Act, his right to sue became barred in the year 1867. The defendants claim to be in

(1) 9 B. 198.

(2) P. J. 1890, p. 28.

possession under Kalova, and her possession having been adverse, our possession has also been adverse from the date of the first mortgage in 1865—Mitra on Limitation, p. 133; *Madhava* v. *Narayana* (1).

Jardine (with *Ghanasham*) *N. Nadkarni*), for the respondent:—The *sanad* granted in the year 1886 and the other documentary evidence in the case show that the property is both service and *deshmukhi watan*. No holder can alienate *watan* property beyond his lifetime—*Apaji* v. *Keshav Shamrav* (2).

As to the mortgage, no evidence of consideration has been given, nor has any necessity for contracting the debt been proved. Admitting the mortgage to be valid, it would be good only during the lifetime of Kalova, the mortgagor, the property being *watan*. It would not bind succeeding holders—West and Buhler, p. 101.

The plaintiff's claim is not barred by limitation. Kalova's possession cannot be said to be adverse, because she being the elder of the two widows naturally held the property as manager. The plaintiff's legitimacy having been judicially established. Kalova cannot be held to have retained possession in her own right. But even if her possession was adverse, the plaintiff's claim would not be barred, because after her death he was entitled to succeed as the nearest heir of Bhujangrav, if not as adopted son.

[28] *P. M. Mehta*, in reply.—In the former suit the Court held Padapa to be a legitimate son, and that being so his right to succeed to the estate of Bhujangrav accrued to him at his birth. The possession of his step-mother Kalova was, therefore, adverse to him. He being in existence she could not legally hold the property as Bhujangrav's widow. She could do so only as trespasser. If she acquired it as trespasser, it was her *stridhan*. It was not a widow's estate to which she succeeded, because she was not the widow of a childless Hindu. Moreover, she had been all along asserting her right to the property, which she need not have done if she had been the widow of a childless Hindu, for in that case it must have been acknowledged. The title which she acquired was not that of a Hindu widow; she got it by the operation of the Limitation Act—*Babu* v. *Bhikaji* (3). On her death the plaintiff, as her step-son, succeeded, if there are no other heirs, to her property, but subject to all the liabilities created by her and, therefore, subject to the defendants' mortgage.

As to estoppel, we say that as Padapa stood by and allowed the property to be charged with money, the property must pay the charge. Kalova's death does not destroy the charge, which was a mortgage and not a charge for her life.

JUDGMENT.

CANDY, J.—Some of the facts of this case are to be found in *Kalova* v. *Padapa* (4).

Bhujangrav Desai died on 27th September, 1847, leaving two widows, Kalova and Ramova. In the following year Padapa was born to Ramova. Bhujangrav's *desai watan* had been attached in 1844, because he would not show his *sanad*. In 1848 or 1849 Government restored a small portion of the *watan*, but entered it in the name of Kalova, refusing to recognize the infant Padapa. Ramova, on behalf of Padapa, made attempts to sue Kalova to establish the legitimacy of the infant, but the

(1) 9 M. 244. (2) 15 B. 13. (3) 14 B. 317. (4) 1 B. 248.

1892
NOV. 18.
APPELLATE CIVIL.
18 B. 22.

case did not then come to trial. It seems that subsequently Kalova and Ramova must have become friends, for they apparently lived together with Padapa.

In 1865 Government restored the rest of the *watan*, again acknowledging Kalova as the holder, the agreement with her being under the "Gordon's Settlement."

[29] On 15th September, 1865, Kalova mortgaged the two villages of Areshankar and Wadwadgi (part of the above-mentioned *watan*) to one Shrinivas, who was the *watani karkun*, the consideration recited in the bond being a sum of Rs. 9,900, the balance of an account of all the sums advanced to Kalova by Shrinivas from time to time while the *watan* was under sequestration. Possession of the village was given to Shrinivas, the village officers being directed to pay him the revenues.

Padapa was not a party to the mortgage (he was then about seventeen); but it appears that he was then on good terms with Kalova and living with her. All went well for a few years, till Kalova repented of her bargain, and directed the village officers not to pay the revenues to Shrinivas. Thereupon Shrinivas filed suit No. 203 of 1870 against Kalova to recover the revenues for 1869-70; and the Subordinate Judge held (27th October, 1871) that the mortgage-bond was proved and was for consideration, and that Shrinivas had obtained possession of the two villages under the bond; and he decreed that Kalova should pay Rs. 995-9-3 for the revenues of the year 1869-70. As Kalova did not pay this sum, Shrinivas in execution bought the villages, but in 1878 the Collector cancelled the sale under the Watan Act (III of 1874). In the meanwhile, Shrinivas had been forced to file another suit against Kalova (No. 59 of 1873) for the revenues of two more years (1870-71, 1871-72), and for restoration to possession as mortgagee. He obtained a decree on 5th June, 1873, and obtained possession of the villages through the Court in 1875.

To return to Kalova and Padapa. They had been on good terms, but having quarrelled because Padapa did not marry Kalova's niece, Kalova, on 16th March, 1872, adopted one Balapa as a son to her deceased husband Bhujangrav. On 4th December, 1872, Padapa filed suit No. 1299 of 1872 against Kalova and Balapa, and prayed that he might be declared the son of the deceased Bhujangrav, and the adoption of Balapa by Kalova be set aside. The Subordinate Judge held that the claim was barred under Act XIV of 1859, s. 1, cl. 16, and s. 11; but, in appeal, the Assistant Judge held that the suit was not barred, and this view was upheld, in second appeal, by the High **[30]** Court in *Kalova* v. *Padapa* (1), and the case was remanded for determination of the questions whether Padapa was the son of Bhujangrav, and, if so, as to the validity of the adoption of Balapa. The Subordinate Judge, on remand, found that Padapa was the legitimate son of Bhujangrav, and that the adoption of Balapa was not valid. Kalova and Balapa both appealed, but the Assistant Judge on 31st July, 1878, confirmed the decree of the Subordinate Judge. Kalova had died in November, 1877, but Balapa made a second appeal to the High Court, which, on 21st January, 1879, confirmed the Assistant Judge's decree (no written judgment).

Padapa having established his legitimacy, and Kalova being dead, the Collector in 1878 entered the *watan* in his name. At that time it is evident that Padapa and Shrinivas were fast friends: in fact, it was

(1) 1 B. 248.

mainly owing to the aid and deposition of Shrinivas that Padapa established his legitimacy. As to the possession of the two mortgaged villages, it appears that Kalova had put up one Gopaldas to obstruct the execution of the decree of 1873 (mentioned above). This obstruction was removed, and Shrinivas sued Gopaldas for the revenues of 1873-74 and 1874-75. This case was finally decided by the High Court in appeal No. 22 of 1879 (26th January, 1880). It appears also that tenants were set up antagonistic to the tenants of the mortgagee, and several suits ensued (see Exs. 155, 158, 159, 160, 173, 174, 175). But it is evident that throughout these proceedings Padapa and Shrinivas were acting in concert. In 1879 Padapa himself stated (Ex. 116) that possession had been with Shrinivas as mortgagee. In short, there seems to have been a joint possession of Shrinivas and Padapa, the latter since October, 1878, being the recognized occupant, the former taking some, if not all, of the revenues of the two mortgaged villages. In 1879 Shrinivas deposed (Ex. 18) that there were no differences between himself and Padapa as regards the '*vahivat*'; and this is borne out by the letters (Exs. 36 to 39), which apparently relate to 1878-79. But in 1880 Shrinivas died, and his sons, Swamirao and Devrao (hereafter called the defendants), soon fell out with **[31]** Padapa, who in 1881 obtained an order from the Collector, directing the village officers to pay the revenues of the two villages to him and not to the defendants. In March, 1886, defendants obtained an order of the Revenue Commissioner (Mr. A. Crawford), setting aside the Collector's order as illegal, and directing that officer to issue orders to the village officers to pay the revenues to defendants "until Padapa brings a decree of a competent Court to the contrary." Padapa appealed to Government, but Government (without stating reasons) confirmed the order of the Revenue Commissioner on 7th January, 1887.

Accordingly, on 16th August, 1887, Padapa filed the present suit to have it declared that the bond, executed by Kalova to Shrinivas on 15th September, 1865, was null and void, and for possession of the two villages; and, in the alternative, for redemption of the mortgage.

First, as to the nature of the property: Mr. Mehta contended that it was originally non-service *watan*; but there is a mass of evidence showing that it is part of a *desai watan* and, as such, of course it was held on a service tenure.

Next it was contended that by the application of a summary settlement and commutation of service the property became alienable like the ordinary landed property of the district. This contention is likewise bad. "Lands held for service" could never be settled under Bombay Act II of 1863 (the Summary Settlement Act which applies to the southern districts of the Bombay Presidency whence the present case comes), such lands being expressly excepted from the operation of the Act. It was for this reason that Government carried out what is termed the "Gordon Settlement," to which legal effect was subsequently given by s. 15 of Bombay Act III of 1874. The report and appendices of Mr. Gordon's Committee on the Sholapur District, (Areshankar and Wadwadgi were formerly in the Mangoli Taluka, Sholapur District), which we have perused, show that, whatever may have been the case in other districts, the settlement made with the district hereditary officers of Sholapur was not intended to convert the *watan* lands into the private property of the *watandars*, with the necessary incident **[32]** of alienability, but to leave them attached to the hereditary offices which, although freed from the performance of service, remained intact. It was a four-annas "*judi*,"

1892
NOV. 18.
APPEL-
LATE
CIVIL.
18 B. 22.

and there was no extra *nazarana* levied for the conversion of the *watan* into private property. (See also Colonel Etheridge's mention of the Gordon Settlement in Sholapur, p. 41, Government Selection, N. S., No. CXXXII). Apparently no *sanad* was issued to Kalova in accordance with the terms of the settlement; but if any *sanad* was issued to her, there is no reason to suppose that it materially differed from that which was subsequently issued to Padapa (Ex. 50), and which is the same as the form of *sanad* issued to district hereditary officers in the Southern Maratha Country. (See p. 142 of General Rules in force in the Revenue Department under the Government of Bombay.) There is nothing in this *sanad* to take the property out of the well-established rule (which was in force in 1865 when the mortgage to Shrinivas was executed), that alienation by way of mortgage of any portion of *watan* property had no force beyond the life of the *watandar*-mortgagor. (See *Kalu Narayan Kulkarni* v. *Hanmapa bin Bhimapa* (1). The Commissioner, Mr. Crawford, thought that the *sanad* made a distinction between alienation by way of sale and alienation by way of mortgage, and that as the alienation to Shrinivas was of the latter description, the mortgagee (if unredeemed) could not be ejected as long as there was a male holder of the *watan* in existence. But there is no warrant for any such distinction, which is not to be found in the *sanad* or in the cases which establish the principle above quoted.

Prima facie, then, Padapa, if the successor to Kalova, is entitled to recover the *watan* lands free from any mortgage executed by his predecessor. This was the ground stated by the Subordinate Judge, who said "as no mortgage or alienation of a *watan* beyond the lifetime of the incumbent would be valid, the property is not liable for any debt, even if proved, after Kalova's death." But here we are met by the fact that Kalova was not the rightful incumbent of the *watan*, and Padapa is not her successor. Padapa has been declared by the Courts to be the [33] legitimate son of Bhujangrav. It follows, therefore, that from the date of his birth in 1848 he was the *watandar*, and Kalova, unless she was the manager acting on his behalf, was a mere trespasser. The fact that Government entered the *watan* in the name of Kalova, and that the "Gordon Settlement" was effected with her, would not make her the *watandar* as long as Bhujangrav's son was alive. If she was a mere trespasser, then his right to recover the lands free from any incumbrance, on the ground that he is the *watandar*, has been lost by statute.

It is unnecessary to enquire whether the mortgage may not be regarded as effected on behalf of Padapa, who was in 1865, and still is, the *watandar*. But we may remark that there is good reason for supposing that in 1865 Padapa (who was then of age) was living with Kalova, was cognizant of the mortgage, allowed Kalova to represent the estate, and acquiesced in the transaction. Certainly, it is clear that from 1877 (when Kalova died) to 1881, (when Padapa quarrelled with defendants), Padapa adopted the mortgage. He admitted the status of Shrinivas as mortgagee, and Shrinivas equally admitted the status of Padapa as representative of the mortgagor.

But, apart from these considerations, regarding Kalova as a mere trespasser, Mr. Mehta for defendants admitted that Kalova or Kalova's heir was fully competent to redeem the mortgage. He also admitted that

(1) 5 B. 435.

Kalova's heir was her step-son, the plaintiff Padapa. Assuming, as defendants contended, that Kalova fully represented the estate and purported to deal with the property as her own, and that the title of the rightful *watandar* was lost by limitation, in this case it so happens that the rightful *watandar* is Kalova's heir, and, therefore, his claim to redeem in the latter capacity cannot be resisted.

The Subordinate Judge found that the mortgage-bond was not proved, and that it was without consideration. But as to execution there can be no doubt: the plaint recites the fact. And as to consideration, it is evident that there was no fraud or collusion between Kalova and Shrinivas in the suit of 1870 (mentioned above); so even if Padapa could claim to be the successor of Kalova in the *watan* he would be bound by the **[34]** decision in that suit (see *Radhabai* v. *Anantrav* (1)). Of course if the bond was executed for the benefit of the estate, and Padapa adopted and acquiesced in the mortgage transaction, he cannot now plead want of consideration. Nor can he do so as heir of Kalova, being bound by the finding against her that the mortgage was for good consideration.

It only remains, therefore, to take the account.

Mr. Mehta abandoned the claim for Rs. 19,995 as recited in the 27th paragraph of the written statement.

With regard to the mortgage-bond for Rs. 3,000 recited in the 26th paragraph of the written statement, the Subordinate Judge framed an issue (the fourth) and recorded a finding "in the affirmative," noting that "the question whether the mortgagor has a right to redeem the present mortgage irrespective of the separate mortgage for Rs. 3,000 will be considered after the fifth issue has been disposed of." The point seems to have subsequently escaped the notice of the Subordinate Judge, for it was not further considered by him. The eighth paragraph of the memo. of appeal to this Court is that "the lower Court did not allow the defendants sufficient opportunity to prove the second mortgage of 1869 for Rs. 3,000." But counsel did not press the point or show in any way that defendants had not the fullest opportunity of proving the bond for Rs. 3,000. Under these circumstances, we cannot now allow that bond to be proved.

As regards the debt due on the bond for Rs. 9,900, we think that, as stated in the plaint, the plaintiff must be taken as having enjoyed possession of the villages from the date of the Collector's order (4th April, 1881) till January, 1887. For that period he must pay simple interest at 12 per cent., the rate recited in the bond. For the remaining period defendants must be taken to have been in possession, and, according to the stipulation in the bond, their receipts of the rents or profits are in lieu of interest. If obstruction was offered to their full enjoyment of the rents and profits, the mortgagee had his remedy, a remedy which he availed himself of in previous years as shown by the suits which he filed. That matter cannot now be gone into.

[35] It must be understood that this decree does not deal with the property recited in the 29th paragraph of the written statement. No issue was framed in regard to that point.

We amend the decree of the Subordinate Judge, by allowing the plaintiff to redeem the villages of Areshankar and Wadwadgi on paying, within six months from this date, the sum of Rs. 9,900 with 12 per cent.

---

(1) 9 B. 198.

1892
NOV. 18.

APPELLATE CIVIL.

18 B. 22.

simple interest on the said sum of Rs. 9,900 from 4th April, 1881, to 7th January, 1887, and, in default of payment, his mortgage will be foreclosed.

Defendants must have the costs of this appeal. Each party to pay his own costs in the Court below.

Decree amended.

18 B. 35.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Candy.

MOTILAL KASHIBHAI (*Original Plaintiff*), *Applicant v.* NANA *alias* LANGDA MUKUND PATIL (*Original Defendant No.* 2), *Opponent.**

[25th November, 1892.]

Civil Procedure Code (*Act XIV of* 1882), *s.* 622—*Application and purpose of the section —Revision.*

An application under s. 622 of the Civil Procedure Code (Act XIV of 1882) cannot be entertained in the case of those interlocutory orders against which, though no immediate appeal lies, a remedy is supplied by s. 591, which provides that they may be made a ground of objection in the appeal against final decree.

The purpose with which s. 622 was framed was to enable a party to a suit to get a decision or order of a lower Court rectified by the High Court where there would otherwise be no remedy.

[F., 30 M. 230=17 M.L.J. 79=2 M.L.T. 88; 19 A.W.N. 210 (211); 4 Ind. Cas. 878=12 O.C. 405 (411); 25 Ind. Cas. 191=16 M.L.T. 101; **Appl.**, 11 O.C. 238 (239); 1 S.L.R. 120; **R**, 34 A. 592=10 A.L.J. 130=16 Ind. Cas. 1; 14 P.R. 1904 =140 P.L.R. 1904; 22 P.L.R. 1900; 2 S.L.R. 22 (23).]

THIS was an application under the extraordinary jurisdiction of the Court, under s. 622 of the Civil Procedure Code (XIV of 1882), against an interlocutory order passed by Rao Saheb Prabhakar Vitthal Gupte, Second Class Subordinate Judge of Bassein.

Plaintiff Motilal Kashibhai brought a suit against (1) Raghunath Patil, (2) Nana, and (3) Botmaria, to recover possession of a house. On the day of fixing issues Nana alone appeared, and after the settlement of issues the hearing was adjourned till the 1st **[36]** December, 1891, on Nana's application to enable him to instruct a pleader. On the day so fixed for hearing, all the defendants being absent, the Court passed a decree for the plaintiff. On the 6th December, 1891, Nana and Botmaria applied to the Court to set aside the decree and restore the suit to the file, stating that they had been prevented by accident from attending the Court on the day fixed. The Court, thereupon, issued notice to the plaintiff to show cause why the decree should not be set aside and the suit restored to the file for rehearing, and, after having heard both the sides, passed an order setting aside the decree and directing the suit to be proceeded with only so far as Nana was concerned. The decree with respect to the other two defendants was allowed to stand, because Raghunath had not appeared at all, and Botmaria had not appeared on the day on which the issues were settled.

Against the order setting aside the decree with respect to Nana, the plaintiff applied to the High Court, and obtained a rule *nisi*, to set aside the order under s. 622 of the Civil Procedure Code (XIV of 1882).

* Application under Extraordinary Jurisdiction, No. 142 of 1892.

1892
NOV. 25.
APPELLATE CIVIL.
18 B. 35.

Govardhanram M. Tripathi, appeared for the opponent Nana to show cause.—We take a preliminary objection, and submit that this application cannot be entertained under s. 622 of the Civil Procedure Code, inasmuch as s. 591 has provided a remedy in case of orders such as the one now in question—*Chattar Singh* v. *Lekhraj* (1); *Farid Ahmad* v. *Dulari Bibi* (2); *In re Nizam of Hyderabad* (3).

Ganesh Krishna Deshamukh, for the applicant, in support of the rule.—Interlocutory orders such as the one in question can be interfered with under s. 622 of the Civil Procedure Code—*Dhapi* v. *Ram Pershad*(4) The exercise of the extraordinary jurisdiction is discretionary, the true interpretation of s. 622 being that, in case of orders which are appealable, the High Court cannot interfere, and that, in the case of those which are unappealable, the High Court has a discretion to interfere, which will be exercised with regard to the circumstances of each case.

JUDGMENT.

[37] SARGENT, C. J.—The expression "case" in s. 622 of the Code of Civil Procedure may be, as stated by the Court in *Dhapi* v. *Ram Pershad* (4), wide enough to include an interlocutory order. But a word of such general import must be controlled by due regard to the purpose with which s. 622 was framed. This, it cannot be doubted, was to enable a party to a suit to get a decision or order of a lower Court rectified by the High Court, when there would otherwise be no remedy. In the case of those interlocutory orders (such as the present one), against which no immediate appeal lies, a remedy is still supplied by s. 591, which provides that the order may be made ground of objection in the appeal against the final decree. We may remark that the Madras and Allahabad High Courts in *In re Nizam of Hyderabad*(3) and *Chattar Singh* v. *Lekhraj* (1), differing from the Calcutta High Court, take this view of the section.

We must, therefore, discharge the ruie, with costs.

Rule discharged.

---

18 B. 37.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Candy.

NAMDEV (*Original Defendant*), *Appellant v.* RAMCHANDRA GOMAJI MARWADI (*Original Plaintiff*), *Respondent.** [5th December, 1892.]

Decree—Execution—Auction-purchaser — Symbolical possession — Judgment-debtors remaining in actual possession—Subsequent attempt by purchaser to take possession—Obstruction—Application to remove obstruction—Application converted into a suit under s. 331 *of Civil Procedure Code* (*XIV of* 1882)*—Limitation—Adverse possession —Limitation Act* (*XV of* 1877), *s.* 3, *and sch. II, arts.* 138, 144, 167*—Civil Procedure Code* (*XIV of* 1882), *ss.* 328, 329, 331.

The plaintiff purchased the property in dispute at an auction sale in execution of a decree, and on the 14th August, 1877, he took formal possession, but the judgment-debtors remained in actual possession. On 18th September, 1889, the plaintiff proceeded to take possession, but was obstructed by the defendant, who alleged that he had purchased the property from the judgment-debtors in

---

* Second Appeal No. 863 of 1891.

(1) 5 A. 293. (2) 6 A. 233. (3) 9 M. 256. (4) 14 C. 768 (780).

1892
DEC. 5.

APPELLATE CIVIL.

18 B. 37.

1888. The plaintiff [38] then applied for the removal of the defendant's obstruction, and his application was registered as a suit under s. 331 of the Civil Procedure Code (XIV of 1882).

Held, that the plaintiff's claim was barred by limitation. When his application was converted into a suit under s. 331, the rights of the parties had to be determined as if an ordinary suit for posseesion had been instituted against the defendant, and either art. 138 or art. 144 of the Limitation Act (XV of 1877), applied. In either case the defendant could avail himself of the judgment-debtors' possession, which was adverse to the plaintiff.

[F., 8 Ind. Cas. 236=70 P.L.R. 1910=58 P.W.R. 1911; R., 21 B. 392 (393); 3 Bom. L.R. 832 (834); 12 C.L.J. 378=6 Ind. Cas. 467 (471); D., 19 A 499 (501)=17 A.W.N. 127.]

SECOND APPEAL from the decision of Dr. A. D. Pollen, District Judge of Poona.

One Gangadhar Keshav Bhat obtained a decree (No. 1628 of 1876) against four brothers, Hari, Narayan, Rama and Vithu. In execution of that decree the property in dispute was sold by auction and was purchased by the present plaintiff, Ramchandra Gomaji Marwadi, on the 14th August, 1877, who took formal possession through the Court, but the judgment-debtors remained in actual possession. Subsequently, *viz.*, in the year 1889, the plaintiff having himself obtained a decree (No. 126 of 1889) against the four brothers, sold the same property in execution and purchased it. On the 18th September, 1889, he proceeded to take possession, but was obstructed by the defendant Namdev, who alleged that on the 3rd January, 1888, he had purchased the property from the judgment-debtors. The plaintiff in October, 1889, presented an application for the removal of the defendant's obstruction, and the application was registered as a suit under s. 331 of the Civil Procedure Code (Act XIV of 1882).

The Subordinate Judge found that the defendant acquired no right to the property in dispute under his purchase, because his vendor's right, title and interest had been already purchased by the plaintiff in the Court sale on the 14th August, 1877, under Gangadhar Keshav Bhat's decree. He, therefore, allowed the plaintiff's claim.

On appeal by the defendant the Acting District Judge (T. Hart-Davies) sent down the following issue for trial :—

"Is the claim time-barred ?"

The finding of the Subordinate Judge on the above issue was in the negative, on the ground that as the plaintiff's application [39] for the removal of the defendant's obstruction was made within thirty days from the date of the obstruction, the claim was not barred under art. 167, sch. II of the Limitation Act (XV of 1877).

On appeal the District Judge, concurring with the Subordinate Judge, confirmed his order.

The defendant preferred a second appeal.

Mahadev Bhaskar Chavbal, for the appellant (defendant).—The plaintiff's claim now to take possession is barred. He got symbolical possession in August, 1877, and his present application was made in October, 1889, *i.e.*, more than twelve years subsequently. The plaintiff allowed the judgment-debtors to remain in possession, and they sold the property to the defendant. The possession of the judgment-debtors was adverse to the respondent (the plaintiff) and we claim through them. The suit was, therefore, clearly barred.

Gangaram B. Rele, for the respondent (plaintiff).—The point of adverse possession is raised for the first time in second appeal. It was

not raised in the written statement, nor was it raised in either of the lower Courts.

[SARGENT, C. J.—The issue sent down by the Acting District Judge includes the point.]

Neither of the lower Courts understood the issue to mean whether the claim was barred by adverse possession. It was after the issue was sent down that the Subordinate Judge came to the conclusion that the claim was not time-barred, being filed within thirty days from the date of obstruction. It was not suggested, in appeal, that the Subordinate Judge did not understand the issue, nor did the defendant raise any objection to the Subordinate Judge's finding. The District Judge also understood the issue to mean whether the suit was filed within thirty days from the date of obstruction. The appellant should not be allowed, in second appeal, to raise a point which he did not raise, and never urged, in either of the lower Courts.

JUDGMENT.

SARGENT, C. J.—We think both the Courts below have misapplied the Statute of Limitations in disposing of the first issue **[40]** sent down on remand. Article 167 of the second schedule of the Statute of of Limitations required that the application contemplated by s. 329 of the Civil Procedure Code (XIV of 1882) should be brought within thirty days from the obstruction, but when that application was converted into a suit, the rights of the parties had to be determined as if an ordinary suit for possession had been instituted by the decree-holder against the defendant. The issue as to the Statute of Limitations must, we think, have been intended by Mr. Hart-Davies to be determined in its double aspect, and that being so, either art. 138 or art. 144 would be applicable to the case. See *Lakshman* v. *Bisansing* (1) and *Lakshman* v. *Moru* (2). It is not a matter of importance which article is applied, as in either case the defendant will be able to avail himself of Hari's possession, which, after the petition by plaintiff, became adverse to the latter. Assuming art. 144 to apply, the defendant would have acquired possession from Hari, which was the cause of "his liability to be sued" in the present suit, and would, therefore, fall under the definition of a defendant in s. 3 of the Statute of Limitations.

The plaintiff's suit is, therefore, barred, and we must reverse the decree of the Court below and dismiss the plaint with costs throughout on the plaintiff.

Decree reversed.

(1) 15 B. 261.

(2) 16 B. 722.

1892
DEC. 5.

APPEL-
LATE
CIVIL.

18 B. 40.

18 B. 40.

APPELLATE CIVIL.

Before Mr. Justice Telang and Mr. Justice Fulton.

BHAGVANTRAI MUNSHI (*Original Plaintiff*), *Appellant v.* MEHTA BAJURAO (*Original Defendant*), *Respondent.** [5th December, 1892.]

Valuation—Valuation of suit—Suit Valuation Act (VII of 1887), *s.* 8—*Valuation for purposes of Court fees and for purposes of jurisdiction—Jurdisdiction—Appeal.*

In a suit for an account the valuation for purposes of Court fees determines the question of jurisdiction, the valuation for both purposes being the same under s. 8 of Act VII of 1887.

[41] The plaintiff sued for an account, and valued the relief sought at Rs. 130. The suit was filed in the Court of a Subordinate Judge of the First Class. The Subordinate Judge rejected the claim. Thereupon, the plaintiff appealed to the High Court, valuing his claim in appeal at Rs. 10,505.

Held, that the appeal lay to the District Court, and not to the High Court.

[R., 18 B. 100 (102) ; 20 B. 265 (267).**]**

APPEEL from the decree of Rao Bahadur Chunilal Maneklal, First Class Subordinate Judge of Ahmedabad, in suit No. 567 of 1888.

The plaintiff sued for an account from May, 1881, to 22nd July, 1886, and to recover whatever might be found due to him by the defendant, alleging that the defendant was his *mukhtyar* or agent, and as such entrusted with the management of his property consisting of houses, fields and an *inam* village called Vastral, situate in the Ahmedabad District. The plaintiff further alleged that on the 21st July 1888, he had revoked the defendant's *mukhtyarnama*, or power of attorney, and had given him notice to render an account of his management, but this he refused to do. Hence the present suit. The claim was valued at Rs. 130 for purposes of Court fees, and a stamp of Rs. 10 was affixed to the plaint.

The suit was filed in the Court of the First Class Subordinate Judge of Ahmedabad.

The Subordinate Judge, after taking accounts between the parties, rejected the plaintiff's claim *in toto*.

Against this decision the plaintiff appealed to the High Court. He valued his claim in appeal at Rs. 10,505.

The appeal was heard by Telang and Fulton, JJ.

Goverdhan M. Tripati, for respondent.—There is a preliminary objection to the appeal. The appeal in this case lies to the District Court, and not to the High Court. The plaintiff valued his original claim at Rs. 130 in the Court below. This valuation should be taken for purposes of Court fees, as well as for jurisdiction. Under s. 8 of Act VII of 1887, the valuation for both purposes is the same. That being the case the appeal lies to the District Court under Act XIV of 1869—*Kushal-chand* v. *Nagindas* (1).

[42] *Ganpat Sadashiv Rao*, for appellant.—The valuation of the suit, as given in the plaint, is for purposes of Court fees only. The suit involves a claim to property worth more than Rs. 5,000. That being the case, according to the established practice of this Court, the appeal lies to this Court and not to the District Court. Refers to *Manohar Ganesh*

---

* Appeal No. 104 of 1890.

(1) 12 B. 675.

v. *Bava Ramcharandas* (1). The law is well settled that valuation for purposes of Court fees is quite distinct from valuation for purposes of jurisdiction. Section 8 of Act VII of 1887 has no application to the present case. Nor would s. 9 of the Act apply in the absence of any rules made by the High Court.

1892
DEC. 5.
APPELLATE CIVIL.
18 B. 40.

JUDGMENT.

TELANG, J.—The plaintiff sued for an account, and in the plaint valued the relief sought at Rs. 130, stating at the same time that he would pay Court fee on any larger amount that might be decreed. The First Class Subordinate Judge rejected the claim, with costs. The plaintiff has now appealed to this Court, but a preliminary objection has been taken that, as the relief sought was valued at Rs. 130, the appeal lies not to this Court, but to the District Court. The appellant's pleader relies on the statement in the plaint that at the time of filing it there were no means of ascertaining the amount due, but that it was a very large sum, and that temporarily the relief sought was valued at Rs. 130. It was contended that this valuation was made merely for the purpose of ascertaining the Court fee payable, but we are unable to accept this view. In *Khushalchand* v. *Nagindas* (2), it was held that, in a suit for account, the valuation entered in the plaint for purposes of Court fee determined the question of jurisdiction, and the law thus laid down has been embodied by the Legislature in s. 8 of Act VII of 1887 which was in force at the time this suit was instituted. We must, therefore, direct that the memorandum of appeal be returned to the appellant for presentation in the proper Court. The appellant must pay the costs incurred in this Court.

Appeal rejected.

18 B. 43.

[43] APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Bayley.

DADABHAI DAJIBHAI (*Original Defendant No.* 2), *Applicant v.* DIOGO SALDANHA (*Original Plaintiff*), *Opponent.** [13th December, 1892.]

Jurisdiction—Contract—Performance of contract—Making of contract—Goods to be shipped at Bombay to the plaintiff at Karwar—Contract entered into and intended to be performed at Bombay.

The plaintiff residing at Karwar sent a sum of money to Kemp & Co. (defendant No. 1), a firm at Bombay, asking them to send him certain goods. Kemp & Co. informed the plaintiff that they had not the goods required by him. The plaintiff thereupon telegraphed to them to pay the amount to defendant No. 2, a resident of Bombay, provided he shipped the goods. On the failure of defendant No. 2 to ship the goods, the plaintiff brought a suit against the defendants in the Court at Karwar to recover the amount. He claimed against Kemp & Co. (defendant No. 1) because they had paid the money to the second defendant before the goods were shipped, and against the second defendant because he had not shipped the goods, although he had received the money. The Court at Karwar was of opinion that Karwar was the place where the contract was to be performed, and that, therefore, it had jurisdiction to entertain the suit, and it passed a decree against defendant No. 2. The claim as against defendant No. 1 was dismissed.

* Application under Extraordinary Jurisdiction, No. 169 of 1892.

(1) 2 B. 219.

(2) 12 B. 675.

1892
DEC. 13.

APPELLATE CIVIL.

18 B. 43.

Held, reversing the decree, that the understanding on which the money was paid to defendant No. 2 by Kemp & Co., and which was the agreement on which the plaintiff sued, was that the second defendant would ship the goods at Bombay to the plaintiff at Karwar. The contract, therefore, as between defendant No. 2 and Kemp & Co., acting on behalf of the plaintiff, was both entered into and intended to be performed at Bombay. The cause of action arose, therefore, in Bombay, and the Court at Karwar had no jurisdiction.

APPLICATION under the extraordinary jurisdiction of the High Court, under s. 622 of the Civil Procedure Code, Act XIV of 1882, against the decision of Rao Bahadur Raghavendra Ramchandra, Acting First Class Subordinate Judge of Karwar, in a Small Cause Suit.

The plaintiff resided at Karwar. The first defendant was the firm of Messrs. Kemp & Co., which carries on business at Bombay. The second defendant (the appellant) was one Dadabhai Dajibhai, who also resided in Bombay.

The plaintiff alleged that he had sent to Messrs. Kemp & Co. (defendant No. 1) at Bombay a sum of Rs. 300 to pay for goods **[44]** which he ordered from that firm. Kemp & Co., however, informed him that they could not supply the goods, whereupon the plaintiff telegraphed to them requesting them to pay the money to the second defendant, provided he shipped the goods to Karwar. The goods did not arrive, and the plaintiff brought this suit against Kemp & Co. (defendant No. 1), because they had paid the money to the second defendant before the goods were shipped, and against the second defendant because he had not shipped the goods, although he had received the money.

The plaintiff filed this suit in the Court at Karwar.

The second defendant pleaded (*inter alia*) that the Court had no jurisdiction. The Court, however, held that Karwar was the place where the performance of the contract was to be completed, and that, therefore, the plaintiff's cause of action arose within its jurisdiction. The claim was awarded against defendant No. 2 only, defendant No. 1 being held not liable.

In coming to the above conclusion the Subordinate Judge relied upon (1) a telegram which plaintiff had sent to defendant No. 1 (Kemp & Co.) and which ran as follows:—"Otherwise pay Dadabhai Dajibhai Baria, provided he ships goods;" and also upon (2) the evidence given by Mr. Tate, the accountant of defendant No. 1 (Kemp & Co.) "that the plaintiff's telegram was shown to defendant No. 2 and the contents thereof made known to him, that the money was paid to defendant No. 2 under a contract that he should ship the goods required by the plaintiff to Karwar, that it was paid for no other purpose, that defendant No. 2 promised to send the goods, and that on that condition the money was paid to him."

Against the decree the second defendant applied to the High Court on the ground that the Court at Karwar had no jurisdiction. He obtained a rule *nisi* to set aside the decree.

Manekshah J. Taleyarkhan, for the applicant (defendant No. 2):—The lower Court erred in holding that the plaintiff's cause of action arose at Karwar. When the defendant No. 1 (Messrs. Kemp & Co.) paid the money to defendant No. 2 at Bombay **[45]** under the plaintiff's instructions, defendant No. 1 acted as the plaintiff's agent, and the distinct understanding then was that the goods were to be shipped at Bombay. These circumstances show that the contract was entered into and was to be performed at Bombay. The cause of action, therefore, arose

at Bombay, and that being so the Court at Karwar had no jurisdiction to entertain the suit.

Shamrao Vithal, for the opponent, *contra*.

1892 DEC. 13. APPELLATE CIVIL. 18 B. 43.

JUDGMENT.

SARGENT, C.J.—The Subordinate Judge has held that Karwar was the place where the contract was to be performed by the second defendant. If that had been so, the cause of action would have been at Karwar and the Subordinate Judge would have had jurisdiction. But it is plain from the telegram which plaintiff sent to Kemp & Co., and from the evidence of Mr. Tate that the understanding on which the money was paid to the second defendant, and which is the agreement upon which the plaintiff is suing, was that he would ship goods consigned to the plaintiff at Karwar. The contract, therefore, between the second defendant and Kemp & Co., acting on behalf of the plaintiff, was both entered into and intended to be performed in Bombay. The cause of action was, therefore, in Bombay, and the Subordinate Judge had no jurisdiction to try the case against the second defendant.

We must make the rule absolute, and reverse the decree with costs throughout.

Rule made absolute.

---

18 B. 46.

[46] APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Bayley.

ABA BIN SADOBA AND ANOTHER (*Original Defendants*), *Applicants v.* PARVATRAO BIN GANPATRAO (*Original Plaintiff*), *Opponent.**

[13th December, 1892.]

Mamlatdars' Act (Bombay Act III of 1876), *s.* 4 (1), *cl.* 2—*Suit for disturbance of possession—Possession by tenant—Physical possession—Jurisdiction.*

There must be physical possession to enable an aggrieved person to invoke the Mamlatdar's assistance in a case falling under the second clause of s. 4 of the Mamlatdars' Act (Bombay Act III of 1876).

A person who is in possession through his tenant cannot sue for an injunction for disturbance of possession under the Act.

Desai Malabhai v. *Keshavbhai* (2) approved and followed.

---

* Application under Extraordinary Jurisdiction, No. 150 of 1892.

(1) Section 4 of the Mamlatdars' Act (Bombay Act III of 1876) :—

(1) Every Mamlatdar shall preside over a Court, which shall be called a Mamlatdar's Court, and which shall have powers within such territorial limits as may from time to time be fixed by the Governor in Council to give immediate possession of lands, premises, trees, crops, or fisheries, or of any profits of the same, or to restore the use of water from wells, tanks, canals or water-courses to any person who shall have been dispossessed or deprived thereof otherwise than by due course of law, or who shall have become entitled to the possession or restoration thereof by reason of the determination of any tenancy, or other right of any other person in respect thereof.

(2) The said Court shall have also power, within the said limits when any person is disturbed or obstructed, or when an attempt has been made to disturb or obstruct any person in the possession of any lands, premises, crops, trees or fisheries, or in the use of water from any well, tank, canal or water-course, or of the use of roads or customary ways to fields, to issue an injunction to the person causing, or who has attempted to cause, such disturbance or obstruction, requiring him to refrain from causing or attempting to cause any such further disturbance or obstruction.

(2) 12 B. 419.

1892
DEC. 13.
APPEL-
LATE
CIVIL.
18 B. 46.

THIS was an application under the extraordinary jurisdiction of the High Court, (s. 622 of the Civil Procedure Code, Act XIV of 1882) against the decision of Rao Saheb Rangnath Narayan, Mamlatdar of the taluka of Kopargaon in the Ahmednagar District.

The plaintiff by his mukhtyar Shankar Vaman Kulkarni brought a summary suit under the Mamlatdars' Act (Bombay Act [47] III of 1876) against the defendants for an injunction directing the defendants not to obstruct the plaintiff's possession of the lands in dispute. It was stated in the plaint that the plaintiff was in possession of the lands through his tenant.

The Mamlatdar passed a decree for the plaintiff as prayed for.

The defendants applied to the High Court and obtained a rule *nisi* to set aside the order.

Gangaram B. Rele, for the applicants.—The opponent (plaintiff) being in possession through his tenant, no obstruction was caused to him. In a suit for injunction under the Mamlatdars' Act the person in actual possession must bring the suit. The obstruction must be to physical possession and not constructive possession as that of a landlord. The present suit being brought by the landlord, the Mamlatdar had no jurisdiction to entertain it—*Desai Malabhai* v. *Keshavbhai* (1).

Mahadev Chimnaji Apte, for the opponent.

JUDGMENT.

SARGENT, C.J.—The decision in *Desai Malabhai* v. *Keshavbhai* (1), in which we concur, shows that there must be physical possession to enable an aggrieved person to invoke the Mamlatdar's assistance in a case falling under the second clause of s. 4 of the Mamlatdars' Act, and, therefore, that the plaintiff, who was only in possession by his tenant Gangaram, could not sue in the present case.

We must, therefore, make the rule absolute and reverse the decree of the Mamlatdar. Applicants to have their costs of this application.

Decree reversed.

---

18 B. 48.

[48] APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Bayley.

VIRCHAND LALCHAND (*Original Plaintiff*), *Appellant v.* KUMAJI AND ANOTHER (*Original Defendants*), *Respondents.** [23rd December, 1892.]

Vendor and purchaser—Unpaid purchase-money, suit by vendor to recover—Evidence—Registration of bonds given for purchase-money—Limitation—Limitation Act (XV of 1877), sch. II, art. 132.

The defendants purchased land from the plaintiff, and gave bonds for the purchase-money. These bonds were not registered and were, therefore, not admissible in evidence.

Held, that the plaintiff, as vendor, was under no necessity to rely on the bonds in order to establish a charge on the property sold in respect of the unpaid purchase-money.

---

* Second Appeal No. 860 of 1891.

(1) 12 B. 419.

Unpaid purchase-money is a charge on the property in the hands of the vendee, and the claim to enforce it falls under art. 132, sch. II of the Limitation Act (XV of 1877).

[Diss., 21 M. 141 (142) ; F., 21 A. 454 ; 22 B. 846 ; 9 O.C. 284 (285).]

SECOND appeal from the decision of Dr. A. D. Pollen, District Judge of Poona.

The plaintiff in execution of a decree bought certain land belonging to the defendants and entered into possession. He subsequently agreed to re-sell it to the defendants for Rs. 240. The defendants accordingly executed to him six instalment bonds for Rs. 40 each, and re-took possession of the land. The bonds contained a condition that, if default was made in any instalment, the land should revert to the plaintiff. The defendants made default, and in 1885 the plaintiff sued (No. 239 of 1885) to recover the land, on the ground of the breach of the conditions of the sale. In that suit he failed, as the bonds were held to be inadmissible in evidence for want of registration. The High Court, however, in second appeal, allowed him to withdraw the suit and to bring a fresh suit for the unpaid purchase-money. The plaintiff accordingly now sued to recover the said purchase-money. He prayed, in the alternative, that the land should be restored to him.

The defendants pleaded that the present suit was barred by the previous suit and by limitation.

[49] The Subordinate Judge dismissed the suit. He held that the claim for possession could not be made, inasmuch as the permission given to the plaintiff by the High Court was only to sue for the unpaid purchase-money, and that in other respects the present suit, although brought within twelve years of the date of sale, was barred by limitation under arts. 66, 111, 115 of sch. II of the Limitation Act (XV of 1877), and by s. 72 of the Dekkhan Agriculturists' Relief Act (XVII of 1879), the defendants being agriculturists.

On appeal, the District Judge confirmed the decree of the lower Court. In giving judgment he said :—

"The lands originally belonged to defendants, but had been purchased by plaintiff at a Court sale. The bonds contained a condition that, if default was made of any instalment, the land should revert to plaintiff. He alleged that default had been made, and he instituted a suit, No. 239 of 1885, to recover the lands. Technically the suit was one to enforce reconveyance of the lands to him for breach of conditions of the sale. The lower Court and the first appellate Court held that the bonds containing the conditions were inadmissible in evidence for want of registration, and rejected the claim. In second appeal the High Court allowed the plaintiff to withdraw his suit and both appeals, with permission to bring a fresh suit for the unpaid purchase-money. The only suit, therefore, that he can now bring is one for the unpaid purchase-money. Therefore, his present alternative claim for possession of the land, which is, in effect, a renewal of his previous suit, is not maintainable: and, if it were maintainable, the same question of registration would arise again. The claim for the unpaid purchase-money is admittedly made more than six years after the alleged default ; and it is, therefore, time-barred, if art. 111 of the Limitation Schedule be held to apply. This is the only article that, in my opinion, applies to the case. It is argued that art. 132 might apply. Plaintiff might indeed urge, on a fair construction of the bonds, that they gave a special charge upon the land for the purchase-money ; but here again the question

1892
DEC. 23.
APPELLATE CIVIL.
18 B. 48.

of registration would come in, and that point has been virtually decided by the previous litigation, and cannot be re-opened."

[50] *Mahadeo Chimnaji Apte*, for the appellant.—We seek to recover the unpaid purchase-money from the land itself. Unpaid purchase-money being a charge upon the property, the claim to recover it is governed by art. 132, sch. II of the Limitation Act (XV of 1877) and not by art. 111 of the same schedule, which would have applied if we had sought to make the respondents personally liable.

We do not rely upon the bonds for the recovery of the money. It is the charge upon the property that we seek to enforce.

There was no appearance for the respondents.

JUDGMENT.

SARGENT, C. J.—The vendor was under no necessity, as the District Judge would appear to think, to rely on the bonds in order to establish a charge on the property sold in respect of the unpaid purchase-money. It is a well-established rule of an English Court of Equity, and which is equally applicable to the circumstances of this country, that the unpaid purchase money is a charge on the property in the hands of the vendee, and the claim to enforce it would, therefore, fall under art. 132 of the Limitation Act (XV of 1877).

The present suit, which the Subordinate Judge has found was within twelve years of the defendants going into possession, is, therefore, in time, and the decree must be reversed, and the case sent back for disposal having regard to the above remarks. Costs to follow the result.

Decree reversed.

---

18 B. 51.

[51] APPELLATE CIVIL.

Before Mr. Justice Telang and Mr. Justice Fulton.

CHINTO (*Original Plaintiff*), *Appellant v.* JANKI AND OTHERS (*Original Defendants*), *Respondents.** [23rd December, 1892.]

Adverse possession—Mortgage—Mortgagee in possession—Dispossession of mortgagee by trespasser—Adverse possession as against mortgagee when good also as against the mortgagor—Evidence—Burden of proof—Limitation Act (XV of 1877), sch. II, art. 144.

Land was mortgaged with possession to A, the father-in-law of defendant No. 1, in 1828. In 1856 A was ousted from possession by B, a trespasser (defendant No. 2), who subsequently held the land and dealt with it as his own for forty years. The mortgagor sued both A and B for redemption. In appeal, it was contended by B that his possession had been adverse not merely to A (the mortgagee), but also to the plaintiff (the mortgagor), and that the suit was barred by limitation. The plaintiff contended that B's possession was not adverse to him, because he as mortgagor had no right to possession during the term of the mortgage.

Held, that the suit fell under art. 144 of sch. 2 of the Limitation Act (XV of 1877), and that it lay upon B to prove that his possession for twelve years prior to the suit was adverse to the plaintiff (the mortgagor). There may be a possession adverse to the interest of a mortgagee which nevertheless is not adverse to the interest of the mortgagor. In such a case a suit by the mortgagor, or those claiming under him, will not be barred, although one by the mortgagee

---

* Second Appeal No. 215 of 1891.

may be. The case was remanded for a finding on the question of when B's possession became adverse to the plaintiff.

[F., 27 A. 395 (397) = 1 A.L.J. 725 = 25 A.W.N. 4; U.B.R. (1906) Lim. 9 (11); R., 30 A. 119 (122) = 5 A.L.J. 85 = 28 A.W.N. 25; 34 A. 640 = 10 A.L.J. 278 = 17 Ind. Cas. 632; 19 B. 138 (139); 35 B. 438 = 13 Bom. L.R. 867 = 12 Ind. Cas. 362; 21 M. 153 (165) = 8 M.L.J. 92; 25 M. 507 (512); 5 Bom. L.R 186 (189); 6 Bom. L.R. 638 (639); 14 C.L.J. 292 = 16 C.W N. 351 = 11 Ind. Cas. 465; 16 C.P.L R. 154 (155); 15 Ind. Cas. 146 = (1912) M.W.N. 669; 26 M.L.J. 140 = 1914 M.W.N. 417 (423); 12 O C. 45 (55); U.B.R. (1897—1901) 469; Con., 27 B. 43 = 4 Bom. L.R. 721; 6 C.W.N. 601; 23 T.L.R. 92; D., 26 C. 460 (464).]

SECOND appeal from the decision of J. FitzMaurice, Acting District Judge of Ratnagiri, in appeal No. 204 of 1889.

Suit for redemption. In 1828 the land in dispute was mortgaged with possession by plaintiff's father to one Pundlik, the father-in-law of the first defendant. The mortgagee remained in possession till 1856, when he was ousted by defendant No. 2 and his brother. In 1867 defendant No. 2 mortgaged the land to defendants Nos. 3 to 6. In 1869 defendant No. 2 got the land entered in his name in the revenue records. In 1887 the revenue authorities entered the land in the names of both plaintiff and defendant No. 2.

In 1888 the present suit was filed for redemption of the land in question. The plaintiff alleged that the mortgagee Pundlik had assigned his interest to defendant No. 2, who in his turn [52] bas sub-mortgaged the property to defendants Nos. 3—6. The suit was dismissed by the Court of first instance, on the ground that the mortgage sought to be redeemed was not proved.

On appeal, the District Judge found that the mortgage was proved. He, however, rejected the plaintiff's claim, holding that the sub-mortgage to defendant No. 2 was not proved, but that defendant No. 2 had been in possession and had dealt with the land as his own for nearly forty years. The decree of the first Court dismissing the suit was, therefore, confirmed.

Against this decision the plaintiff preferred a second appeal to the High Court.

Ganesh Krishna Deshmukh, for appellant.—The lower Court has not recorded a distinct finding that the suit is barred by limitation. But assuming that to be the effect of the conclusion to which the Judge has come, then I contend that the suit is not time-barred. The defendant No. 2 may have held adversely to the *mortgagee*, but such adverse possession does not and cannot affect the *mortgagor* during the continuance of the mortgage term. Until the term is expired, the mortgagor is not entitled to possession. Till then he has no cause of action. The trespasser can only acquire such estate as the mortgagee possessed. His adverse possession cannot curtail the period of sixty years prescribed for a redemption suit—*Vithoba* v. *Gangaram* (1). So, too, in the case of a lease, it has been held that the lessor's title is not affected by the possession of a trespasser during the period of the lease—*Sharat Sundari Dabia* v. *Bhobo Pershad Khan* (2). In *Bejoy Chunder Banerjee* v. *Kally Prosonno Mookerjee* (3), Mr. Justice Markby explains what is meant by adverse possession. Unless the true owner has a right to immediate possession, the possession of a stranger cannot become adverse to him, nor can limitation begin to run against him. But assuming that art. 144 of the Limitation Act (XV

(1) 12 B.H.C.R.A.C.J. 180. (2) 13 C. 101. (3) 4 C. 327.

1892
DEC. 23.

APPELLATE CIVIL.

18 B. 51.

of 1877) applies, it lies upon the defendant to show when his adverse possession commenced. This has not been shown in the present case.

[53] *Daji Abaji Khare*, for respondent.—The principle laid down in *Vithoba* v. *Gangaram* (1) is no longer good law. It is dissented from, and disapproved by the Madras High Court in the case of *Ammu* v. *Ramakishna*(2). It is, moreover, inconsistent with a recent ruling of this Court in *Puttappa* v. *Timmaji* (3). That case shows that the possession of a trespasser can be adverse to the mortgagor as well as to the mortgagee. In the present case it is found by the lower Court that defendant No. 2 and his brother have held and dealt with the property in dispute as owners for nearly forty years. During that period their possession has been clearly adverse to the mortgagor. The suit is, therefore, barred by limitation.

JUDGMENT.

FULTON, J.—The District Judge has found that in 1828 the plaintiff mortgaged the land in dispute to Pundlik, from whom the defendant No. 1 derives her title. He has also found that for the last forty years it has been in the possession of defendant No. 2 and his brother, who have mortgaged it to defendants Nos. 3 to 6.

On these facts, holding the allegation that defendant No. 2 was the sub-mortgagee of defendant No. 1 not to be proved, he rejected the claim. He does not expressly state that he considers the claim time-barred, but finding that the sub-mortgage to No. 2 was not proved, and apparently considering it to be the sole ground on which the plaintiff based his claim against him, he dismissed the suit. Both Courts seem to have avoided finding on the question of limitation, which was not raised in the issues framed in the District Court, and they decided against the plaintiff merely because he had failed to prove the existence of the sub-mortgage. This, however, was, in my opinion, too narrow a ground to proceed on, for, remembering the want of accuracy with which plaints are often drawn up, I think that it should have been held that, in case of failure to prove the sub-mortgage, the plaintiff intended to sue defendants Nos. 2 to 6 as trespassers relying on his own title.

The question then directly arises whether the claim against defendants Nos. 2 to 6 is time-barred. In argument it was, I think, **[54]** not disputed that art. 144 of sch. II of the Limitation Act (XV of 1877) is the one to be applied, but on behalf of the plaintiff it was contended that, although the second defendant and those claiming under him had held for more than twelve years, their possession was not adverse to the plaintiff, who was himself not entitled to possession without redeeming the property from defendant No. 1. The case of *Vithoba* v. *Gangaram* (1) is an authority for holding that, in the circumstances described, the possession of a trespasser though adverse to the mortgagee is not adverse to the mortgagor. In that case the Court remarked that it was difficult to understand how there could be any trespass on the mortgagor's possession so long as he had only the equitable estate. But this view has been dissented from in the case of *Ammu* v. *Ramkishan* (2) in which it has been held that the rights of the mortgagor are liable to invasion equally with those of the mortgagee. Again, in *Puttappa* v. *Timmaji* (3), it was held that there can be an invasion of the rights of the mortgagor of such a nature as to render the possession of a trespasser on the property adverse to him. But I think that although the possession of a trespasser may undoubtedly be

(1) 12 B.H.C.R.A.C.J. 180. (2) 2 M. 226. (3) 14 B. 176.

adverse to the mortgagor, the burden of proving when it became so rests on the former. *Prima facie*, by his act of possession he merely ousts the mortgagee who is entitled to hold the property. Such ouster unaccompanied by any further act of aggression on the mortgagor's rights cannot give any cause of action to the latter. During the continuance of the mortgage the mortgagor cannot sue to recover possession of the land. In the case of *Scott* v. *Newington* (1), Tindal, C. J., held that where the pledgee of certain goods had, in his turn, pledged them, and they had been found ultimately in the hand of a stranger, the original pledgor was entitled to recover possession, on the ground that the owner's right revived because the person having the lien had abused it by pledging the goods. But I do not think similar reasoning will apply to land mortgages in India, or that it can be held that the mere fact of a mortgagee's allowing the mortgaged property to pass into the hands of a trespasser revives the mortgagor's right to possession. In the **[55]** language of s. 58 of the Transfer of Property Act, he has transferred to the mortgagee an interest which comprises the right to possession until redemption, and he cannot sue to recover what does not belong to him. Consequently I agree with the view expressed in *Vithoba* v. *Gangaram* in so far as it is held that the possession of a trespasser is not necessarily adverse to the mortgagor. In *Wōmesh Chunder Goopto* v. *Raj Narain Roy* (2) the Calcutta High Court (Peacock, C. J., and Jackson, J.) held that a zemindar was not barred by the adverse possession of a trespasser on his land during the period of the lease, and the decision was followed in *Sharat Sundari Dabia* v. *Bhobo Pershad Khan* (3). Similarly, in the case of a mortgage, I think it is clear that the mere fact of possession by a stranger is not necessarily an invasion of the mortgagor's right. It may, however, become so, but it is for the defendant to show when it became adverse. In the Madras case above referred to it will be observed that the defendant had many years before got her name entered in the Government records and had since then purported to hold directly from the Government. In the present case the second defendant alleges that proceedings have been taken to remove plaintiff's name from the survey records, but there has been no finding as to when they took place, whether they were successful, and whether the plaintiff had any notice of them. Excepting this statement of proceedings to remove the plaintiff's name it does not appear in what way the second defendant's possession was adverse to him. It is true that he now states that he holds not as mortgagee but as owner, but it is for him to show when he assumed that attitude. The rule which requires a plaintiff who has been dispossessed to prove that he has been in possession within the period of limitation, does not apply to a case of this sort in which the plaintiff's mortgage is found to have been in possession in 1856 and the plaintiff himself was not entitled to immediate possession.

Under the circumstances, I think the following issues should be sent to the District Judge for finding on the evidence on record :—

[56] (1) When did the defendant No. 2's possession become adverse to the plaintiff ?

(2) Has plaintiff proved his title to the land as against defendant No. 2 and his assignees ?

The findings should be returned within two months.

---

(1) 1 Moo. and R. 253. (2) 10 W.R. C.R. 15. (3) 13 C. 101.

1892
DEC. 23.
APPELLATE CIVIL.
18 B. 51.

JUDGMENT.

TELANG, J.—In this case I have, on the whole, come to the conclusion, that looking to the issues settled in the Court of appeal, and also to the judgment of the Subordinate Judge, (which shows that *Vithoba* v. *Gangaram* (1) was relied on before him) it is open to the appellant to raise the main question which was argued before us on his behalf. That question is whether, when a mortgage is effected, and the mortgagee is put in possession, a stranger to the mortgage can by twelve years' possession obtain a title against the mortgagor. In *Vithoba* v. *Gangaram*(1), it appears to have been broadly laid down that he cannot do so. In *Ammu* v. *Ramakishan*(2), on the other hand, the High Court of Madras has held that such a possession is capable of ripening into a title even as against the mortgagor by virtue of the Limitation Act. And in *Puttappa* v. *Timmaji* (3) this Court has pointed out that *Cholmondely* v. *Clinton* (4), to which I referred during the argument, has laid down the doctrine inconsistent with the broad proposition enunciated in *Vithoba* v. *Gangaram* (1) that there may be a possession adverse to an equity of redemption during the currency of a mortgage.

It seems to me that the question is one not capable of an answer in the abstract without reference to the circumstances of each case. It is well established in this Court, that there may be a possession adverse to the interest of a mortgagee, which is nevertheless not adverse to the interest of the mortgagor. The case of *Purmanandas* v. *Jamnabai* (5) affords an illustration of that kind. In such a case a suit for possession by the mortgagor, or those claiming under him, will not be barred, although one by the mortgagee may be. In the present case, however, we have not such an admission of the title of the mortgagor by the party in possession, as the Court had to deal [57] with it in that case. Here, on the findings of the Court below, we must take it that there was a mortgage by the plaintiff purporting to be one with possession in 1828; that the mortgagee was in possession under such mortgage in 1856, but that the defendants have been in possession of the property "as their own for some forty years past" without having ever "attorned to the plaintiff in any way or made any admission of his right." And the question arises, what is the effect of the law of limitation in such a case? In this aspect of it, it is obviously not a suit coming within art. 148 of the Schedule to the Limitation Act, as was faintly suggested in argument for the appellant. The case must fall within the purview of art. 144. And according to the decision of the Privy Council, in cases falling within that article, it lies on the defendant to prove that his adverse possession commenced more than twelve years prior to the institution of the suit. Now, no doubt, a person who by trespass or without title is in possession of property as his own may, in one sense, be said to hold a possession adverse to every one including the true owner. For, as said in quaint language in an old English case, "wrong is unlimited, and ravens all that can be gotten" (see 2 Smith's Leading Cases (9th Ed.), p. 736). But, on the other hand, Mr. Justice Markby's definition of adverse possession does not apply to a possession of this character, if the true owner is not at the time himself entitled to possession. The words "immediately entitled to possession," which form part of that definition, are in such a

(1) 12 B. H. C. R. A. C. J. 180.
(2) 2 M. 226.
(3) 14 B. 176.
(4) 2 J. and W. 1.
(5) 10 B. 49.

case inapplicable. I think, too, on the whole, that Mr. J. W. Smith's definition also is not satisfied by such a possession, as the "incompatibility" required by it does not necessarily exist in such a case. And this construction of the phrase "adverse possession" would be in harmony with the general principle that *contra non valentem agere nulla currit præscriptio*. Compare also *Dalton* v. *Angus* (1) per Lord Blackburn.

The question then resolves itself into this. Has a mortgagor a right to possession of mortgaged property, if the mortgagee, having been placed in possession, should thereafter lose such possession by trespass or otherwise on the part of a stranger? **[58]** By English law, apparently, the mortgagor would have no such right. In Cole on Ejectment it is said that ejectment against a stranger "cannot be maintained in the name of the mortgagor, except, perhaps, under circumstances similar to those in which the action might be maintained against the mortgagee himself," —that is, apart from special cases, except after payment of the mortgage money. And although, no doubt, the rule there laid down is due to the fact that the legal title is under English law conveyed to the mortgagee, still it would seem that the same rule ought to be applied in India also. For the mortgagor, having once put the mortgagee in possession, ordinarily has no right to possession himself until the mortgage is paid off. The mere fact of the mortgagee's letting the property go out of his possession cannot give the mortgagor such a right before payment. And the party in possession, though he may be a trespasser, would ordinarily be able to defend an action of ejectment at the suit of the mortgagor by setting up the *jus tertii* (2).

In England, before the Act of William IV, the rule in the somewhat analogous case of limitation against a landlord was, as stated by the Real Property Commissioners quoted in Smith's Leading Cases, p. 643, that "in the case of a lease adverse possession so as to bar the reversioner does not commence till the expiration of the term where rent is reserved on a lease." The Commissioners recommended a change, and the statute enacted one to the extent that where rent was wrongfully received by another, and the landlord received none at all, limitation should run against the landlord from the time of such wrongful receipt. But this would rest on the principle which the Commissioners indicate, that refusal to pay rent to the rightful owner coupled with a payment to another is a virtual dispossession of the rightful owner. There would not, however, be necessarily any such "virtual dispossession" of a mortgagor, where the mortgagee having taken possession, a trespasser subsequently entered upon the mortgaged property.

The result of these considerations in the present case is that it lies upon the defendant before he can succeed to make out that **[59]** his possession for twelve years prior to the suit was adverse to the plaintiff. The plaintiff says it was not adverse, because he had no right to possession during all these years. In order to decide on that contention it is necessary to have the finding of the Court below on the various questions of fact involved in it, and for that purpose I concur in sending down to that Court the issues framed by Mr. Justice Fulton, which are wide enough to embrace all considerations of fact relevant to the questions of law raised in the case.

Case remanded.

(1) 6 Ap. Ca. 818.
(2) 2 Smith's Leading Cases, 602—3; Woodfall's Londlard and Tenant, p. 885.

1893
JAN. 10.

APPEL-
LATE
CIVIL.

18 B. 59.

18 B. 59.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Bayley.

LALLUBHAI VAJERAM AND ANOTHER (*Original Plaintiffs and Petitioners*), *Appellants v.* BAI MAGANGAVRI (*Original Defendant and Opponent*), *Respondent.** [10th January, 1893.]

Practice—Procedure—Civil Procedure Code (XIV of 1882), ss. 100 *and* 647—*Dismissal of suit for default—Application to restore suit—Notice of application—Service of notice—Negligence—Second application for issue of notice—Costs.*

A suit having been dismissed for plaintiff's default, he applied for the restoration of the suit to the file, and a notice was issued to the defendant to show cause why the suit should not be restored. The notice was returned unserved, owing to plaintiff's neglect to point out the defendant to the serving officer. The plaintiff having applied for a fresh notice, the Subordinate Judge rejected the application.

Held, that the Subordinate Judge had no power to reject the plaintiff's application for a fresh notice. Section 100 of the Civil Procedure Code (XIV of 1882), which by s. 647 is made applicable to such a proceeding, only enabled him to order a fresh notice to issue, and, if he thought proper, to order plaintiff to pay the costs occasioned by the necessary postponement.

[R., 10 Ind. Cas. 705=7 N.L.R. 32.]

APPEAL from an order passed by the First Class Subordinate Judge of Surat.

The plaintiff's suit having been dismissed for default, the plaintiff applied to the Subordinate Judge to set aside the order of dismissal. A notice was issued to the defendant to show cause why the suit should not be restored to the file, but it was returned unserved owing to plaintiff's neglect to point out the defendant to the bailiff. The plaintiff then applied for the issue of a fresh [60] notice, stating that he had been absent in Bombay, and, therefore, had been unable to accompany the bailiff when he went to serve the previous notice on the defendant.

The Subordinate Judge, however, rejected the application, on the ground that no sufficient excuse had been shown for the plaintiff's neglect.

The plaintiff appealed.

Govardhanram M. Tripathi, for the appellants (plaintiffs).—The lower Court was bound to issue a fresh notice. Under s. 100 of the Civil Procedure Code (XIV of 1882), which is made applicable to proceedings of the present nature by s. 647, the utmost that the Court could do was to make the plaintiff pay the costs of the application, but it had no authority to reject it. The issue of a fresh notice is merely a formal matter.

Motilal Mugutlal Munshi, for the respondent (defendant).—It was the plaintiff's duty to point out the defendant to the bailiff. The Court found him guilty of negligence in not doing so. The Court is not bound under these circumstances to continue to issue fresh notices.

JUDGMENT.

SARGENT, C. J.—The Subordinate Judge had no power to dispose of the plaintiff's application on the 18th June, because notice had not been served on defendant owing to plaintiff's neglect to point him out to the serving officer. Section 100 of the Code of Civil Procedure (XIV of 1882), which by s. 647 of the Civil Procedure Code is made applicable

* Appeal No. 35 of 1892.

to a proceeding of this nature, only enabled him to order a fresh notice to issue, and, if he thought proper, to order plaintiff to pay the costs occasioned by the necessary postponement. We must, therefore, discharge the order, and direct the Subordinate Judge to proceed according to law. Costs of this appeal to be costs in the plaintiff's application.

Order discharged.

1893
JAN. 10.
APPELLATE CIVIL.
18 B. 59.

---

18 B. 61.

[61] APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Bayley.

KRISHNA VELJI MARWADI (*Original Opponent*), *Applicant v.* BHAU MANSARAM (*Original Petitioner*), *Opponent.** [3rd August, 1893.]

Civil Procedure Code (XIV of 1882), *ss.* 25 (1) *and* 647—*Decree—Execution—Transfer of execution proceedings from one Court to another—Small Cause suit—Act VI of* 1892, *s.* 4—*Rateable contribution—Civil Procedure Code (XIV of* 1882) *ss.* 295 *and* 223 (*d*)—*Discretion of District Judge—Extraordinary jurisdiction of High Court.*

A District Judge has power, under s. 25 of the Civil Procedure Code (XIV of 1882), or under that section read with s. 647, to transfer execution proceedings in a Small Cause Court to the Court of a Subordinate Judge. The ruling in the case of *Balaji Ranchoddas* (2), that these sections apply to execution proceedings in Small Cause Courts, is not affected by the explanation to s. 4 of Act VI of 1892.

Execution proceedings under a decree against A in a Small Cause Court were transferred by a District Judge to a Subordinate Judge's Court where execution was proceeding against A under another decree, and it was objected that, as by the concluding paragraph of s. 25 of the Civil Procedure Code (XIV of 1882), the attachments under the two decrees would be in different Courts, s. 295 of the Code would not apply, and rateable distribution could not be granted.

Held, that the last paragraph of s. 25 did not convert the Subordinate Judge's Court into a Small Cause Court, but only provided for the trial of the suit, which had been transferred, being conducted by the Subordinate Judge's Court as a Small Cause suit.

[62] The High Court will not in its extraordinary jurisdiction interfere, except under circumstances of a very special nature, with the discretion of a Judge who has transferred execution proceedings under a decree from one Subordinate Court to another.

Quære—Whether a Subordinate Judge under cl. (*d*) of s. 223 of the Civil Procedure Code (XIV of 1882), can transfer a decree for execution to a Court of Small Causes when the property attached is situate within the local jurisdiction of the Subordinate Judge.

---

* Application No. 217 of 1892 under Extraordinary Jurisdiction.

(1) Section 25, Civil Procedure Code (XIV of 1882) :—

The High Court or District Court may, on the application of any of the parties, after giving notice to the parties and hearing such of them as desire to be heard, or of its own motion without giving such notice, withdraw any suit whether pending in a Court of first instance or in a Court of appeal subordinate to such High Court or District Court, as the case may be, and try the suit itself, or transfer it for trial to any other such Subordinate Court competent to try the same in respect of its nature and the amount or value of its subject-matter.

For the purpose of this section the Courts of Additional and Assistant Judges shall be deemed to be subordinate to the District Court.

The Court trying any suit withdrawn under this section from a Court of Small Causes, shall, for the purposes of such suit, be deemed to be a Court of Small Causes.

(2) 5 B. 680.

1893
AUG. 3.

APPELLATE CIVIL.

18 B. 61.

[F., 22 B. 778 (781); R., 18 B. 458 (463); 19 B. 276 (280); 12 Ind. Cas. 357=7 N. L. R. 130; 1 O. C. 117 (118); U. B. R. (1905) 3rd Qr. C. P. C. 28.]

THIS was an application under the extraordinary jurisdiction, (s. 622 of the Civil Procedure Code, Act XIV of 1882), against an order passed by W. H. Crowe, District Judge of Poona.

Krishna Velji Marwadi, the applicant, obtained a decree against one Gumna Damber in the Court of Small Causes at Poona, and in execution attached his moveable property. In the meanwhile the opponent, Bhau Mansaram, who had obtained a decree in the High Court at Bombay, on its original side, for Rs. 13,446-14-6 against the said Gumna Damber and one Moti Rasa, got the decree of that Court transferred to the Court of the First Class Subordinate Judge of Poona for execution, and levied an attachment on the property, which, as above stated, was already attached in execution of the Small Cause Court's decree. The property having been thus attached under two decrees passed by two different Courts, the opponent (Bhau Mansaram) with the object of sharing in the sale-proceeds of the property, applied to the District Judge to transfer the execution proceedings of the Small Cause Court to the First Class Subordinate Judge, and asked that an order might be passed that he should share rateably in the proceeds of the execution sale. The District Judge in granting the application made the following remarks :—

"Sections 25 and 647 of the Code of Civil Procedure empower this Court to transfer such a *darkhast*. By Act VI of 1892, s. 4, s. 647 is declared not to apply to applications for execution which are proceedings in suits. The course adopted by the applicant (opponent in the High Court) is that authorized by the ruling in *Muttalgiri* v. *Muttayyar* (1), and I can see no objection to complying with the application."

[63] The applicant then applied to the High Court under the extraordinary jurisdiction to set aside this order, contending (1) that it was passed without jurisdiction; (2) that it was contrary to the spirit and purpose of s. 25 of the Civil Procedure Code.

A rule *nisi* was granted calling on the opponent to show cause why the order should not be set aside.

Mahadeo Chimnaji Apte, appeared for the opponent to show cause.—We sought for the transfer of the Small Cause Court's decree to that of the Subordinate Judge, to which our decree had been already transferred, for the purpose of obtaining a share of the proceeds of the sale. Section 647 of the Civil Procedure Code read together with s. 25 empowers the District Judge to order the transfer—*Balaji Ranchoddas* (2); *Muttalgiri* v. *Muttayyar* (1). The property attached being within the jurisdiction of the Subordinate Judge, our decree could not be transferred to the Small Cause Court.

Ghanasham N. Nadkarni, for the applicant, in support of the rule.—Section 25 of the Civil Procedure Code relates to suits and not to execution proceedings. The Judge had no authority to transfer the execution of the Small Cause Court decree to the Subordinate Judge. Even supposing that s. 647 read along with s. 25 does empower the Judge to order such a transfer, still as the nature of the decree of the Small Cause Court cannot be altered, the Court of the Subordinate Judge will be the Court of Small Causes with respect to that decree. The proceedings under the two decrees cannot coalesce merely because the Judge is the same, and that

(1) 6 M. 357.

(2) 5 B. 680.

being so, s. 295 of the Civil Procedure Code does not apply—*Sankappa* v. *Basappa* (1); *Bhagvan Dayalji* v. *Balu* (2); *Dharamdas* v. *Vaman Govind* (3). The ruling in *Balaji Ranchoddas* (4) no longer applies, because s. 4 of Act VI of 1892 enacts that s. 647 of the Civil Procedure Code does not apply to applications for the execution of decrees.

ORDER.

SARGENT, C.J.—We think that the District Judge had jurisdiction to transfer the execution proceedings in the Small Cause [64] Court to the Subordinate Court. In *Balaji Ranchoddas* (4), it was held that s. 25, Civil Procedure Code, read with s. 647 applied to such proceedings, and we do not think that ruling is in any way affected by the explanation to s. 4 of Act VI of 1892. But in any case either s. 25 alone or s. 25 read with s. 647 would give the District Court the power of transfer.

It was said, however, that when the execution proceedings in the Small Cause Court had been transferred, the attachments would then be in two Courts by virtue of the concluding paragraph in s. 25, and s. 295 would, therefore, not apply. But that paragraph does not convert the Subordinate Judge's Court into a Small Cause Court, but only provides for the trial of the suit being conducted by the Court to which it is transferred as a Small Cause Court suit. The remarks of West, J., in *Bhagvan Dayalji* v. *Balu* (2), where a similar question arose under Act XIV of 1869, are applicable to this case.

As to the propriety of the transfer, the question is one of discretion with the District Court, and the exercise of it could not be impeached under our extraordinary jurisdiction unless the circumstances were of a very special nature. We may, however, remark that here the opponent, who was anxious to share in the proceeds of the sale, could not get his decree transferred to the Small Cause Court for execution, as the property attached was in the local jurisdiction of the Subordinate Judge, and in that case it may well be doubted whether cl. (*d*) of s. 223 would enable the Subordinate Judge to transfer the decree; but in any case it would be a matter of discretion with him and in no way compulsory and it was, therefore, reasonable to transfer the Small Cause Court execution proceedings to the Subordinate Judge's Court in order to do equity between the judgment-creditors according to the spirit of the Civil Procedure Code. For these reasons we must refuse the application. Rule discharged with costs.

Rule discharged.

(1) P. J. for 1880, p. 106. (2) 8 B. 230. (3) 9 B. 237. (4) 5 B. 680.

1893
SEP. 19.

ORIGINAL CIVIL.

18 B. 65.

18 B. 65.

[65] ORIGINAL CIVIL.

Before Mr. Justice Parsons.

VIRBAIJI (*Plaintiff*) *v.* THE WADIA MILLS COMPANY (*Defendants*).*
[19th September, 1893.]

Company—Indian Companies Act (VI of 1882), s. 134—Winding up—Suit against a company—Stay of proceedings when petition to wind up is pending—High Court Rules No. 10, cl. (r)—Practice—Procedure.

The plaintiff sued the defendant company to recover Rs. 10,000. The claim was not disputed, but shortly after the suit was filed another creditor filed a petition to wind up the company. This petition was pending when the suit came on for hearing, but no order to stay proceedings had been obtained by the defendants, and the plaintiff contended that under the circumstances he was entitled to obtain a decree having regard to the fact that no such order had been made, and that by the rules of the Court such order could only be made in chambers.

Held, on application by the defendants at the hearing, that the proceedings must be stayed.

SHORT cause. This suit, which was filed on the 19th August, 1893, came on for hearing on the 19th September. At that time a petition to wind up the defendant company was pending which had been filed by another creditor on the 19th August, 1893. The hearing of the petition to wind up was fixed for the 23rd September. No written statement was filed, and the plaintiff's claim was admitted by the defendants.

Defendants' attorneys on the 8th September, 1893, wrote to the attorneys for the plaintiff asking her (the plaintiff) to consent to the suit standing over until the disposal of the petition to wind up had been disposed of, and giving notice that otherwise an application would be made to the Court to stay further proceedings. The plaintiff's attorney declined to consent, on the ground that no order had been made to wind up the company, and stated that the plaintiff would proceed to obtain a decree on the day fixed for hearing.

The suit came for hearing on the 19th September, when

Lang (Acting Advocate General), for the defendants, applied that the proceedings should be stayed—Indian Companies Act (VI of 1882), s. 134. He admitted that the plaintiff was entitled to her costs of suit up to date, but submitted that the costs should not be increased by any further proceedings in the suit. He referred to s. 85 of the English Companies Act (Stat. 25 and 26 **[66]** Vic., c. 89); *In re The London and Suburban Bank* (1); Lindley on Companies (5th Ed.), pp. 674-676; Buckley on Companies (5th Ed.), p. 230.

Inverarity, for the plaintiff:—The plaintiff is entitled to a decree. By the rules of Court (Rule 10, cl. (*r*), all applications) in company matters must be made in chambers. No application to stay proceedings has been made, and no order to that effect has been obtained. The plaintiff is, therefore, now entitled to proceed and get her decree. The defendants may hereafter apply to have execution stayed.

ORDER.

PARSONS, J.—The application to stay proceedings is now made by the defendants, and under s. 134 of the Companies Act (VI of 1882) I

* Suit No. 404 of 1893.

(1) 19 W. R. 950.

have discretion to make the order The proceedings must be stayed until the petition to wind up the company is heard and disposed of on the defendants giving the usual undertaking as to damages.

Order to stay proceedings.

1893
SEP. 19.

ORIGINAL CIVIL.

Attorney for the plaintiff : Mr. *Shamrao Pandurang.*
Attorneys for the defendants : Messrs. *Wadia and Gandhy.*

18 B. 65.

---

18 B. 66.

ORIGINAL CIVIL.

Before Mr. Justice Bayley and Mr. Justice Starling.

YESHWADABAI AND GOPIKABAI, WIDOWS (*Original Plaintiffs*), *Appellants v.* RAMCHANDRA TUKARAM (*Original Defendant*), *Respondent.** [18th August and 2nd September, 1893.]

Practice—Procedure—Evidence—Landlord and tenant—Terms of tenancy proved orally although contained in a document—Compensation for buildings erected by tenant—Estoppel.

The plaintiffs alleged that in 1866 the defendant's father had let land to their predecessor-in-title in perpetuity on fazendari tenure for building purposes, subject to a certain rent. They complained that the defendant sought to eject them, and they prayed for a declaration that they were entitled to the land in perpetuity subject only to payment of the yearly rent. In the event of its being held that they were not perpetual tenants, they prayed that the defendant might be ordered to pay them Rs. 7,000, the value of the buildings on the land. The plaintiffs made out a *prima facie* case without showing, or its being shown, that there was any agreement or lease. Before the case had concluded, however, a document was **[67]** produced which was said to be a counterpart of the agreement of letting made in 1866. It was not registered, and was, therefore, inadmissible in evidence. It was not tendered, but it was shown to the defendant in cross-examination, and he denied that it was a genuine document.

Held, that the plaintiffs, having made out a *prima facie* case without betraying the existence of a written contract relating to the subject-matter of the suit, were not precluded from obtaining a decree even though it afterwards appeared that a written contract had been made. If the defendant intended to rely upon a written contract it was for him to produce it as part of his evidence. In the present case, as the document was not referred to in the plaint, written statement or issues and was not before the Court, the evidence should be looked at to ascertain the terms of the tenancy by which the plaintiffs and their predecessors in title held the property.

Where a landlord had not objected to buildings erected by his tenant for a period of twenty-five years, and during that time had received rent from the tenant.

Held, that even if the Court were not justified in holding that the land had originally been granted for building purposes, the landlord would be precluded from ejecting the tenant without compensation.

[F., 22 C. 820 (826); R., 20 B. 1 (4); 22 B. 1 (14); 27 M. 211 (222)=14 M.L.J. 25; 3 C.W.N. 255 (259); (1900) P.L.R. 203 (205); D., 16 A. 328 (332); 27 C. 570 (586); 1 Bom.L.R. 191 (197); 3 N.L.R. 72 (78).]

SUIT for a declaration that the plaintiffs were entitled to hold certain land situate at Foras Road in Bombay in perpetuity subject only to a certain rent payable to the defendant, and for an injunction restraining the defendant from executing a decree for possession obtained by him in the Small Cause Court.

---

* Suit No. 34 of 1882.

1893
SEP. 2.
ORIGINAL CIVIL.
18 B. 66.

The plaint stated that in 1866 one Tukaram Moroji, the father of the defendant, let the land in question to one Thucker Tricum Sewji Lowana, in perpetuity, on fazendari tenure for building purposes at an uniform rate of Rs. 12 per kathi per annum; and that it was then agreed that, in the event of Government taking up the said land, the said Thucker Tricum Sewji and his successors or assigns should be entitled to receive the value of any buildings erected by him or them upon the land, and that the said Tukaram Moroji should only be entitled to receive the value of the land.

In pursuance of this agreement, Thucker Tricum Sewji built a house on the land and paid as rent Rs. 102 per annum to Tukaram Moroji.

Thucker Tricum Sewji afterwards became insolvent, and his right, title and interest in the house and land were sold in 1876 to Solomon Aroon Gandel, who continued to pay the said sum of Rs. 102 as rent.

In 1878 Solomon Aroon conveyed the said house and land to Gopal Yeshwant Pednekar, the husband of the plaintiffs, and he [68] continued to pay the said rent each year to the defendant as fazendar.

Gopal Yeshwant rebuilt the house and continued to pay the said rent to the defendant until 1885. He died intestate in February, 1887, and the plaintiffs, his widows, paid the defendant the rent for 1886. They also subsequently paid the rent for 1887, 1888, 1889 and 1890.

On the 30th September, 1891, the defendant gave notice to the plaintiffs requiring them to give up the land, which he alleged they held as monthly tenants. The plaintiffs declined to do so. The defendant then filed a suit in the Court of Small Causes in Bombay, and on the 5th December, 1891, obtained a decree for possession.

The plaintiffs now sued praying for an injunction restraining the defendant from executing the decree of the Small Cause Court, and for a declaration that they were entitled to hold the land in perpetuity, subject only to the payment of the aforesaid yearly rent, and that the defendant was not entitled to eject them so long as the said rent was paid. They prayed that, in the event of its being held that they were not perpetual tenants, the defendant might be ordered to pay them Rs. 7,000, the value of the building standing on the land, &c.

The defendant denied that the plaintiffs were perpetual tenants, and alleged that the rent was payable monthly, but had been often in arrear.

At the hearing a document was produced which was said to be a counterpart of the agreement under which the land was let in 1866 by the defendant's father to the plaintiffs' predecessor (Tricum Sewji). This document, however, was not registered, and was, therefore, inadmissible in evidence. It was not tendered, but in cross-examination it was shown to the defendant, who denied that the mark affixed to it was his father's mark. The document was not made an exhibit in the case.

The lower Court (Parsons, J.) held that there was no evidence of the perpetual lease alleged by the plaintiffs, and that the defendant had a right to eject the plaintiffs. The plaintiffs had alleged a special agreement. Although there was no evidence of its terms (the document being inadmissible) the fact that this agreement was made [69] precluded the plaintiffs from claiming compensation under the custom of the country. As to this the Court said:—"Had the plaintiffs been let in on the land without an agreement, or had the land been let to them according to the custom of the country, it might be argued, according to some decided cases, that plaintiffs would be entitled to remove the materials or to compensation, but here there was a special agreement, and we cannot go

beyond it. It might have been one for a term of years. Certainly it is not proved that under that agreement plaintiffs have the right to remove the materials, and, therefore, I cannot award them or their value. The value of them is very little. It is not proved that the plaintiffs' husband rebuilt, or that they spent Rs. 1,500 in repairs." The suit was dismissed with costs.

The plaintiffs appealed.

Macpherson and *Lowndes*, for the appellants (plaintiffs).—They cited *Beni Madhab Banerjee* v. *Jai Krishna* (1) ; *Sufdur Ali* v. *Jeo Narain* (2) ; *Lalla Gopee Chand* v. *Liakut Hossein* (3) ; *Furzund Ali Khan* v. *Aka Ali Mahomed* (4) ; *Prosunno Coomar Chatterjee* v. *Jagun Nath Bysack* (5) ; *Gungadhur Shikdar* v. *Ayimuddin Shah Biswas* (6) ; *Irangowda* v. *Leshapa* (7) ; *Ramsden* v. *Dyson* (8).

Inverarity and *Anderson*, for respondent (defendant).—They cited *Juggut Mohinee Dossee* v. *Dwarka Nath Bysack* (9) ; *Beni Madhab Banerjee* v. *Jai Krishna* (1) ; *Prosunno Coomar Chatterjee* v. *Jagun Nath Bysack* (5) ; *Plimmer* v. *Mayor, &c., of Wellington* (10).

Cur. adv. vult.

JUDGMENT.

September 2. BAYLEY, J.—The plaint in this suit states that in or about the year 1866 Tukaram Moroji, defendant's father, let to Thucker Tricum Sewji, in perpetuity, on fazendari tenure a piece of land situate at Foras Road, called Arthur Road, leading from Parel to Tardeo, 85 feet in length and 30 in breadth and measuring 8½ kathis, at an uniform rate of Rs. 12 per kathi per annum, and it was agreed that, in the event of Government taking up the land, [70] Tricum Sewji and his successors or assigns should be entitled to receive the value of any house or other buildings erected by him or them thereon, and that Tukaram Moroji should only be entitled to receive the value of the land ; that Tricum Sewji, in pursuance of the said agreement, built a house on the land and paid as rent Rs. 102 per year to Tukaram Moroji ; that Tricum Sewji having subsequently filed his petition and schedule in the Insolvency Court, the Official Assignee in 1876 sold the insolvent's right, title and interest in the house and ground to one Solomon Aroon Gandel, who thereafter continued to pay annually the said sum of Rs. 102 as the rent for the said ground ; that by indenture dated 2nd July, 1878, Solomon Aroon Gandel conveyed the property to Gopal Yeshwant, the husband of the plaintiffs, who thereafter paid the aforesaid rent every year to the fazendar, the defendant ; that Gopal Yeshwant rebuilt the house and continued to pay the annual rent of Rs. 102 to defendant until 1885 ; that Gopal Yeshwant died intestate on the 17th February, 1887, leaving him surviving the plaintiffs his widows, and that the plaintiffs paid the rent for 1886 to defendant ; that in 1887 the defendant demanded payment of the rent from plaintiffs every six months, who accordingly paid it every six months, and in 1888 at defendant's request they paid it to him every two months until the 31st August, 1888, after which date defendant sent his rent bills sometimes every month and sometimes every two months until 31st December, 1889. In 1890 defendant returned to the former practice and sent a bill for the

(1) 7 B.L.R. 152 (158.) (2) 16 W.R. C. R. 161. (3) 25 W.R. C.R. 211.
(4) 3 C.L.R. 194. (5) 10 C.L.R. 25 (30). (6) 11 C.L.R. 281=8 C. 960.
(7) P.J. 1892, p. 382. (8) L.R. 1 H.L. 129, (140.) (9) 8 C. 582.
(10) 9 App. Cas. 699.

1893
SEP. 2.
ORIGINAL CIVIL.
18 B. 66.

year's rent, *viz.*, Rs. 102, which plaintiffs paid; that on the 30th September, 1891, defendant by his solicitor sent a notice to plaintiffs calling on them to give up possession of the land on the 1st November, 1891, and threatening, in default of compliance with such requisition, that a suit in ejectment would be brought against them, and that in reply thereto the plaintiffs by a letter dated the 29th October, 1891, denied that they were monthly tenants, and declined to give up possession of the land.

The plaint then stated that the defendant filed a suit (No. 25011 of 1891) in the Bombay Court of Small Causes against the plaintiffs for possession of the land, and obtained a decree against them on the 5th December, 1891, whereby the plaintiffs were ordered to deliver up possession to the defendant within two months from the date of the decree.

[71] The plaintiffs prayed that it might be declared that they are entitled to hold the land in perpetuity, subject only to the payment of the annual rent of Rs. 102; that defendant might be restrained by injunction from executing the decree of the Court of Small Causes in suit No. 25011 of 1891 until the final determination of this suit; that, in the event of the Court's holding that the plaintiffs are not the permanent tenants of the defendant, he might be decreed to pay to them Rs. 7,000, the present value of the building now standing on the ground, and a further sum of Rs. 3,000 for damages for the defendant's unlawful acts and proceedings taken by him against the plaintiffs, by which the property has deteriorated in value; that the plaintiffs' costs may be provided for, with a prayer for such further or other relief as the circumstances of the case may require.

The defendant by his written statement denied the statements contained in the 1st and 2nd paragraphs of the plaint and the statement as to payment of rent in paragraphs 4 and 5 thereof, and required the plaintiffs to prove the same. He alleged that the rent was always, as a matter of fact, payable monthly, but that the plaintiffs, being the defendant's monthly tenants, frequently got into arrears, and consequently when they did pay, they paid rent for more than one month. He denied that the plaintiffs were entitled to the remedies claimed, and submitted that the suit should be dismissed with costs.

The case came on for hearing before Mr. Justice Parsons on the 1st August, 1892, when after reading the plaint and written statement the following issues were framed :—

1. Whether plaintiffs are entitled to hold the land in suit in perpetuity, subject only to the payment of Rs. 102 annually?

2. Whether after the decision of the Small Cause Court in suit No. 25011 of 1891 the plaintiffs can maintain this suit?

3. Whether the defendant has a right to eject the plaintiffs?

4. Whether the plaintiffs are entitled to claim Rs. 7,000 or any and what sum for the value of the buildings now on the land?

The claim for damages (*i.e.*, of Rs. 3,000) being abandoned, no issue was raised on it.

5. The general issue.

[72] The judgment and findings were thus recorded by the learned Judge :—

"I find issue 1 in the negative. No evidence of perpetual lease or of right to hold subject to payment of fixed rent; 2 affirmative. 3 affirmative. Plaintiffs being tenants can be ejected, no right to the contrary being proved. 4. Had the plaintiffs been let in on the land without an agreement, or had the land been let to them according to the custom of the country, it might be argued, according to some decided

cases, that plaintiffs would be entitled to remove the materials or to compensation; but here there was a special agreement, and we cannot go beyond it. It might have been here one for a term of years. Certainly it is not proved that under that agreement plaintiffs have the right to remove the materials, and, therefore, I cannot award them or their value. The value of them is very little. It is not proved plaintiffs' husband rebuilt, or that they spent Rs. 1,500 in repairs. The suit is dismissed with costs."

The plaintiffs have appealed on the ground, amongst others, that the Judge was in error in finding that there was no evidence of a perpetual lease of the premises in question or of a right in the plaintiffs to hold the same subject to the payment of a fixed rent; that, in any event, he should have held that the plaintiffs were entitled either to remove the building erected on the land in question or to compensation therefor; that the decree was contrary to law and equity and to the weight of evidence in the case, and should be reversed with costs, and a decree passed for the plaintiffs for the relief claimed by them.

On the agrument of the appeal before us Mr. Macpherson, on behalf of the appellants, contended that the original grant in 1866 not being before the Court, the Court could only collect what were the terms of it from perusing the evidence given at the hearing; that the respondent could not eject the appellants, because they had an absolute title so long as they paid the rent; and that, if he could, they were entitled to compensation, or to have a reasonable time to remove their buildings, and that the case must be dealt with as if the origin of the tenancy was not known. Mr. Anderson, on the other hand, argued that the foundation of the claim was a written document of which by a Judge's order the respondent had been allowed inspection **[73]** that on the authority of *Juggut Mohinee Dossee* v. *Dwarka Nath Bysack*, a case reported in I.L.R., 8 Calc., 582, it was clear that the English law applied, the property in dispute being situated in a Presidency town and not in the Mofussil, and that the decision of the learned Judge was correct, and ought not to be disturbed. The Judge in the Court below found that there was a special agreement, and that he could not go beyond it.

The plaint, however, made no reference whatever to any written agreement, nor did the written statement, and there was no allusion to any such document in the issues. There was nothing said in the evidence, oral or documentary, given *on behalf of the appellants* as to any written contract or lease having been executed by respondent's father Tukaram Moroji to Tricum Sewji, and the appellants made out a *prima facie* case without showing, or its being shown, that there was any written agreement or lease. When the respondent was afterwards examined in support of his case he said, in cross-examination, that he had no writing of the lease to Tricum, no counterpart; that his father could not write or sign his name, but used to make a mark—the mark of a plough; that he had no paper with him that bears his mark; that the paper then shown to him was not his mark.

There is, however, some document in existence which was alleged to be a counterpart of a Marathi agreement said to be dated 19th November, 1866, made between Tukaram Moroji and Tricum Sewji. The respondent had applied and, under a Judge's order, was allowed inspection of it before he filed his written statement, and such document was probably the one shown to him during his cross-examination, the mark on which he said was not his father's mark. Had he admitted that the document was a genuine one, and had he tendered it, it could not

1893
SEP. 2

ORIGINAL CIVIL.

18 B. 66.

have been received in evidence, because, as stated by counsel during argument before us, it had not been registered as required by the Registration Act then in force, the first of which Acts (XVI of 1864) came into force in the Bombay Presidency on the 1st January, 1865. We are of opinion that the Judge could not see judicially that such document was in existence, unless it was produced properly registered. In point of fact, no such document was produced, or even tendered in evidence, during the hearing.

[74] Now it has been long settled in England that, if a plaintiff can establish a *prima facie* case without betraying the existence of a written contract relating to the subject-matter of the action, he cannot be precluded from recovering by defendant subsequently giving evidence that the agreement was reduced into writing; but the defendant, if he means to rely on a written contract, must produce it as part of his evidence, and, in the event of its turning out to be unstamped or insufficiently stamped, he must pay the duty and penalty. In a case decided by the Court of King's Bench in 1827—*Read* v. *Deere* (1)—Mr. Justice Littledale said (p. 266): "If, indeed, a plaintiff gets through his case, without giving the defendant any opportunity of mentioning the written agreement, the latter must produce it, and he cannot avail himself of it unless it be duly stamped." In *Stevens* v. *Pinney* (2) decided by the Court of Common Pleas in 1818, in an action on the common counts for work and labour, it was held that the plaintiff having established his case by other evidence was not precluded from recovering by the defendant's proving the existence of an unstamped and unsigned agreement which fixed the price and which the defendant did not give notice to the plaintiff to produce. In *Fielder* v. *Ray* (3), after the plaintiff had proved by witnesses a case of implied or oral contract, it was held that he could not be non-suited by the defendant's producing an unstamped written instrument purporting to contain the terms of the contract. Tindal, C.J., said: "It was incumbent on the defendant in that stage of the cause to prove the existence of the agreement, by producing it in a form in which it could be received, that is, properly stamped. . . We cannot see judicially that the instrument is in existence unless it is produced properly stamped," and Mr. Justice Burrough said: "When the plaintiff's case has been closed, the defendant is not to get rid of it by suggesting the existence of a writing which he is unable legally to produce, and on the subject of which he might have cross-examined the plaintiff's witnesses."

The same rule has been applied in cases where the question was, as here, as to the terms on which landed property was let [75] to a tenant. In *The King* v. *The Inhabitants of Padstow* (4), the respondents having proved by parol a taking of the premises by the pauper's husband, who occupied and paid the rent agreed on for two years, a witness for the appellant parish was called, who stated that he was present when the pauper's husband took the fields in question of his master, and that the conditions of taking were reduced into writing and signed by the parties on unstamped paper. Lord Denman, C.J., said that the rule undoubtedly is, that where a party has made out a *prima facie* case, and the opposite party attempts to cut it down by a written instrument, he must prove it; and Parke, J., said that, if a party makes out a *prima facie* case without showing that there was any written contract, the other party, if he relies on that written

(1) 7 B. & C. 261.
(2) 8 Taunt 327.
(3) 6 Bing. 332.
(4) 4 B. & Ad. 208.

contract, must produce it. And in *Martson* v. *Dean* (1), tried at the sittings at Westminster in 1835 before Mr. Justice Coleridge, an action by a landlord for use and occupation, it was held, and the learned Judge stated that he recollected several instances in point, that when the existence of a written agreement was not proved till the defendant had gone into his case, the plaintiff was not bound to put it in. See, also, to the same effect *Magnay* v. *Knight* (2), where the above mentioned decisions were referred to and acted on by the Court of Common Pleas.

None of the above authorities appear to have been brought to the notice of the learned Judge in the Court below, nor indeed were any of them cited to us on the argument of the appeal. We consider, however, that they are applicable to the case now before us. The respondent in the Court below did not rely on or tender in evidence any document executed when Tricum Sewji's occupation of the land in dispute commenced in 1866. The reason he did not was doubtless because his legal advisers knew it was inadmissible for want of registration, and, therefore, made no mention of it in the defendant's written statement; and, as was said by Tindal, C. J., in *Fielder* v. *Ray* (3), the Court could not see judicially that any such instrument was in existence, unless it was produced in proper form, *i.e.*, as regards the present case unless it had been duly registered according to the **[76]** law then in force in British India. The argument, therefore, addressed to us on behalf of the respondent, that the foundation of the appellant's claim is a written document, falls to the ground, as no such document was tendered in evidence, nor was, nor is, legally in existence.

The original grant, if there was one, not being before the Court, the evidence must be looked at to see what were the terms of the tenancy by which the appellants and their predecessors-in-title hold and held the property. The respondent in cross-examination stated that Tricum Sewji built the house, and he did not know whether his father let the land to him, but there was no house on it before Tricum built it; that there were other pieces of land in the same plot which were given to people to build on. He stated he went over the house with Mr. Campbell, the Architect and Civil Engineer, and Mr. Campbell in his report dated the 16th March, 1892, (Ex. No. 12) said that he was informed that the chawl on the land in dispute was built about 26 years ago, *i.e.*, about 1866. He also said in that report that he estimated the cost of the chawl when new at Rs. 3,000, which shows that at the time of the original building a very substantial sum was laid out.

Mr. Cursetji F. Chapkar, a licentiate of civil engineering of the Bombay University, who surveyed the house for the appellants in January, 1892, stated in his report (Ex. 9) that the property is situated at Arthur Road, a greater portion of its frontage commanding DeLisle Road, and that such situation is very desirable on account of its being at the junction of two main roads, *viz.*, DeLisle Road and Arthur Road, and being only about three minutes' walk from the railway station, *i.e.*, the Chinchpokli Station on the G. I. P. Railway. Arthur Road is a road running diagonally across the Flats in a north-north-easterly direction from Tardeo to near the road leading to Government House, Parel. The land in dispute with the chawl on it occupies 8½ kathis and is 85 feet in length and 30 feet in breadth, facing, as it does, Arthur Road.

The evidence shows that from the first down to 1885 the rent had always been paid at the annual rate of Rs. 102 for the **[77]** ground.

(1) 7 C. & P. 13. (2) 1 Man. & Gr. 944. (3) 6 Bing. 332.

1893
SEP. 2.
ORIGINAL CIVIL.
18 B. 66.

In the receipts for the rent put in by the appellants and the respondent, the rent is uniformly described as "the rent of ground of 8½ kathis (85 feet in length and 30 feet in breadth) used and occupied at the rate of one rupee per kathi each per month." In more recent years the rent has, no doubt, been paid at irregular intervals, after six or two months or after one month. Tricum Sewji, the original grantee, became insolvent. Sometimes the respondent had to sue for it in the Court of Small Causes. It was stated, however, before us by the learned counsel for the respondent, and we think correctly, that whether the payments were yearly or monthly did not affect the question.

Tricum Sewji and his successors-in-title appear undoubtedly to have considered that they had an absolute interest in the property, subject to the payment of an annual rent of Rs. 102 to Tukaram Moroji and his son the defendant. In the conveyance dated the 20th June, 1876 (Ex. 13), by Mulchand Lilladhar and Moti Lilladhar and Mr. Gamble, Official Assignee of the insolvent Tricum Sewji, to Solomon Aroon Gandel, after reciting an indenture of mortgage dated the 23rd September, 1871, by Tricum Sewji to Mulchand Lilladhar and Moti Lilladhar to secure Rs. 351-4-0, by which the premises were mortgaged unto and to the use of Mulchand and Moti Lilladhar, their heirs and assigns, and the sale by such mortgagees by public auction, with the consent of Mr. Gamble, to Solomon Aroon Gandel, for the sum of Rs. 550 the premises which are described as a piece or parcel of fazendari land or ground with the messuages, tenement or dwelling-house standing thereon were granted, released and confirmed to Solomon Aroon Gandel, his heirs, executors, administrators and assigns unto and to the use of Solomon Aroon Gandel, his heirs, executors, administrators and assigns for ever subject to the payment of the fazendari rent and all rates, taxes and assessments. That conveyance is in English and was attested by Mr. Rahimtola Mahomed Sayani, solicitor of Bombay, an experienced and careful lawyer, and in whose office the conveyance was probably prepared, and who would doubtless take care that the recitals and other statements in it were accurately set forth.

[78] The conveyance dated the 2nd July, 1878, (Ex. A) by Solomon Aroon Gandel to Gopal Yeshwant, the husband of the appellants, was also in English, but was not attested; and judging from its language was not drawn by any duly qualified legal practitioner. It was a conveyance in consideration of Rs. 500 to Gopal Yeshwant, his heirs, executors and assigns, subject to the payment of the fazendari rent and all taxes, rates and dues, and by it Solomon Aroon Gandel, his heirs, executors, administrators and assigns bound themselves to make the said messuage, tenement or dwelling-house and premises free and clear from all disputes and embarrassment whatever arising by way of mortgage or inheritance by their own costs and expenses, and that they should and would warrant and for ever defend,—a covenant he would not have been likely to enter into unless he considered that he had an absolute interest in the property, and he too, as he described himself in the document, a Jew inhabitant of Bombay, and thus one of a race generally considered to be cautious and circumspect in regard to business and money matters.

The respondent's contention is that from 1866 Tricum Sewji and his successors-in-title were mere monthly tenants, liable to be turned out at a month's notice, although Tricum Sewji had built the house, there being admittedly no house on the ground before. Assuming for argument's sake that such was the position of Tricum Sewji when he took the land, what

would be the rights of the appellants when they filed the present suit on the 25th of January, 1892 ?

In a case decided by the House of Lords in 1866—*Ramsden* v. *Dyson*(1) —the Lord Chancellor (Lord Cranworth) stated what were the principles of equity on the subject. He said (p. 140) : "If a stranger begins to build on my land supposing it to be his own, and I, perceiving his mistake, abstain from setting him right, and leave him to persevere in his error, a Court of Equity will not allow me afterwards to assert my title to the land on which he had expended money on the supposition that the land was his own. It considers that, when I saw the mistake into which he **[79]** had fallen, it was my duty to be active and to state my adverse title, and that it would be dishonest in me to remain wilfully passive on such an occasion, in order afterwards to profit by the mistake which I might have prevented." Lord Kingsdown said (p. 170) : "If a man under a verbal agreement with a landlord for a certain interest in land, or, what amounts to the same thing, under an expectation, created or encouraged by the landlord, that he shall have a certain interest, takes possession of such land with the consent of the landlord, and upon the faith of such promise or expectation, with the knowledge of the landlord or without objection by him, lays out money upon the land, a Court of Equity will compel the landlord to give effect to such promise or expectation. This was the principle of the decision in *Gregory* v. *Mighell* (2), and, as I conceive, is open to no doubt." Then, after stating that there has been a difference of opinion among great Judges as to the nature of the relief to be granted, he says : "But I do not understand any doubt to have been entertained by any of them that, either in the form of a specific interest in the land, or in the shape of compensation for the expenditure, a Court of Equity would give relief, and protect in the meantime the possession of the tenant."

In a case that came before the Judicial Committee of the Privy Council in 1884, on appeal from the Court of appeal, New Zealand, *Plimmer* v. *Mayor, &c. of Wellington* (3), the passage just cited from Lord Kingsdown's judgment was quoted as being the law relating to such cases ; and the Privy Council, when considering the question as to the extent of interest which Plimmer acquired by his expenditure in 1856 for the extension of his jetty and for the erection of a warehouse at Wellington harbour, say : (p. 713) " Referring again to the passage quoted from Lord Kingsdown's judgment, there is good authority for saying what appears to their Lordships to be quite sound in principle, that the equity arising from expenditure on land need not fail merely on the ground that the interest to be secured has not been expressly indicated. In such a case as *Ramsden* v. *Dyson* (1) the evidence (according to Lord Kingsdown's view) showed that the tenant **[80]** expected a particular kind of lease, which Vice-Chancellor Stuart decreed to him, though it does not appear what form of relief Lord Kingsdown himself would have given. In such a case as *Duke of Beaufort* v. *Patrick* (4) nothing but perpetual retention of the land would satisfy the equity raised in favour of those who spent money on it, and it was secured to them at a valuation. In such a case as *Dillwyn* v. *Llewelyn* (5), nothing but a grant of fee simple would satisfy the equity which Lord Chancellor (Lord Westbury) held to have been raised by the son's expenditure on his father's land. . . . In fact, the Court must

(1) L. R. 1 H. L. 129.
(2) 18 Ves. 328.
(3) 9 App. Ca. 699.
(4) 17 Beav. 60.
(5) 4 DeG. F. & J. 517.

1893
SEP. 2.
ORIGINAL CIVIL.
18 B. 66.

look at the circumstances in each case to decide in what way the equity can be satisfied."

In the case now before us the receipts for rent put in evidence at the hearing are printed, and are headed Chinchpokli, in which district, according to Colonel Laughton's survey map of 1872, the property in dispute is situated, and each of them is signed by the respondent. We entertain little doubt that the plot of ground so granted was, as stated in the two indentures already referred to, fazendari land, the tenure of which description of property is well known and is very common in this island, under which the fazendar or landlord of the district or the oart in which the land is situated is entitled to a fixed yearly rent, and as long as that is paid, the fazendar tenant, who had undoubtedly an assignable and transferable interest, cannot, nor can his assignees or transferees be ejected by the fazendar landlord.

It would be a breach of contract, and little short of a direct fraud on the part of this respondent, if he were to be allowed to treat the appellants as mere monthly tenants, and, by giving them a month's notice to quit, to claim the property, and, as he has done, to eject them, and that, too, without any compensation whatever.

The learned counsel for the respondent argued, and we think correctly, that the present case ought to de decided according to English law. Act No. XI of 1855 of the Governor General in Council, s. 4, which applies only to cases under English law, secures to *bona fide* holders under defective titles the value [81] of buildings erected or improvements made by them in the belief that they had an estate in fee simple or other absolute estate. That Act has, by Act XV of 1874, s. 3, been declared to be in force in the whole of British India, except the scheduled districts. The appellants, however, wish to retain possession of the property in dispute, in preference to being paid the value of the buildings erected on the land. In the case of *Beni Madhab Banerjee* v. *Jai Krishna* (1), which came before Sir Barnes Peacock, C.J., and two other Judges in 1869, the first appellate Court (Kemp, J., and Glovey, J.) being divided in opinion, Sir Barnes Peacock, who agreed with Mr. Justice Kemp, said that that learned Judge thought that, in equity, the plaintiff was not entitled to turn the defendant out of the lands, because he stood by and saw them erecting *pucka* buildings on the land without any objection whatever. Sir Barnes Peacock then said that, if the plaintiff allowed the defendants to erect *pucka* buildings upon the land without objecting, it appeared to him that he was bound in the same way, in equity, as if he had granted them a *potta* with the privilege of building *pucka* houses on the land, and he thought that Mr. Justice Kemp was right in holding that the plaintiff was precluded by his conduct from turning the defendants out of possession. He then said: "Independently of this, speaking for myself, I should say that if one man grants a tenure for another for the purpose of living on the land, that tenure, in the absence of any evidence to the contrary, would be assignable. I know of no law which prohibits a man who gets land for the purpose of building from assigning his interest in it to another. By assigning his interest he does not necessarily get rid of his liability to pay the rent reserved." The two other Judges concurring, Mr. Justice Kemp's decision was affirmed. That decision was approved of and followed in *Lalla Gopi Chand* v. *Liakut Hossein* (2).

(1) 7 B.L.R. 152.

(2) 25 W.R. 211.

1893
SEP. 2.
—
ORIGINAL
CIVIL.
—
18 B 66.

In *Gungadhur Shikdar* v. *Ayimuddin Shah Biswas* (1), decided in 1882 by Garth, C. J., and Mitter, J., where it was conceded that the land in dispute was not let for agricultural purposes, [82] and it was found that after the grant (whatever it was) buildings of a substantial character were erected some sixty years ago by the defendant's ancestors, and that they and their ancestors had lived there ever since, the Court held that under these circumstances they thought that the Courts below were at liberty to presume, if they thought fit, that the land was granted for building purposes, and that the grant itself was of a permanent character. The Court added that this had been explained in several recent cases, and, amongst others, in the case of *Prosunno Coomar Chatterjee* v. *Jagun Nath Bysack* (2).

We are of opinion that there is in the present case evidence from which the Court can reasonably presume that the land was granted in or about 1866 to Tricum Sewji for building purposes. It was a small plot of ground facing the Arthur Road, which, though doubtless marked out, and its direction well known, was not, as, in answer to a question put by us to the Municipal Commissioner for the City of Bombay, we have been courteously informed by him, actually made until 1868. The position of the ground, and the rent reserved, preclude any idea that it was let for agricultural purposes. In that locality and on the other portions of the Flats in and near the centre of that part of the island, which, as is well known, until the erection of the Hornby Vellard during the time of Mr. Willian Hornby (who was Governor of Bombay from 1776 to 1784), which closed the main breach of the sea from Mahalaxmi to Love Grove, and rescued the Flats from being flooded each tide with salt water, only rice crops could be grown. The soil is bad, and unless a layer of earth be placed over it, little else than rice can be cultivated.

Tukaram Moroji must have seen, and knowing what he had granted, of course made no objection to Tricum erecting the building on the ground. Even if the Court were not justified in holding that the grant was originally for building purposes, the fact that the building which Tricum Sewji placed upon the ground was not objected to by Tukaram, who, according to his son's evidence, lived until 1874, or since then by his son, and [83] that he and his son received the rent, at first yearly, but afterwards at shorter intervals until nearly twenty-five years afterwards, by his attorney's letter of the 30th September, 1891, (Ex. XI) the respondent treated the appellants as his monthly tenants and required them to vacate on the 1st November, 1891, shows that the position which he then took up was a mistaken one, and that, by his father's and his own conduct, he was, and is, precluded from recovering the land and premises from the appellants in the manner he seeks.

The decree, therefore, dismissing the suit with costs must be reversed, and in lieu thereof this Court passes a decree in favour of the appellants in terms of paragraph (*a*) of the prayer of the plaint. (His Lordship read the paragraph and continued.) The respondent must deliver forthwith to the appellants possession of the land and premises, of which on or about the 13th August, 1892, he was put in possession under the decree in suit No. 25011 of 1891 passed by the Bombay Court of Small Causes. And in the event of parties not agreeing, there must be a reference to the Commissioner of this Court to take an account of the rents and profits received by the respondent since he was so put in possession, which, after making all

(1) 8 C. 960.

(2) 10 C. L. R. 25.

1893
SEP. 2.
ORIGINAL CIVIL.
18 B 66.

just allowances, he is already ordered to pay to the appellants. The respondent to pay to the appellants their costs in the lower Court including costs below and of this appeal, and to bear his own costs throughout, and repay to the appellants any costs which under the decree of the Court below they may have paid to him, and also repay to the appellants any costs paid by them to him under the decree in suit No. 25011 of 1891 in the Court of Small Causes dated the 5th December, 1891. If there be a reference to the Commissioner, further directions and further costs will be reserved with leave to apply as advised.

Decree reversed.

Attorneys for the appellants :—Messrs. *Chalk, Walker and Smetham.*
Attorneys for the respondent :—Messrs. *Balkrishna and Pherozsha.*

---

18 B. 84.

[84] APPELLATE CIVIL.

Before Mr. Justice Candy and Mr. Justice Fulton.

PUNDLIK (*Original Plaintiff*), *Appellant v.* ACHUT (*Original Defendant*), *Respondent.** [10th January, 1893.]

Limitation—Limitation Act (XV of 1877), s. 5—Review of judgment—Application for review—Sufficient cause for delay in filing an appeal.

Though under certain circumstances the presentation of an application for review may be considered as sufficient cause for delay in filing an appeal, the appellant is bound to satisfy the Court that such circumstances did exist in his case, and that he had sufficient cause for not presenting the appeal within the prescribed period.

The plaintiff obtained a decree for possession of certain land in the Court of first instance. This decree was reversed by the appellate Court on 28th October, 1890. The plaintiff applied for a review of judgment of the appellate Court on 27th January, 1891. The petition of review was rejected on 18th March, 1891. Thereupon the plaintiff preferred a second appeal to the High Court on 13th April, 1891.

Held, that the second appeal was time-barred. The time taken in prosecuting the application for review could not be deducted in calculating the period of limitation, as the plaintiff had not shown that he had reasonable grounds for asking for a review.

[F., 33 C. 1323=3 C. L. J. 545 (546)=10 C. W. N. 986; 1 L. B. R. 313 (314).]

THIS was a second appeal from the decision of Arthur H. Unwin, District Judge of Kanara, in appeals Nos. 169 and 192 of 1890 of the district file.

The plaintiff sued to eject the defendant from the lands in dispute, alleging that defendant was a trespasser in wrongful possession.

The Court of first instance passed a decree awarding possession to the plaintiff as prayed for.

This decree was reversed, and plaintiff's claim was rejected, on appeal, on 28th October, 1890.

On 27th January, 1891, the plaintiff applied for a review of the judgment of the appellate Court. The petition of review was rejected on 18th March, 1891.

---

* Second Appeal, No. 511 of 1891.

Thereupon plaintiff preferred a second appeal to the High Court on 13th April, 1891.

At the hearing of the appeal the respondent's pleader raised a preliminary objection that the appeal was time-barred, having [85] been filed more than 90 days after the date of the lower appellate Court's decree.

Shamrao Vithal (with him *N. G. Chandavarkar*), for appellant.—We applied for a review of the lower Court's judgment on the ground of the discovery of new evidence. The time occupied in the review should be excluded from computation—*Trimbakraj* v. *The General Traffic Manager of the G. I. P. Railway Company* (1).

Ghanasham Nilkanth, for respondent.—The mere presentation of a petition of review is not a sufficient reason for filing an appeal beyond time. The appellant must show that he had reasonable grounds for asking for a review. This he has not done in the present case. There is nothing to show that the lower Court was wrong in refusing to grant a review. The delay in filing the appeal should not, therefore, be excused.

JUDGMENT.

CANDY, J.—We think that the appellant in this case has failed to show that he had reasonable grounds for asking for a review and, therefore, the time taken in prosecuting the application for review cannot be deducted in calculating the period of limitation, and thus the present appeal is time barred. The only evidence before us in regard to this matter is a copy of the order of the District Judge rejecting the application for review on the ground that no sufficient reason had been shown why the evidence referred to in the application was not adduced at the original hearing of the suit, while there was "every reason why, if relevant, it should have been adduced before all other." No copy of the application for review has been referred to before us, nor has any attempt been made to show when the fresh evidence was discovered, and how long afterwards the application was made, or that the District Judge was in error in the strong opinion which he expressed.

The ruling in *Trimbakraj* v. *The General Traffic Manager of the G. I.P. Railway Company* (1) shows that, under certain circumstances, the presentation of an application for review may be considered as sufficient cause for delay in filing an appeal. But in the present case we do not think that such circumstances are proved to exist. Under the proviso to Rule 9 (VI) of [86] chap. I of the High Court Rules, it was incumbent on appellant to be prepared to satisfy the Court that he had sufficient cause for not presenting his appeal within the time prescribed by law. This he has not done, and his appeal must be dismissed. All costs on appellant.

Appeal dismissed.

(1) P. J. for 1880, 345.

1893
JAN. 11.

APPEL-
LATE
CIVIL.

18 B. 86.

18 B. 86.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice and Mr. Justice Candy.

LOMBA GOMAJI (*Original Plaintiff*), *Appellant v.* VISHVANATH AMRIT TILVANKAR (*Original Defendant*), *Respondent.**

[11th January, 1893.]

Mortgage—Sale of property subject to a mortgage in execution of a money decree obtained by plaintiff against mortgagor—Subsequent mortgage of same property by original mortgagor and first mortgagee paid off—Possession taken by new mortgagee—Suit for possession by plaintiff as purchaser in execution—Right of purchaser to recover—Right of second mortgagee to be repaid his advances by plaintiff keeping alive the first mortgage.

On the 10th June, 1885, Tikaram mortgaged the property in dispute to Ganpat along with some other property. In 1886 the plaintiff obtained a money decree against Tikaram and in execution of his decree he sold the property in dispute and obtained a certificate of sale on the 1st November, 1886.

On the 13th February, 1888. Tikaram mortgaged the property, in dispute along with other property to the defendant and paid off Ganpat's mortgage. Ganpat thereupon returned the mortgage-deed to Tikaram with a receipt for payment endorsed. After payment of Ganpat's mortgage the defendant took possession of the property. In July, 1888, Tikaram executed a further mortgage of the property to the defendant for Rs. 8,000.

On the 30th August, 1888, the plaintiff having attempted to take possession was obstructed by the defendant. Thereupon the plaintiff brought this suit for possession.

Held, that the plaintiff was entitled to possession. The mortgage to the defendant was subsequent to the plaintiff's purchase of the equity of redemption. The defendant did not know of that purchase. He took the mortgage from Tikaram, to whom he advanced the money to pay off the previous mortgage to Ganpat. There was nothing to show that there was any intention to keep Ganpat's mortgage alive in favour of the defendant.

Gokul Doss v. *Rambux* (1) distinguished.

Held, also, that as plaintiff was seeking to recover property which but for the defendant's payment to Ganpat would have been burdened with Ganpat's mortgage, [87] and as the defendant when he advanced the money to Tikaram to pay off that mortgage did not know that Tikaram was no longer the owner of the equity of redemption, the plaintiff should give credit to the defendant for the sum paid by him; but as the defendant's mortgage comprised other properties besides the one in dispute, the plaintiff should recover possession on payment to the defendant of a proportionate part of Ganpat's mortgage-debt having regard to the value of the property in dispute and that of the other mortgaged properties.

Mahomed Shumsool v. *Shewukram* (2) followed.

[**F.**, 35 B. 433 = 13 Bom.L.R. 867 = 12 Ind. Cas. 362; **R.**, 18 B. 348 (354); 21 B. 567 (569); **Expl.**, 36 C. 193 (221) = 5 C.L.J. 611.]

SECOND appeal from the decision of T. Hart-Davies, Assistant Judge of Poona.

On the 10th June, 1885, one Tikaram Lachhiram mortgaged the property in question with other properties to Ganpat Dalsaram for Rs. 500. The mortgagee was given possession.

On the 18th June, 1886, the plaintiff, who had obtained a money decree against Tikaram (the mortgagor), caused the mortgaged property to be sold in execution, and at the sale himself became the purchaser. The sale to him was confirmed in November, 1886.

---

* Second Appeal No. 454 of 1891.

(1) 11 I.A. 126.

(2) 2 I.A. 7.

On the 13th February, 1888, Tikaram executed a mortgage of the property in dispute along with other properties to the defendant for Rs. 5,000. Ganpat Dalsaram joined in this transaction, and on the 14th February, 1888, his mortgage was paid off out of the Rs. 5,000. He returned his mortgage-deed to Tikaram with an endorsement of satisfaction of his debt as follows:—"I, the creditor named Ganpat Dalsaram Gujar, having entered satisfaction on the back of this mortgage, have received moneys as follows:—Rs. 500, I have received Rs. 500 in respect of the said mortgage right. . . . The above-mentioned amount of Rs. 3,606, which is caused to be paid by Vishvanath Amrit Tilvankar . . . for redeeming two mortgaged fields, two bungalows and two houses in all, which I held in mortgage, and for mortgaging the same to Tilvankar, I have received in full. Now there is nothing whatever due to me on the property. I have relinquished all my mortgage rights, and have delivered all the letters and papers to him for enjoyment."

The new mortgage-deed to the defendant contained the following passage:—"We have received, in all, from you Rs. 5,000 of **[88]** the Surat currency for paying to Rajeshri Ganpat Dalsaramshet in order to redeem our property which is mortgaged to him and to mortgage the same to you . . We . . . have of our own free will received payment in respect of this mortgage-deed. The details are as follows: having paid Rs. 3,606 in cash to Rajeshri Ganpat Dalsaramshet we have obtained the mortgage deed with an intention of satisfaction thereon, &c."

Upon the execution of this mortgage the defendant took possession, the previous mortgagee (Ganpat Dalsaram) having been paid off as already mentioned.

On the 5th July, 1888, Tikaram executed a further mortgage of the property to the defendant for Rs. 8,000.

On the 30th August, 1888, the plaintiff attempted to take possession of the property under his sale certificate, and he was resisted by the defendant. He then applied to the Court executing the decree to have the obstruction removed, but his application was rejected.

The plaintiff thereupon brought the present suit to have the order rejecting his application set aside, and for possession of the property.

The defendant contended (*inter alia*) that as he had satisfied Ganpat Dalsaram's mortgage lien, which was prior in date to the plaintiff's purchase and had been put in possession and that the plaintiff was aware of that fact, that the plaintiff's remedy was a suit for redemption and not for possession.

The plaintiff preferred a second appeal.

Inverarity (with *Mahadeo Bhaskar Chavbal*), for the appellant (plaintiff).—When the plaintiff purchased the property in execution of his decree, Ganpat's mortgage lien was in existence. Subsequently to that purchase Tikaram paid off Ganpat's mortgage, and the result was that when the plaintiff sought to recover possession in execution, the property was free from that mortgage. The documents clearly show that the parties to the transaction of February, 1888, intended simply to wipe off Ganpat's mortgage; if they had intended otherwise, the defendant would have taken an assignment of the mortgage from Ganpat. The plaintiff is, therefore, **[89]** entitled to recover possession without paying anything to the respondent—*Ram Tuhul Singh* v. *Biseswar Lall* (1), *Gadgeppa* v. *Apaji* (2) *Krishna Reddi* v. *Muttu Narayana Reddi* (3). Supposing that

(1) 2 I. A. 131 (143). (2) 3 B. 237. (3) 7 M. 127.

1893
JAN. 11.

APPELLATE CIVIL.

18 B. 86.

the plaintiff is liable to make any payment to defendant on account of Ganpat's mortgage lien on the ground that that lien was prior to his purchase, this liability should be limited to the property which he purchased. He should not be made liable to pay the whole of the lien, which extended over some other property which he has not purchased.

Mahadeo Chimnaji Apte, for the respondent (defendant).—The intention to keep alive Ganpat's mortgage lien in the defendant's favour is shown by the endorsement made on his mortgage-deed and also by the conduct of the parties. If Ganpat's mortgage had been merely wiped off, the mortgage-deed would not have come into the defendant's possession. The endorsement distinctly says that Ganpat's mortgage was paid off for the purpose of mortgaging the property to the defendant. Therefore the transaction is tantamount to an assignment—*Gokuldoss* v. *Rambux* (1); *Gangadhara* v. *Sivarama* (2), *Mahomed Shumsool* v. *Shewakram* (3). The defendant had no notice of the plaintiff's purchase, and, therefore, he paid off Ganpat's mortgage, and advanced money to the mortgagor. But now owing to the plaintiff's purchase the defendant's transaction was, by the lower Court, held to be abortive. A man paying an incumbrance honestly, though unauthorisedly, is entitled to be recouped in justice, equity and good conscience—*Nilo Pandurang* v. *Rama Patloji* (4).

JUDGMENT.

SARGENT, C. J.—As the defendant's mortgages in 1888 were subsequent to the plaintiff's purchase at auction-sale on 18th June, 1886, of Tikaram's equity of redemption, it is plain that the defendant can have no defence to the plaintiff's suit for possession, unless Ganpat Dalsaram's mortgage, to which the property was subject when the plaintiff purchased it, can be regarded: for there was no formal assignment of it, as having been kept alive in his favour. We agree with the Joint **[90]** Subordinate Judge that no such intention can be gathered from what took place when the first mortgage was passed to defendant.

Mr. Apte relied on the Privy Council's decision in *Gokul Doss* v. *Rambux* (1) to show that the intention ought to be presumed, but the principle laid down in that case only applies where, as their Lordships explain it, "the estate is burdened by a succession of mortgages, and the owner of an ulterior interest pays off an earlier mortgage, in which case (in England) it is a matter of course to have it assigned to a trustee for his benefit as against intermediate mortgagees to whom he is not personally liable." Such was the case in *Gangadhara* v. *Sivarama* (2), which proceeded on the ruling in *Gokul Doss* v. *Rambux* (1). But here there was no intermediate mortgage to be protected against from which an intention to keep Ganpat's mortgage alive can be gathered, nor has it ever been suggested in either Court, that the defendant was aware of the plaintiff's purchase. On the other hand, the evidence that defendant took no part in paying off Ganpat's mortgage, and that the receipt endorsed on it was in favour of Tikaram, together with the recital in defendant's mortgage-deed that the mortgage had been paid off out of the money advanced by defendant, without any words showing an intention to keep it alive, indicates that the only object the defendant had in view was to insure the property being cleared from Ganpat's mortgage.

---

(1) 11 I. A. 126. (2) 8 M. 246. (3) 2 I.A. 7 (17). (4) 9 B. 35.

It remains, however, to consider whether this is a case in which the Court ought, as Mr. Apte contends it should, on the principle acted on by the Privy Council in *Mahomed Shumsool* v. *Shewukram* (1), to refuse to give the plaintiff possession except on the condition of his recouping the defendant for what he paid to satisfy Ganpat's mortgage, and thus freeing the estate from an incumbrance to which it would have been liable in his lands. The cases of *Ram Tuhul Singh* v. *Biseswar Lall Sahoo* (2) and *Gadgeppa* v. *Apaji* (3) were relied on by Mr. Inverarity for the plaintiff. In the case before the Privy Council it is to be observed that the plaintiff was the party who had **[91]** paid the money, and he sought to recover it from the defendant who had benefited by it, and their Lordships at the bottom of page 141 distinguished it on that ground from the case of *Bellamy* v. *Sabine* (4) before Lord Cottenham and others of that class where the plaintiff seeks the aid of a Court of Equity and the Court proceeds on the broad ground that he who seeks to be relieved on equitable grounds must do equity. Moreover, the money was paid in that case against the will of the party who was said to have benefited by it. In *Gadgeppa* v. *Apaji* (3) the plaintiff was also the party who had paid the money, and the Court relied on *Ram Tuhul Singh* v. *Biseswar Lall Sahoo* (2).

Those cases, therefore, differ from the present one, in this important respect that the plaintiff is here invoking the aid of the Court to recover the property from defendant, which, but for defendant's payment to Ganpat, would have been burdened with Ganpat's mortgage; and unless defendant knew that Tikaram was no longer the owner of the equity of redemption, when he advanced the money to Tikaram, which, as found by the Subordinate Judge, was not the case, and was not relied on in the lower Court of appeal, it is difficult to see how the present case is in principle to be distinguished from *Mahomed Shumsool* v. *Shewukram* (1). In both cases there is a subsisting charge on the property paid off by the person in possession, which, as their Lordships say, makes it "equitable when the plaintiff reclaims the estate, that credit should be given to the purchaser (in this case the mortgagee) for the payment of the mortgage which the plaintiff would otherwise have had to meet."

It was said, however, and we think rightly, that plaintiff cannot be called on to pay more than a proportionate part of the money paid in satisfaction of Ganpat's mortgage-debt, as his mortgage security consisted of other properties as well as the one in dispute. That is all the defendant would have had ultimately to meet, as, even if he must have paid the whole mortgage-debt to recover the property in question, he would have been entitled to contribution by Tikaram in respect of the rest of the mortgaged property.

[92] We think, therefore, that the decree must be varied by directing that the plaintiff do recover the property on payment to the defendant of the proportionate part of Ganpat's mortgage-debt, having regard to the values of the property in question and that of the other mortgaged properties. The sum to be so paid to be determined in execution. Parties to pay their own costs of this appeal.

Decree varied.

(1) 2 I. A. 7 (17). (2) 2 I. A. 131. (3) 3 B. 237. (4) 2 Ph. 425.

1893

JAN. 11.

APPEL-LATE CIVIL.

18 B. 92.

18 B. 92.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice and Mr. Justice Candy.

DESAI MOTILAL MANGALJI (*Original Plaintiff*), *Appellant v.* DESAI PARASHOTAM NANDLAL (*Original Defendant*), *Respondent.**

[11th January, 1893.]

Registration—Evidence—Act III of 1877, *s.* 17—*Retrospective operation of section—Document not registrable under Act in force* (*XX of* 1866) *when executed, but requiring registration under Act III of* 1877—*Immoveable property, what is—Hereditary allowance attached to office of Desai not immoveable property under Act XX of* 1866—*Deed of gift of such property originally not registrable—Hereditary office when immoveable property by Hindu law—Desaigiri* sukhdi.

Section 17 of the Registration Act (III of 1877) should not be construed as requiring a document to be registered which would not have required registration when it was executed.

Raju Balu v. *Krishnarav* (1) distinguished.

An instrument which did not require registration under Act XX of 1866 is not inadmissible in evidence by reason of Act III of 1877.

Dues incidental to an office such as that of a Desai, which is capable of being held by a person other than a Hindu, were not immoveable property when the Registration Act XX of 1866 was enacted.

[F., 8 A.L.J. 609 = 10 Ind. Cas. 314.]

SECOND appeal from the decision of T. Hart-Davies, Joint Judge of Ahmedabad.

The plaintiff Desai sued to recover Rs. 99 on account of his share in the Desaigiri *sukhdi* allowance for three years. He alleged that he and the defendant were members of the family of the Bania Desais of Godhra; that the *sukhdi* allowance was received from the Government treasury by a senior representative [93] of the family; that a dispute having arisen between the defendant's father, and the plaintiff's father, it had been agreed that the defendant's father and his descendants should continue to recover the allowance and should pay Rs. 33 out of it to the plaintiff's father and his descendants every year, and that an agreement to that effect had been accordingly executed by the defendant's father on the 24th May, 1866. The defendant had refused to pay the plaintiff's share of the allowance since 1886.

The defendant denied the plaintiff's right to a share in the allowance, disputed the genuineness of the agreement sued on, and contended that it was inadmissible in evidence for want of registration.

The Subordinate Judge found that the agreement sued upon was a deed of gift which being unregistered was not admissible in evidence. He, therefore, rejected the claim.

The plaintiff preferred a second appeal.

Gokuldas K. Parekh, for the appellant.—Hereditary allowances are for the first time included in immoveable property for the purposes of registration by s. 3 of the Registration Act III of 1877. The document in question was passed in 1866; and at that time hereditary allowances were not immoveable property for the purposes of registration. Act III of 1877 has no retrospective operation—*Ram Coomar Singh* v. *Kishari* (2).

---

* Second Appeal No. 754 of 1891.

(1) 2 B. 273.

(2) 9 C. 68.

Hereditary allowances may be immoveable property under Hindu law; but the office of a Desai is not such as is incapable of being held by persons other than Hindus. We find that even Mahomedans and Parsis are Desais. Therefore the question whether Desaigiri *sukhdi* is immoveable property for the purposes of registration, cannot be governed by Hindu law—*Maharana Fattehsangji* v. *Desai Kallianraiji* (1).

Rao Saheb *Vasudeo J. Kirtikar* (Government Pleader), for the respondent (defendant).—The Registration Act III of 1877 has retrospective operation—*Lachman Das* v. *Dip Chand* (2); *Raju Balu* v. *Krishnarav* (3). As the suit is between Hindus, the question whether Desaigiri *sukhdi* is immoveable property should [94] be determined by Hindu law. Hereditary offices are immoveable property under Hindu law—*Balvantrav* v. *Purshotam* (4); *The Government of Bombay* v. *Gosvami Shri Girdharlalji* (5); *Krishnabhat* v. *Kapabhat* (6).

JUDGMENT.

SARGENT, C. J.—The plaintiff in this suit, which has arisen out of a dispute between two branches of the Bania family of Desais of Godhra, sues on an agreement (Ex. 3), dated 24th May, 1866, by which the defendant undertook that he and his descendants would pay the plaintiff's father and his descendants an annual sum of Rs. 33 out of the *sukhdi* allowance payable out of the Government treasury at Godhra and which was to be collected by the defendant and his descendants. Both the lower Courts have held that the document was a deed of gift of immoveable property and required registration under s. 17 of Act III of 1877, and not being registered, was not admissible in evidence.

Act XX of 1866 was the Registration Act applicable to the document when it was executed, and much argument has been addressed to us on the question whether such a *sukhdi* was immoveable property when that Act came into force. It was common to both parties that the *sukhdi* was an allowance incidental to the hereditary office of Desai, and, as such, it was contended for the respondent that, on the authority of the decisions in *Balvantrav* v. *Purshotam* (4) and *The Government of Bombay* v. *Gosvami Shri Girdharlalji* (5), it was of the nature of immoveable property. On the other hand, it was contended by Mr. Gokuldas, for the appellant, that the rulings in these cases only applied to hereditary offices which could only be held by Hindus such as that of a village Joshi, and that the office of Desai, any more than that of a patil, was not necessarily held by a Hindu, and might be held by a Mahomedan or Parsi. This latter statement was admitted by Mr. Vasudev, but he contended that the rulings applied to all hereditary allowances.

It is to be remarked that what was actually decided in *Balvantrav* v. *Purshotam* (4) was that the dues incidental to an hereditary [95] office such as a village Joshi was by Hindu law regarded as immoveable property. In *The Government of Bombay* v. *Gosvami Shri Girdharlalji* (5), where the question was as to the nature of allowances to a Hindu temple, Mr. Justice Melvill no doubt refers to the last case as deciding that "allowances incidental to hereditary offices are immoveable property." However, in *Maharana Fattehsangji* v. *Desai Kallianraiji* (1), their Lordships of the Privy Council treat the ruling to be that for the interpretation of s. 1, cl. 12 of Act XIV of 1859 immoveable property must, when it concerns the rights

(1) 1 I. A. 34 (50). (2) 2 A. 851. (3) 2 B. 273.
(4) 9 B. H. C. R. 99. (5) 9 B. H. C R. 222. (6) 6 B. H. C. R. A. C. J. 137.

1893
JAN. 11.
APPELLATE CIVIL
18 B. 92.

of Hindus, be taken to include whatever Hindu law classes as immoveable, and their Lordships say they see no objection to the rule within proper limits, and express approval of the decision on the ground "that Hindu texts were legitimately used to show that, in the contemplation of Hindu law, hereditary offices in a Hindu community *incapable of being held by any person not a Hindu* were in the nature of immoveables."

We think it is impossible, with due regard to these remarks of the Privy Council, to hold that the dues incidental to an office such as that of Desai were immoveable property when Act XX of 1866 was enacted, and it becomes necessary to consider the view taken by the Joint Judge that, whatever may have been the character of a Desaigiri *sukhdi* at the time Act XX of 1866 was enacted, the document in question required to be registered under s. 17 of Act III of 1877, which includes hereditary allowances in the interpretation of "immoveable property." This raises a question of some difficulty on which the High Courts of Calcutta and Allahabad have apparently differed—*Ram Coomar Singh* v. *Kishari* (1) and *Lachman Das* v. *Dip Chand* (2)—the former Court being of opinion that neither s. 17 of Act III of 1877 nor the similar sections of the preceding Acts have the effect of rendering a document, which was not registrable under Act XVI of 1864, inadmissible in evidence under the succeeding Acts without registration. Mr. Justice Green had to consider s. 17 in *Raju Balu* v. *Krishnarav* (3) with respect to a document **[96]** dated 15th July, 1865. After referring to the peculiar language of s. 17 and pointing out that "the greater strictness of the requirements of Act VIII of 1871 and the earlier Registration Acts has been mitigated, and the Act was framed as it is, very probably with a view to admit to the benefit of such mitigatious documents though executed before the day on which the Act came into force," he arrives at the conclusion that "the practical result is, that the provisions of Act III of 1877 apply to all documents tendered in evidence on or after 1st April, 1877." It is to be remarked that the document in question, which was held to require registration in that case, was clearly one which ought to have been registered under Act XVI of 1864. The case, therefore, has no direct bearing on the present question whether s. 17 of the Act is to be construed as requiring a document to be registered which would not have required registration when it was executed. It is plain that if it is so regarded, as the Act provides no means of registering such a document (unless perhaps it was executed within three months before the Act of 1877 comes into force), the section will have the retrospective effect of invalidating for all practical purposes documents which when they were executed were free from defects according to the existing law. The presumption is of course against the Legislature having such an intention. The actual question here arises from the change in the interpretation clause which in the Act of 1877 includes "hereditary allowances" without any restriction in immoveable property, and we think that such a change cannot on principle affect instruments executed before the Act.

We must, therefore, reverse the decree of the Court below and send back the case for a fresh decision, having regard to the above remarks. Costs to abide the result.

---

(1) 9 C. 68. (2) 2 A. 851 (853). (3) 2 B. 273 (281).

18 B. 97.

1893
FEB. 13.

CRIMINAL REVISION.

18 B. 97.

[97] CRIMINAL REVISION.

Before Mr. Justice Candy and Mr. Justice Fulton.

QUEEN-EMPRESS *v.* SHIDGAUDA.* [13th February, 1893.]

Criminal Procedure Code (Act X of 1882), s. 263 (h) – Summary trials—Magistrate's finding to contain a statement of the reasons for a conviction.

Under s. 263 (*h*) of the Code of Criminal Procedure (Act X of 1882) a Magistrate, in recording his reasons for a conviction, must state them so that the High Court on revision may judge whether there were sufficient materials before him to support the conviction.

Empress v. *Panjab Sing* (1) followed.

[F., 2 Cr. L. J. 375=3 L. B. R. 208 (209); 1 L. B. R. 95; 1 L. B. R. 203 (209); Rat. Unr. Cr. Cas. 778 (779); R., 21 A. 189 (191); 2 S. L. R. 3 Cr.]

THIS was an application under the criminal revisional jurisdiction of the High Court [s. 435, Criminal Procedure Code (X of 1882)].

The accused was charged with having committed criminal trespass on certain land in respect of which the complainant had obtained a decree for possession in the Mamlatdar's Court.

The case was tried by the First Class Magistrate of Belgaum in a summary way under the provisions of Chap. XXII of the Code of Criminal Procedure (Act X of 1882).

The Magistrate convicted the accused under s. 447 of the Indian Penal Code, and sentenced him to a fine of Rs. 25.

The Magistrate's judgment was as follows :—

"The complainant states that the accused prevented his tenants from keeping fuel and rubbish in the place decided by the Mamlatdar to be his, to cause annoyance to him. The witnesses called by the complainant support the complainant. The accused pleads not guilty and has called two witnesses to prove his innocence. The witnesses do not say that the accused has not committed the offence. I, therefore, direct that the accused should pay Rs. 25, or, in default, should undergo rigorous imprisonment for thirty days."

The accused applied to the High Court, under s. 435 of the Code of Criminal Procedure, for a revision of the Magistrate's proceedings.

[98] *Vasudeo G. Bhandarkar*, for the accused.

Chitgupe (with him Messrs. *Chitnis*, *Motilal and Moulvi*), for the complainant.

JUDGMENT.

CANDY, J.—The Magistrate's "brief statement of the reasons for conviction" (s. 263 (*h*), Criminal Procedure Code) is simply,—"The witnesses called by the complainant support the complainant. The witnesses (for the accused) do not say that the accused has not committed the offence." We are of opinion that this is not a compliance with law. We agree with the ruling in *Empress* v. *Panjab Singh* (1) that a Magistrate under this section in recording his reasons for the conviction should state them so that the High Court on revision may judge whether there were sufficient materials before him to support the conviction. The conviction must, therefore, be set aside, and the fine, if paid, refunded.

Conviction and sentence reversed.

* Application for Revision No. 390 of 1892.
(1) 6 C. 579.

1893

JAN. 13.

APPEL-LATE CIVIL.

18 B. 98.

18 B. 98.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Bayley.

HIMATRAM (*Original Judgment-Creditor*), *Applicant v.* KHUSHAL JETHIRAM GUJAR (*Original Applicant*), *Opponent.** [13th January, 1893.]

Mortgage—Decree on mortgage—Sale in execution—Claim on property ordered to be sold under a mortgage decree—Civil Procedure Code (Act XIV of 1882), ss. 278 and 287—Jurisdiction.

Himatram obtained a decree upon a mortgage against Dewji in 1891, and applied in execution for the sale of the mortgaged property. On the proclamation of the sale being issued, Khushal intervened, alleging that the property had been sold to him by Dewji in 1883 at a private sale. The Subordinate Judge allowed his claim, and stopped the sale, being of opinion that he had power, under s. 287 of the Civil Procedure Code, to make this order.

Held, that the order was made without jurisdiction, and must be discharged. Proceedings by way of claim as provided by s. 278 of the Civil Procedure Code (Act XIV of 1882) are not applicable where the property is directed to be sold under a mortgage decree, and s. 287 had no application.

Deefholts v. *Peters* (1) followed.

[F., 1 N.L.R. 142 (143); R., 6 Bom. L. R. 1043 (1049); 12 C.P.L.R. 73 (75); L.B.R. (1893—1900) 509 (510); 2 L. B. R. 138 (139); D., 13 Ind. Cas. 563 = 123 P.L.R. 1912 = 247 P.W.R. 1912.]

[99] THIS was an application under the extraordinary jurisdiction (s. 622 of the Civil Procedure Code, Act XIV of 1882) against an order passed by Rao Saheb V. G. Kaduskar, Joint Subordinate Judge of Nasik.

In 1891 one Himatram obtained a decree in the Court of the Subordinate Judge at Nasik against Dewji on a mortgage. The decree directed the payment of the mortgage-debt within six months, or, in default, the sale of the mortgaged property. Default having been made, and the defendant being an agriculturist, the Subordinate Judge sent the proceedings to the Collector that he might sell the property, and realize the amount of the decree.

Before the date fixed for the sale, one Khushal Jethiram claimed the property in the Court of the Subordinate Judge, alleging that he had bought it from Dewji in 1883. He prayed for a declaration that the property was not liable to attachment. The Subordinate Judge cancelled the proclamation, and stopped the sale, and referred Himatram to a regular suit. He was of opinion that although s. 278 of the Civil Procedure Code (XIV of 1882) did not apply to this case as there had been no attachment, yet that under s. 287 of the Civil Procedure Code he could deal with Khushal's application and make the order. He held that the ruling of the Calcutta High Court in *Deefholts* v. *Peters* (1) was not applicable to the case.

Against the above order Himatram applied to the High Court in its extraordinary jurisdiction (Civil Procedure Code (XIV of 1882), s. 622), contending that the Subordinate Judge had acted illegally and without jurisdiction. He obtained a rule *nisi* to set aside the above order. The rule now came on for argument.

Shivram V. Bhandarkar, for the applicant, in support of the rule.—The Subordinate Judge had no jurisdiction to make the order stopping the

* Application No. 113 of 1892 under Extraordinary Jurisdiction.

(1) 14 C. 631.

sale. It is admitted that the order could not be made under s. 278 of the Civil Procedure Code, as there was no attachment. Nor could it be made under s. 287, which does not contemplate such an application at all.

[100] *N. G. Chandavarkar*, for the opponent, showed cause:—Technically no doubt s. 278 does not apply, because the property was not attached; but although not attached, yet as it was directed to be sold in execution of a decree, it should be regarded as practically attached for the purpose of a sale, and that being so the claimant's application should be dealt with. If property to which claims are made, is put up for sale, the purchaser runs the risk of buying what may turn out to be property which does not belong to the judgment-debtor, and which ought not to be sold. This inconvenience ought to be prevented by the Court.

1893
JAN. 13.
APPELLATE CIVIL.
18 B. 98.

ORDER.

SARGENT, C. J.—We agree with the opinion expressed by the Calcutta High Court in *Deefholts* v. *Peters* (1) that proceedings by way of claim as provided by s. 278 of the Civil Procedure Code are not applicable to a case of *this* kind. As to s. 287, it has no application to a case of this nature. The Subordinate Judge has acted, therefore, without jurisdiction. The rule must be made absolute, and the Subordinate Judge's order discharged. Costs of this application to be paid by the opponent.

Rule made absolute.

---

18 B. 100.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice and Mr. Justice Bayley.

GULABSINGJI AND OTHERS (*Original Plaintiffs*), *Appellants* v. LAKSHMANSINGJI (*Original Defendant*), *Respondent.**

[18th January, 1893.]

Court-fees Act, VII of 1870, *s.* 7, *cl.* 4 (*c*)—*Act VII of* 1887, *s.* 8—*Stamp—Consequential relief—Valuation of suit—Injunction—Talukdari Act, Bombay Act VI of* 1888, *s.* 11—*Jurisdiction.*

Where plaintiff sued for a declaration that they were entitled to share in certain talukdari estates and for an injunction to restrain defendant from cutting and removing timber from certain forests, or, if the injunction was not granted, for an order to defendant to keep a correct account of the timber removed, the First Class Subordinate Judge rejected the claim for want of jurisdiction.

Held, that the suit was one for a declaration and consequential relief under s. 7, *cl.* 4 (*c*) of the Court-Fees Act, and that as the claim was valued at **[101]** Rs. 230 only, the appeal lay under Act VII of 1887, s. 8, to the District Court.

An injunction is in the nature of consequential relief.

[F., 6 C.L.J. 427=11 C.W.N. 705 (707); R., 20 B. 265 (267); 20 B. 736 (741); 5 Bom. L.R. 195 (196); 6 O.C. 255 (258).]

APPEAL from the decision of Rao Bahadur Lalshankar Umiashankar, First Class Subordinate Judge of Ahmedabad.

Plaintiffs sued for a declaration of their shares in certain talukdari estates, and for a temporary injunction to restrain defendant from cutting

---

* Appeal No. 138 of 1892.

(1) 14 C. 631.

1893
JAN. 18.
APPEL-
LATE
CIVIL.
18 B. 100.

and removing timber from certain forests, or, in the alternative, for a direction to defendant to keep correct and proper accounts of timber removed from those forests.

Defendant contended (*inter alia*) that the Court had no jurisdiction to try the suit.

The First Class Subordinate Judge held that as plaintiff's object in bringing the suit was to get division by actual partition, they must apply, in the first instance, to the Talukdari Settlement Officer under s. 11 of Bombay Act VI of 1888, and dismissed the suit.

From this decree plaintiffs preferred an appeal to the High Court.

Inverarity (with *Ganpat Sadashiv Rao*), for respondent (defendant).—There is a preliminary objection to this appeal. I contend that the appeal lies not to this Court, but to the District Court. The plaintiffs sue for a declaratory decree and consequential relief. The suit falls within s. 7, cl. 4, sub-ss. (*c*) and (*d*) of the Court-fees Act, VII of 1870. Under this section the plaintiff is, no doubt, at liberty to put his own valuation upon the reliefs sought. But the valuation will determine the jurisdiction of the Court. Under s. 8 of Act VII of 1887, in a suit like the present, the valuation for purposes of Court-fees and the valuation for purposes of jurisdiction are the same. The plaintiffs value their claim at Rs. 230. This valuation should be taken for purposes of jurisdiction as well as Court-fees. The appeal, therefore, lies to the District Court.

He referred to *Bhagvantrai* v. *Mehta Bajurao* (1).

[102] *Jardine* (with *Gokuldas K. Parekh*), for appellants (plaintiffs).—The objection that no appeal lies to the High Court, practically amounts to saying that the First Class Subordinate Judge's Court had no jurisdiction to try the original suit, and the objection about jurisdiction having not been raised in the original Court, it is not open to the respondent to say in this Court that no appeal lies.

This is not a case, under sub-cl. (*c*), cl. 4, s. 7 of Act VII of 1870, of a suit to obtain a declaratory decree where consequential relief is prayed. A prayer for partition which necessarily follows from the declaration would be consequential relief, but not a prayer for injunction; if a declaration is made in plaintiff's favour, his right to injunction would not follow as a matter of course. In a suit for a declaration the Court-fees duty is fixed, and not *ad valorem*. The suit would not have been held bad if the prayer for injunction had been omitted. If the prayer in the plaint had been limited to a mere declaration of title, there would have been no objection to this appeal. By adding the further prayer for injunction, this Court would not become deprived of its jurisdiction.

JUDGMENT.

SARGENT, C. J.—This is a regular appeal from the First Class Subordinate Judge of Ahmedabad, and a preliminary objection has been taken that the appeal does not lie to this Court, the value of the suit for the purpose of determining the jurisdiction of this Court to hear the appeal being, it is contended, only Rs. 230, *viz.*, the sum at which the plaintiffs have valued the relief sought in their plaint.

In *Khushalchand* v. *Nagindas* (2) in a suit for account and a decree for the balance to be found due where the plaintiff had valued the relief at Rs. 510, it was held that the appeal lay to the District Court, and not to the High Court. This decision was come to independently of the effect

(1) 18 B. 40.

(2) 12 B. 675.

of s. 8 of Act VII of 1887. In *Bhagvantrai* v. *Mehta Bajirao* (1) the High Court, in a similar suit, followed *Khushalchand* v. *Nagindas* (2), pointing out at the same time that the law so laid down had already been embodied in s. 8 of Act VII of 1887, when that decision [103] was passed. The question is whether that section is applicable to the present suit.

It was contended for the respondent that it is a suit for "a declaratory decree where consequential relief is prayed" as contemplated by s. 7, cl. 4, sub-cl. (*c*) of Act VII of 1870. It was urged for the appellants that an injunction is not such "consequential" relief as is intended by that expression in sub-cl. (*c*). "An injunction" is undoubtedly in the nature of consequential relief, and the following sub-cl. (*d*) shows that the Legislature considered it was a form of relief which might be valued in a suit which asked for it. Moreover, in the present case the relief sought is not merely an injunction, but, in the alternative, for an account of the timber which defendant might cut before the actual partition. We think, therefore, that the above rule applies to the present suit, and that the relief having been valued at only Rs. 230, the appeal lay to the District Court, and we must, therefore, return the appeal for presentation in that Court. Appellants to pay the costs incurred in this Court.

Appeal returned for presentation to proper Court.

---

18 B. 103.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Bayley.

BABA KAKAJI SHET SHIMPI (*Original Plaintiff*), *Appellant v.* NASSARUDDIN VALAD AMINUDDIN KAZI AND ANOTHER (*Original Defendants*), *Respondents.** [19th January, 1893.]

Kazi, office of—Hereditary office—Watan—Watandars Act (Bombay Act III of 1874), s. 9†*—Mortgage.*

The office of Kazi is not an hereditary office, unless perhaps by special custom of the locality. Where such a custom is not established, property attached to the [104] office is not watan property, and the Collector has no power to make an order with respect to it under s. 9 of the Watandars Act (Bombay Act III of

* Second Appeal, No. 910 of 1891.

† Section 9 of the Watandars Act (Bombay Act III of 1874)—

9. *Clause* 1.—Whenever any watan or any part thereof, or any of the profits thereof, whether assigned as remuneration of an officiator or not, has or have, before the date of this Act coming into force, passed otherwise than by virtue of, or in execution of a decree or order of any British Court and without the consent of the Collector and transfer of ownership in the revenue records, into the ownership or beneficial possession of any person not a watandar of the same watan, the Collector may, after recording his reasons in writing, declare such alienation to be null and void, and order that such watan or any part thereof, or any of the profits thereof, shall from the date of such order belong to the watandar previously entitled thereto, and may recover and pay to such watandar any profits thereof accordingly.

Clause 2.—If such part of a watan be land, it shall be lawful for the Collector, instead of transferring the possession of the land, to demand and recover the full rent ordinarily paid by tenants of land of similar description in the same locality, and the amount so recovered shall be considered as the profits. The decision of the Collector shall be final.

(1) 18 B. 40.

(2) 12 B. 675.

1893

JAN. 19.

APPEL-LATE CIVIL.

18 B. 103.

1874). *Jamal valad Ahmed* v. *Jamal valad Jallal* (1) and *Daudsha* v. *Ismalsha* (2) followed.

A Resolution of Government empowering a Collector to levy full assessment from the person other than the grantee in possession of land granted for public service does not authorize him to order the delivery of possession of the land to the grantee.

[R., 21 B. 733 (737).]

SECOND appeal from the decision of L. G. Fernandez, First Class Subordinate Judge, A. P., at Nasik.

On the 30th May, 1869, the first defendant mortgaged with possession to the plaintiff's father certain property attached by *sanad* to the office of Kazi in the villages of Wani and Sewali in the district of Nasik. The mortgagee continued in possession until 1883, but in that year the property was restored to the first and second defendants, who were Kazis in these villages in pursuance of an order of the Collector in exercise of the power vested in him by the Watan Act (Bombay Act III of 1874), s. 9.

The plaintiff's father died, and the plaintiff sued to recover the mortgage-debt. He prayed for the sale of the mortgaged properties, or for possession of them until the amount of debt was paid.

The defendants pleaded (*inter alia*) that they had been put into possession by the Collector under the Act, and they contended that the property in question was service *inam* property, and as such inalienable without the sanction of Government.

[105] The Subordinate Judge dismissed the suit. He held that he had no power to interfere with Collector's order. On appeal the decree was confirmed.

The plaintiff preferred a second appeal.

Daji Abaji Khare, for the appellant (plaintiff).—The question is whether a Kazi is a watandar under the Watan Act. The appointment of Mahomedan law officers was made under Reg. XXVI of 1827. But that Act was repealed by Act XI of 1864, and thereupon Mahomedan officers ceased to be officers of Government. A Kazi is now no longer an officer connected with the civil administration of the country, and is, therefore, not a watandar under the Watan Act (III of 1874). He is not an hereditary officer under the Act—*Jamal valad Ahmed* v. *Jamal valad Jallal* (1); *Daudsha* v. *Ismalsha* (2).

To be a watandar under that Act, payment must be received from Government for service performed. If, then, the defendants are not watandars under the Act, the Collector was wrong in restoring the mortgaged property to them, and s. 9 of the Act does not afford them protection.

Govardhanram M. Tripathi, for the respondents (defendants).—A Kazi is connected with the civil administration of the country—*Muhammad Yusub* v. *Sayad Ahmad* (3). The question here is as to the property and not the office of a Kazi. It is within the cognizance of the Collector to determine whether a property is watan or not, and he having once held that the property in dispute is watan, it is inalienable, and consequently not liable to the appellant's mortgage.

JUDGMENT.

SARGENT, C.J.—The judgments of both the Courts below proceed on the assumption that the Collector's order was made under the Watandars

(1) 1 B. 633. (2) 3 B. 72. (3) 1 B.H.C.R. App. xviii.

Act of 1874. The decisions in *Jamal valad Ahmed* v. *Jamal valad Jallal* (1) and *Daudsha* v. *Ismalsha* (2) are, however, conclusive that the office of Kazi is not an hereditary one, unless perhaps by a special custom of a locality, and there is no evidence of any such established custom in this case. The [106] Watandars Act, III of 1874, relates to watan property, which by that Act is defined to be "property acquired or assigned for providing remuneration for the performance of the duty appertaining to an hereditary office." The properties in question which, by the *sanad*, were attached to the office of Kazi were, therefore, not watan property under the Act, and not such as the Collector had power to recover from the defendants under s. 9 of the Watandars Act.

However, an examination of the Collector's order shows that he acted under a Resolution of Government (No. 512 of 1882 (3)), which he considered entitled him to order the lands to be handed over to the defendants on the ground that they had been granted for public service. That Resolution may have enabled such lands to be resumed by the Collector, but it is plain from the subsequent Resolution of Government on 25th August 1833 (4) that by the "resumption" in that Resolution was only meant the levying of full assessment from the person in occupation [107] other than the grantee and his descendants. The Collector had, therefore, no legal authority to make the order for the handing over of the properties to the defendants.

We must, therefore, reverse the decree of the Court below, and direct that the lands in question be restored by the defendants to the plaintiff as mortgagee. Appellant to have his costs throughout.

Decree reversed.

(1) 1 B. 633. (2) 3 B. 72.

(3) Bombay Government Resolution No. 512 of 1882.—Bombay Act III of 1874 does not appear to be applicable to village servants useful to the community. All the sanads which have been issued to such servants prohibit alienation of the property to which they relate. Under the terms of the settlement, land which ceases to be held as remuneration for service to the village community may be resumed. (Nairne's Hand Book, p. 526).

(4) No 6310.—Revenue Department, 25th August, 1883. RESOLUTION.—Government concur with the Commissioner, Central Division, and the Remembrancer of Legal Affairs that the terms of the settlement made in the case of village servants useful to the community should be held applicable to all cases in which their service lands have ceased to constitute the remuneration of such servants, and that the lands should be resumed at once irrespective of the date of alienation.

2. It should be borne in mind that by resumption in such instances is only meant the levy of full assessment from the person in occupation other than the original grantee or his descendants. The present holders should, therefore, be allowed to remain in possession on payment of the full assessment to which the lands are liable.

3. If the original holders or their descendants have thought proper to alienate their lands in which they had only a life interest, and have thus deprived themselves of the remuneration provided for the performance of their duties, they themselves are to blame for their own action, and the Governor in Council does not consider them to be entitled to any consideration. The full assessment to be levied in the case of these alienations should accordingly be credited to Government.

18 B. 107.

1893
JAN. 23.

APPELLATE CIVIL.

18 B. 107.

APPELLATE CIVIL.

Before Mr. Justice Candy and Mr. Justice Fulton.

ABU BAKAR SAIBA AND ANOTHER (*Original Defendants*), *Appellants v.* VENKATRAMANA VISHVESHVAR (*Original Plaintiff*), *Respondent.**
[23rd January, 1893.]

Landlord and tenant—Notice to quit—Plea of permanent tenancy.

The plaintiff sued to eject the defendants from certain land. The defendants pleaded that they were permanent tenants under a lease granted to their ancestor by the plaintiff's grandfather in 1805. The Court of first instance awarded the plaintiff's claim. On appeal, the District Judge held that the lease on which the defendants relied was one determinable on the grantee's death, but as the grantee's heirs (the defendants) had continued in possession paying the stipulated rent, they were entitled to a reasonable notice to quit. The District Judge accordingly passed a decree, directing the defendants to vacate the land at the expiry of six months from the date of the decree.

Held, that the District Judge could not, in his judgment, give the notice which the plaintiff was bound to give to his tenants. Plaintiff's suit must fail for want of notice.

[F., 6 M.L.J. 59 (61); R., 20 B. 759 (761).]

SECOND appeal from the decision of Arthur H. Unwin, District Judge of Kanara, in appeal No. 47 of 1891.

The plaintiff sued to eject the defendants from the land in dispute.

The defendants pleaded (*inter alia*) that they were permanent tenants, holding under a lease granted by the plaintiff's grandfather in 1805 to their ancestors.

The lease contained the following stipulation on the part of the lessor:—"I will take back the land when you yourself surrender it. I for my part will not ask you to quit."

[108] The Subordinate Judge held that the lease in question was a lease for life only, and that on the death of the lessee the tenancy came to an end. He, therefore, passed a decree, awarding possession of the land to the plaintiff.

On appeal, the District Judge was also of opinion that the lease was one for life, determinable on the death of the grantee. But he held that as the grantee's heirs had continued in possession paying the stipulated rent, they were entitled to a reasonable notice to quit. He, therefore, amended the decree of the Court of first instance by directing that the defendants should surrender the land in suit to the plaintiff at the expiry of six months from the date of the decree.

Against this decision the defendants appealed to the High Court.

Manckshah Jehangirshah, for appellants.—Plaintiff has not given us any notice to quit. He is not, therefore, entitled to recover. The District Judge has no power to do that which the plaintiff was bound to do. The plea of permanent tenancy which we had set up does not dispense with the necessity of a proper notice—*Vithu* v. *Dhondi* (1). That case is conclusive on the point.

Shamrao Vithal and *N. G. Chandavarkar*, for respondents.

---

* Second Appeal No. 774 of 1891.

(1) 15 B. 407.

JUDGMENT.

1893
JAN. 23.
APPELLATE CIVIL.
18 B. 107.

CANDY, J.—The District Judge held that defendants 8 to 13 were entitled to notice, and the plaintiff has taken no objection to that ruling. The District Judge, however, has in his judgment given the notice which he thought the plaintiff was bound to give his tenants. This he could not do. On the authorities collected in *Vithu* v. *Dhondi* (1) we must reverse the decree of the District Judge and reject the claim. All costs on plaintiff.

Decree reversed.

---

18 B. 109.

[109] APPELLATE CIVIL.

Before Mr. Justice Candy and Mr. Justice Fulton.

PARSHOTAM VISHNU (*Original Plaintiff*), *Appellant v.* NANA PRAYAG (*Original Defendant*), *Respondent.** [23rd January, 1893.]

Registration Act III of 1877, *s.* 17 (*d*)—*Lease—Lease for life of the lessee—Registration.*

A lease of immoveable property for the life of the lessee is a lease for a term exceeding one year. It, therefore, requires registration.

SECOND appeal from the decree of Khan Bahadur N. N. Nanavati, First Class Subordinate Judge, with appellate powers, of Dhulia, confirming the decree of Rao Saheb D. S. Sapre, Second Class Subordinate Judge of Nandurbar in suit No. 994 of 1889.

The plaintiff sued to recover possession of a piece of land, alleging that it was leased by him to Nana Prayag for his life under an agreement dated 25th March, 1878; that in violation of this agreement Nana had assigned 7 gunthas of this land to defendant No. 2, and that after Nana's death his heir, defendant No. 1, refused to vacate the land.

The agreement, on which the plaintiff relied in support of his claim, provided as follows:—

"I (the lessee) shall continue to pay each year Re. 0-12-5 to you in the month of February, and I shall enjoy the said land as long as I live."

The Subordinate Judge held that the agreement in question was compulsorily registrable, being a lease falling under sub-s. 1, cl. (*d*) of s. 17 of the Indian Registration Act III of 1877; that as it was not registered, it was inadmissible in evidence; and that as it was the foundation of the plaintiff's case, he must fail. He, therefore, rejected the plaintiff's claim.

This decision was confirmed by the lower appellate Court.

The plaintiff thereupon preferred a second appeal to the High Court.

Narayan Vishnu Gokhale, for appellant.

Daji Abaji Khare, for respondent.

JUDGMENT.

[110] CANDY, J.—We consider that a lease for the life of the lessee is a lease for a term exceeding one year, as it entitles the lessee to hold for more than that period if he live so long. It is not a lease terminable at the end of a year or at the option of the lessor. It, therefore, requires registration. We confirm the decree, with costs.

Decree confirmed.

---

* Second Appeal, No. 738 of 1891.
(1) 15 B. 407.

1893

JAN. 23.

APPEL-LATE CIVIL.

18 B. 110.

18 B. 110.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Bayley.

DODHU AND OTHERS (*Original Defendants Nos.* 12 *to* 18), *Appellants* *v.* MADHAVRAO NARAYAN GADRE AND OTHERS (*Original Plaintiff and Defendants Nos.* 1 *to* 11).* [23rd January, 1893.]

Landlord and tenant—Suit for possession—Denial of landlord's title—Plea of permanent tenancy—Notice to quit—Yearly tenant—Practice—Procedure—Second appeal—Point taken for first time on second appeal—Specific performance, suit for—Parties made defendants who were not parties to the agreement.

The plaintiff sued the jaghirdars of a certain village (defendants Nos. 1 to 11) and certain of their tenants (defendants Nos. 12 to 18) for specific performance of an agreement made between the plaintiff and the jaghirdars, by which the jagirdhars agreed to give up to the plaintiff possession of certain lands, which were in possession of the tenants (defendants Nos. 12 to 18). The jaghirdars (defendants Nos. 1 to 11) pleaded that they were unable to give possession, as the tenants (defendants Nos. 12 to 18) were permanent tenants and refused to quit the land. The tenants (defendants Nos. 12 to 18) put in a separate defence, also alleging that they were permanent tenants of the jaghirdars. The lower appellate Court held that the tenants (defendants Nos. 12 to 18) were yearly tenants and did not hold in perpetuity, and that the jaghirdars (defendants Nos. 1 to 11) had power to eject them. That Court, therefore, passed a decree for the plaintiff, for specific performance of the agreement as against the jaghirdars (defendants Nos. 1 to 11) and for possession as against the other defendants (Nos. 12 to 18). The latter defendants (the tenants) appealed to the High Court. They there contended that if they were yearly tenants as held by the decree of the lower Court they could not be dispossessed without notice to quit, and that no such notice had been given.

Held (1) that the objection was good, and that no decree against the tenants (defendants Nos. 12 to 18) could be made in favour of the plaintiff, and that he was only entitled to a declaration that the said defendants were mere yearly and not permanent tenants.

[111] (2) That the tenants (defendants Nos. 12 to 18) had claimed to be permanent tenants before the suit was filed and at that time they were not tenants of the plaintiff but of the jaghirdars (defendants Nos. 1 to 11). Under the circumstances that claim could not be taken to have worked a forfeiture of their tenancy as a denial of their landlord's title, or in any case it must be deemed to have been waived by the jaghirdars (defendants Nos. 1 to 11). The plaintiff, therefore, could not rely upon it as an answer to the defendants' contention that a notice to quit was necessary.

(3) That the objection as to the necessity of notice to quit was one which might be taken in second appeal.

Held, also, that an objection that certain of the defendants should not have been made parties to a suit for specific performance, because they were not parties to the agreement, could not be taken for the first time in second appeal, as it only involved a question of practice.

[R., 17 A. 45 (47); 18 B. 256 (259); 20 B. 759 (761); 24 B. 426 (434)=2 Bom.L.R. 228; 26 B. 360 (362)=4 Bom.L.R. 58; 26 C. 927 (932)=13 C.W.N. 949=2 Ind. Cas. 656; 5 Ind. Cas. 336 (337).]

SECOND appeal from the decision of Rao Bahadur N. N. Nanavati, First Class Subordinate Judge of Dhulia with appellate powers.

Suit for specific performance of an agreement and for possession of land.

The plaintiff sued for specific performance of an agreement by which defendants Nos. 1 to 11, Bhivrao Govind and others, who were jaghirdars,

* Second Appeal, No. 394 of 1891.

agreed to grant to plaintiff a *sanad* in respect of two pieces of land and to deliver possession to him of the said lands, and that, in the event of the lands being found to contain less than 70 bighas, to give other land of the same quality in accordance with the agreement. The plaintiff also charged defendants Nos. 12 to 18, who were tenants of the jaghirdars, with colluding with them, and prayed that possession be given him by all the defendants.

Defendants Nos. 1 to 11, Bhivrao Govind and others, answered that they could not give the plaintiff the lands mentioned in the agreement, as defendants Nos. 12 to 18 were permanent tenants and were reluctant to quit, but that they were ready to give the plaintiff other land in lieu of those mentioned in the agreement.

Defendants Nos. 12 to 18 pleaded that the land called Hari Mali Vale had been granted in permanent tenancy to them by the father of defendants Nos. 1 to 8, and that as regards the other piece of land it belonged to defendants Nos. 13 to 18, and that the jaghirdars were only entitled to assessment.

[112] The Subordinate Judge found that the agreement relied on by the plaintiff was proved, and also that defendants Nos. 12 to 18 were entitled to hold the land as long as they paid assessment.

On appeal by the plaintiff the Court found that the jaghirdars had the right to eject the defendants Nos. 12 to 18, and passed a decree for specific performance as against defendants Nos. 1 to 11 and for delivery of possession as against defendants Nos. 12 to 18.

Defendants Nos. 12 to 18 preferred a second appeal.

Jardine (with *Ganpat Sadashiv Rao*), for the appellants (defendants Nos. 12 to 18).—As these defendants were not parties to the agreement of which the specific performance is sought, they were wrongly joined in the suit. A suit for specific performance of an agreement cannot lie against a stranger.

[SARGENT, C.J.—That objection was not taken in either of the lower Courts.]

Our next point is that the Judge found these defendants to be yearly tenants, and that being so the suit ought to have been dismissed, so far as they are concerned, for want of notice to quit—*Vithu* v. *Dhondi* (1).

Mahadeo Chimnaji Apte, for the respondent (plaintiff).—The objections taken have been now raised for the first time. They cannot be taken in second appeal. In the lower Courts the appellants alleged a permanent tenancy. Such a plea being a direct denial of the landlord's title, no notice to quit can be held necessary. In the case relied on, the question of permanent tenancy was raised after suit. Here the appellants disputed the plaintiff's title to possession before the suit was filed.

JUDGMENT.

SARGENT, C.J.—This was a suit by the plaintiff for specific performance of an agreement by which the defendants Nos. 1 to 11 agreed to grant plaintiff a *sanad* in respect of certain lands in their *jaghir* and to deliver possession to him of the said lands, and in the event of the lands being found to contain less than 70 bighas, to give other land of the same quality in accordance with the agreement. The plaintiff also charged defendants Nos. 12 to 18, who were tenants of the jaghirdars, with

(1) 15 B. 407.

1893
JAN. 23.

APPEL-
LATE
CIVIL.

18 B. 110.

colluding with [113] them, and prayed that possession be given him by all the defendants.

The defendants Nos. 1 to 11 by their written statement said they could not give the plaintiff the lands mentioned in the agreement, as defendants Nos. 12 to 18 were permanent tenants and were reluctant to quit, but that they were ready to give the plaintiff other lands.

The defendants Nos. 12 to 18 pleaded that the land Hari Mali Vale had been granted in permanent tenancy to them by the father of defendants Nos. 1 to 8, and that as regards the other piece of land it belonged to defendants Nos. 12 to 18, and the jaghirdar was only entitled to assessment. The agreement was found proved by the Subordinate Judge, who also held that the defendants Nos. 12 to 18 were entitled to hold the lands as long as they paid assessment. On appeal by plaintiff the Court found that the jaghirdar had the right to make the defendants Nos. 12 to 18 quit the land, and passed a decree for specific performance as against the defendants Nos. 1 to 11 and for delivery of possession against the defendants Nos. 12 to 18.

Defendants Nos. 12 to 18 now appeal on the authority of *Javherbai* v. *Haribhai* (1), and have taken the objection that defendants being strangers to the agreement, they could not be made parties to a suit for specific performance; this objection, however, was not taken in either of the Courts below, and as it only involves a question of practice cannot be taken for the first time on second appeal. It has also been objected to the decree that notice to quit not having been given to the defendants Nos. 12 to 18, who have been found by the lower Court of Appeal to be yearly tenants, a decree for possession could not be made against them. This objection raises a question on which there has been some difference of judicial opinion and decision. It was urged, indeed, that it could not be taken for the first time on second appeal. But it has been already decided, and we think rightly, that it can be so taken—*Vithu* v. *Dhondi*(2), following *Haji Sayad* v. [114] *Venkta*(3), *Abdulla* v. *Subbarayyar* (4), and *Subba* v. *Nagappa*(5). In *Vithu* v. *Dhondi* (2), where the effect of a defendant setting up a permanent tenancy by his written statement is fully discussed, it was pointed out that, according to English law, the plaintiff could not rely on a disclaimer of title operating as a forfeiture of the tenancy, when the disclaimer had been made subsequent to the day mentioned in the writ of ejectment as the time when the plaintiff was entitled to possession, and that on general principles the same rule would apply where the plaintiff, in this country, filed his suit before the disclaimer took place. In the present case, however, although there is no distinct finding on the question, it can scarcely be doubted that the defendants Nos. 12 to 18 had set up a permanent tenancy as the ground of their objection to quit before the suit was filed. Assuming this to have been so, it remains to consider what would be the effect of that claim being set up by the tenants. It is to be remarked that they were not the plaintiff's tenants when they set up the claim, and so far as the defendants Nos. 1 to 11 are concerned, it cannot, under the circumstances of the case, be taken to have worked a forfeiture of the tenancy, or in any case it must be deemed to have been waived by defendants Nos. 1 to 11.

---

(1) 5 B. 575 (577). (2) 15 B. 407. (3) 15 B. 414 (N).
(4) 2 M. 346. (5) 12 M. 353.

We are of opinion, therefore, that no decree for possession as against defendants Nos. 12 to 18 can be made in favour of the plaintiff in this suit, and that he is only entitled to a declaration that the said defendants are only yearly and not permanent tenants. We must, therefore, reverse the decree, so far as it directs the defendants Nos. 12 to 18 to deliver possession to plaintiff, and direct that a declaration be inserted in the decree that the said defendants are only in possession of the land as yearly tenants. In other respects the decree is confirmed. Appellants to have their costs of this appeal.

1893 JAN. 23. APPELLATE CIVIL. 18 B. 110.

Decree partially reversed.

---

18 B. 115.

[115] ORIGINAL CIVIL.

Before Mr. Justice Starling.

KANJI BAVLA (*Plaintiff*) *v.* ARJUN SHAMJI AND OTHERS (*Defendants*). [10th August, 1893.]

Caste-matter—Custom of caste—Funeral ceremonies—Right to assistance of fellow-members of caste—Refusal to assist—Cause of action—Suit not maintainable.

The plaintiff, a Hindu and *kharva* by caste, alleged in his plaint that, pursuant to a usage of his caste, he, on the occasion of his child's death, called upon the defendants, who were his caste-fellows, to assist him in removing the dead body and performing caste ceremonies incidental thereto; that the defendants refused to do so, and induced other members of the caste to refuse also; that, in consequence thereof, the plaintiff was injured in his caste-*status*, and he prayed for a declaration that the defendants' acts were unlawful, and that he was lawfully entitled to exercise and enjoy all his customary caste-rights and privileges; and also for damages and for an injunction restraining the defendants from preventing other members of the caste from recognising him and treating him as a member of the caste.

Held, that the plaint disclosed no cause of action, and must be rejected.

[Rel., 26 B. 174 (182) = 3 Bom. L. R. 718.]

IN chambers. The plaintiff presented a plaint alleging that he was a member of the *kharva* caste of Hindus in Bombay; that it was a custom in the caste that, in case any death took place in the house of any member of the caste, such member was entitled to call upon his caste-fellows to assist him in the removal of the dead body to the burial-ground and to take part in performing the customary caste ceremonies connected with the funeral; that in January, 1893, his child died, and he called upon the defendants, two of whom were trustees of the caste, to aid him and take part in the customary performance of caste rites, but they maliciously and without any cause refused to do so, and induced others also to refuse, and that, in consequence thereof, the plaintiff suffered in his *status* and character as a member of the caste, and was treated as if he had been out-casted. He prayed for a declaration: (1) that the acts of the defendants were illegal, and contrary to the usages of the caste; (2) that he was still a member of his caste, and had done nothing to forfeit the rights and privileges of his caste, and was lawfully entitled in every respect to exercise and enjoy all his customary caste rights, and reciprocate the same to his fellow-castemen. He further prayed for damages and for an injunction restraining the defendants from

1893
AUG. 10.

ORIGINAL CIVIL.

18 B. 115.

[116] preventing other members of the caste from recognising the plaintiff as a member of the caste.

On presentation of the plaint to the Judge in chambers (Starling, J.), objection was taken that it disclosed no cause of action. Subsequently counsel appeared to argue the point.

Vicaji, for the plaintiff:—The plaintiff complains that he has been treated as an out-caste by the defendants, who are fellow-members of his caste, without cause, and without enquiry, and out of malice. He sues, therefore, to have it declared that he has not lost caste, and that the defendants' acts are unjustifiable and contrary to the usages of the caste. Such a suit is one of a civil nature and cognisable by Courts of law. In the Mofussil of Bombay it would be governed by Regulation II of 1827, s. 21 (1). That enactment expressly provides for "the trial of any suit instituted for the recovery of damages on account of an alleged injury to the caste and character of the plaintiff arising from the illegal act or unjustifiable conduct of the other party." The same Regulation declares that "no *interference* on the part of the Court in caste-questions is hereby warranted." The present suit is not a case of such interference; for *interference* has been held not to include cases in which "evidence of the customary law of a caste" is taken, or where the law of the caste has been recognised. The Courts are free to deal "with a caste-question where the *membership* and the *character of a member* have been unjustly injured"—*Pragji Kalan* v. *Govind Gopal* (2). The Madras High Court has held that "a question of caste-*status* in respect of a caste institution "is a right of "a civil nature and within the [117] cognisance of the Civil Courts"—*Venkatachalapati* v. *Subbarayadu* (3). Loss of caste was held so far back as 1867 to be a civil wrong in *Gopal Gurain* v. *Gurain* (4), which was a suit for restoration to caste and damages for the cost of such restoration. In *Sonaram* v. *Obhoyram* (5) the Courts held a suit to gain re-admission to caste maintainable. These cases are distinguishable from suits of the class of *Raghunath* v. *Janardhan* (6) for the enforcement of sumptuary rights by plaintiffs to be invited to social entertainments.

Cur. adv. vult.

JUDGMENT.

STARLING, J.—In this case the plaintiff, who is a member of the *kharva* caste, in his plaint alleges that by a custom of the caste a member thereof, in whose family a death has taken place, is entitled to call upon the other members of the caste, apparently without limitation in number and without regard to their place of residence, to come to his house and

---

(1) Section 21, Regulation II of 1827:—

First—[The jurisdiction of the Civil Court shall extend to the cognisance of all original suits and complaints between natives and others (not British-born subjects) respecting the right to moveable or immoveable property, rents, Government revenues, debts, contracts, marriage, succession, damages for injuries, and generally of all suits and complaints of a civil nature], it being understood that no interference on the part of the Court in caste questions is hereby warranted, beyond the admission and trial of any suit instituted for the recovery of damages on account of an alleged injury to the caste and character of the plaintiff, arising from some illegal act or unjustifiable conduct of the other party. (See also Schedule to Act XIV of 1869).

(2) 11 B. 534. (3) 13 M. 293. (4) 7 W. R. 299.
(5) S. D. A. R. 1847, p. 106. (6) 15 B. 599.

assist in the removal of the dead body to the burial-ground and to take part in performing the customary caste ceremonies incidental to the funeral. He further alleges that, on the 19th January, 1893, on the death of a child, then a few days old, the defendants—two trustees and three members of the caste—refused to assist him in removing the dead body, and induced others of the caste to refuse also, in consequence of which the plaintiff and his family have suffered in their *status* and character, as the treatment they have received is such as would be meted out to those who were outcasted. He then asks that it may be declared that the aforesaid acts of the defendants were illegal and contrary to the usages of the caste; that he may be declared to be lawfully entitled to exercise and enjoy all his customary caste rights; that the defendants may be restrained from preventing other members of the caste from recognising the plaintiff as a member of the caste, and for damages.

When the plaint was first presented to me I refused to admit it until I had heard the attorney on the record, or counsel on the point, whether the plaint disclosed any cause of action cognizable by the Civil Courts. Accordingly Mr. Vicaji appeared and argued **[118]** that point. He cited Regulation II of 1827. s. 21; *Pragji Kalan* v. *Govind Gopal* (1), which, however, involved a question of the right to caste property; *Gopal Gurain* v. *Gurain* (2), which was a suit for a declaration of the plaintiff's right to be restored to caste and for the cost of such restoration; and *Venkatachalapati* v. *Subbarayadu* (3), which was a suit for a declaration of the plaintiff's right to enter a certain portion of a *quasi*-public building, *viz.*, a Hindu temple. None of these cases seem to me to govern the present one, which, in my opinion, belongs to that class which has often been before the Courts, and in which relief has been constantly refused, *viz.*, where the plaintiff has sought a declaration that he is entitled to be invited to dinner with his fellow-castemen, and to insist upon their coming to dinner with him. I think this case is on all fours with that of *Sudharam* v. *Sudharam* (4), where the plaintiff had invited the defendants to a dinner party, which invitation they had accepted, but did not come. At the end of his judgment, Bayley, J., after citing *Joy Chunder* v. *Ramchurn* (5), said: "No decree can be executed declaring a person's right to the membership of a society, as the effect of such a decree would be to require that other persons do accept the plaintiff's invitation and do partake of his food though against their will, and that they in their turn must give him similar invitations and dine with him whether they like to do so or not." This case was cited and followed in *Raghunath* v. *Janardhan* (6), wherein the case of *Shankar* v. *Hanma* (7) was also cited. I think these cases and the majority of the older cases, collected and reported in 3 Beng. L. R. (A. J.) 91 show that the present suit is not maintainable, as the decree to be of any effect would have to declare that all members of the *kharva* caste whom the plaintiff chose to call to his house on the occasion of a death in his family, must go, whether they were willing or not; and that the defendants were never to state any reason to any of their fellow-members why they should not accept the plaintiff's invitations, and I fail to see how such a decree could be enforced.

[119] Consequently I shall follow the decision in *Sudharam* v. *Sudharam* (4). If the defendants are in fault at all it is because they

---

(1) 11 B. 534. (2) 7 W.R. 299. (3) 13 M. 293. (4) 3 B.L.R. (A.J.) 91.
(5) 6 W.R.C.R. 325. (6) 15 B. 599. (7) 2 B. 470.

1893
AUG. 10.
——
ORIGINAL CIVIL.
——
18 B 115.

have broken some social rule of the caste, and in such a case it is to the caste the plaintiff must go for redress. There is no question of property involved, nor can I see that the defendants have by their alleged acts slandered the plaintiff so as to give him a right to sue for damages. I, therefore, reject the plaint.

Attorney for the plaintiff:—Mr. *J. C. Cama.*

---

18 B. 119.

ORIGINAL CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Bayley.

KATHIAWAR TRADING COMPANY, LIMITED, IN LIQUIDATION *(Original Plaintiffs), Appellants v.* VIRCHAND DIPCHAND *(Original Defendant), Respondent.** [15th and 22nd September, 1893.]

Company—Directors of company—Liability of directors for funds of company applied in transactions ultra vires*—Dealing in shares of other companies—Stale demand—Limitation—Limitation Act (XV of 1877), s. 10.*

The plaintiff company was formed in 1864. By its memorandum of association its object was declared to be commission agency and general trading in cotton and also in goods and commodities suited for market in the interior of India. The memorandum contained the following words:—"If found desirable, the company may effect purchases of cotton and produce in Bombay and ship to England and carry on such local trade as may seem profitable." The company went into liquidation in 1867. In April, 1890, the present suit was filed against the defendant, who had been one of the directors of the company, and it was alleged that after the formation of the company the defendant and his co-directors had carried on speculative dealings in shares of other companies and had used the funds of the company for this purpose, which was not warranted by the memorandum of association. The plaintiffs alleged that their dealings, which were duly set forth in their plaint, had resulted in a heavy loss to the company, and they now sought to recover from the defendant the sum of Rs. 3,37,700-13-5. There had been originally five directors of the company, but at the date of suit two of them were dead and two had become insolvent. The plaint was filed in April, 1890.

Held (affirming the decision of Parsons, J.) (1) that the memorandum of association did not justify the directors of the company in dealing in shares of other companies, and that the transactions complained of by the plaintiffs were *ultra vires.*

(2) That the directors were liable to replace the moneys of the company which they had misapplied by applying them to a purpose which was *ultra vires.*

[120] (3) That s. 10 of the Limitation Act (XV of 1877) does not apply to directors of companies, the directors not being persons in whom the property of the company is vested as contemplated by that section.

(4) That in any case the staleness of the demand was a valid defence to the action, the liquidators of the company having had full knowledge of the facts since the company went into liquidation, but no suit was filed until the expiration of twenty-three years.

[R., 18 B. 401 (424).]

SUIT to recover Rs. 3,37,700 from the defendant, who had been a director of the company.

The company was duly registered as a limited company on the 23rd June, 1864, under Act XIX of 1857. Its capital was Rs. 12,50,000 divided into 125 shares of Rs. 10,000 each.

---

* Suit No. 187 of 1890.

1893
SEP. 22.

ORIGINAL CIVIL.

18 B. 119.

The company went into liquidation in 1867, and at the date of suit was still in liquidation (see para. 16 of the plaint, *infra*).

The following were the objects of the company as stated in the memorandum of association :—" Commission agency and general trading in cotton and other staple products to be procured, as far as possible, direct from the producers in Kathiawar, Gujarat, Marwar and other parts of the interior of this country; disposing of them either in Bombay or shipping them to England; commission agency and general trading in goods and commodities suited for market in the interior of India, introducing cotton *churkas* in the interior; or erecting factories, establishment and agencies for trading purposes. If found desirable, the company may effect purchases of cotton and produce in Bombay and ship to England and carry on such local trade as may seem profitable."

The plaint after stating the above facts set forth that the directors of the company were Virchand Dipchand (the defendant), Bharmal Parbut, Jugjivandas Hemji, Gopalrao Bulwant and Dowlatchand Hukumchand, who, as such, were entrusted with, and had the management and control of, the funds of the said company.

The plaint then stated that after the formation of the company the said directors speculated with the company's funds in the purchase of shares in other companies and invested and applied large portions of the funds of the company in the purchase of such shares. It set forth, in detail, the various dealings complained [121] of, which resulted in heavy losses to the plaintiff company, and then continued :—

" The plaintiffs say that the said purchases of shares and the application of the funds of the said company in manner aforesaid were wholly unauthorized by the memorandum and articles of association of the said company and were breaches of trust on the part of the said directors. The plaintiffs believe that some of the shares purchased as aforesaid were the shares of one or other of the said directors, and in particular the plaintiffs say that the said shares of the Imperial Banking and Trading Company, Limited, were purchased from the defendant.

" 15. The plaintiffs also say that the said directors in the case of some of the said purchases when they had not moneys of the said company in their hands, sufficient to pay for the same, obtained money for that purpose on the credit of the said company.

" 16. In consequence of the funds of the company having been applied as aforesaid, the said company was unable to meet its liabilities, and it was duly resolved to wind the same up voluntarily, and by an order on the 21st January, 1867, it was ordered that the same winding up should be continued under the supervision of this Court. Pestonji Merwanji Narielwalla, the official liquidator of the said company, having been appointed to that office, by an order dated the 6th day of July, 1886, is now winding up the affairs of the company.

" 18. The plaintiffs submit that under the circumstances aforesaid the defendant is liable to repay to the plaintiffs the said sums aforesaid, amounting in all to Rs. 3,37,700-13-5 and interest thereon at the rate of 9 per cent. per annum from the said 21st January, 1867."

The plaintiff company accordingly claimed to recover the said sum from the defendant. The suit was filed on the 2nd April, 1890.

Of the five directors above mentioned, two (*viz.*, Bharmul Parbut and Dowlatchand Hukumchand) were dead at the date of the suit, and two (*viz.*, Jugjivan Hemji and Gopalrao Bulwant) had become insolvent.

1893
SEP. 22.
ORIGINAL CIVIL.
18 B. 119.

In his written statement the defendant admitted that the company traded in shares, and alleged that trading in shares was at the time one of the principal trades in Bombay, and seemed to be and was considered to be a profitable trade. He stated that some of the plaintiffs' transactions had resulted in loss and some in profit, and he submitted that the plaintiffs were not entitled to select exclusively those transactions in which there was a loss. He admitted all the transactions set forth in the plaint, which he said appeared in the company's books and were known to the liquidator in the year 1867 when the company went into liquidation. [122] He denied all liability to the plaintiff company, and submitted that the said transactions in shares were not *ultra vires* of the company or of the directors. The concluding clauses of his written statement were as follows:—

"7. Neither the defendant or his co-directors ever concealed or attempted to conceal from any one that the plaintiff company had carried on the said share transactions as part of their business, nor had they any reason to do so, as they believed that such transactions were *intra vires* of the plaintiff company.

"8. This defendant says that this suit, brought twenty-three years after the plaintiff company went into liquidation, is barred by the Limitation Acts in force from time to time during that period."

At the hearing the following issues (*inter alia*) were raised:—

(1) Whether the claim in this suit is barred by the law of limitation?

(2) Whether, apart from the law of limitation, this claim is unsustainable as being a stale demand?

(3) Whether the purchases of shares and the application of the funds of the company stated in the plaint, were unauthorized by the memorandum and articles of the company as alleged?

Lang (Acting Advocate-General) and *Scott*, for plaintiffs.

Macpherson and *Inverarity*, for defendant.

The judgment of the Court (Parsons, J.) was as follows:—

30*th January*, 1893. PARSONS, J.—(After stating the facts and referring to the pleadings his Lordship said):

I will deal with the third issue first. It is contended for the defendant that the words in the third clause of the memorandum of association —"carry on such local trade as may seem profitable"—would include the purchase of the shares in question. I am not, however, able to assent to this contention. Speculative dealing in shares is not trade in the usual sense of the term, and the memorandum itself clearly shows that the trade of the company was to be in cotton and produce only, certainly not in shares. I find the third issue in the affirmative.

The first issue raises the question of limitation, and its decision depends upon whether s. 10 of the Limitation Act (XV of 1877) applies to the case or not. It can do so only if the defendant as a director of this company was a person in whom property had [123] become vested in trust for some specific purpose. The point is not without authority. [In *In re Oxford Benefit Building and Investment Society*(1) Kay, J., says: "It is settled by authorities which I cannot dispute, that(1) directors are *quasi*-trustees of the capital of the company, (2) directors who improperly pay dividends out of capital are liable to repay such dividends personally upon the company being wound up * * * * and (5) such an act is a

(1) 35 Ch. D. 502 (509).

breach of trust and the remedy is not barred by the statute of limitation."] In *In re Sharpe*; *In re Bennett*; *Masonic and General Life Assurance Company* v. *Sharp* (1), Lindley, L.J., says: "A director of a company is certainly not a mere agent. It is his duty, amongst other things, to protect the company and to enforce its rights even against himself, and the conflict between his interest and his duty when he has misapplied the company's money prevents the statute of limitations from applying to an action brought against him by the company in order to recover such money;" and I take it from Buckley in his work on Companies, pp. 495 to 497 (6th Ed.), that directors are undoubtedly trustees of the powers entrusted to them as between themselves and the shareholders, for the assets of the company are entrusted to them to be applied for certain defined objects, and they are responsible as for a breach of trust if they apply them to other objects. There can, therefore, I think, be no doubt that s. 10 does apply to the present suit; for, as ruled by their Lordships of the Privy Council in *Balwant Rao Bishwant* v. *Purun Mal* (2), the expression "for the purpose of following in his or their hands such property" means for the purpose of recovering the property for the trusts in question; that when property is used for some purpose other than the proper purpose of the trust in question it may be recovered without any bar of time from the hands of the persons indicated in the section. I find the first issue in the negative.

The second issue raises the question of staleness of demand. The principle and application of the doctrine of laches is set out most clearly in the judgment of Sir Barnes Peacock in the case of *Lindsay Petroleum Co.* v. *Hurd* (3). In his judgment **[124]** (p. 239) he says: "The doctrine of laches in Courts of Equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has by his conduct done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct aud neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases lapse of time and delay are most material. But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances, always important in such cases, are, the length of delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy." The same doctrine is discussed in the cases of *Erlanger* v. *New Sombrero Phosphate Co.* (4) and *In re Mammoth Copperopolis of Utah* (5).

A consideration of those cases and of the remarks also in the case *In re Sharpe* (1) leads me to the conclusion that if there ever was a case to which the principle ought to be applied, the present is such a one; for here the dealings were perfectly open and above board, they were fully set out in the books of the company and must have been known to the shareholders and to all the liquidators since the winding up, and yet the suit is not

---

(1) L.R. (1892) 1 Ch. 154 (167). (2) 10 I. A. 90. (3) L.R. 5 P.C. 221.
(4) 3 Ap. Ca. 1279. (5) 50 L. J. (Ch.) 11.

1893
SEP. 22.
—
ORIGINAL
CIVIL.
—
18 B. 119.

brought until after the expiration of twenty-four years. There is no allegation of fraud, and the directors of this company were only doing what in those times was universal, and are not shown to have been actuated by any other motive than desire for the welfare and benefit of the company. It seems to me that the length of the delay in the present case and the nature of the acts done during the interval and the changed circumstances of the defendant would make it very inequitable and unjust now to award the [125] claim. I find the second issue in the affirmative, and dismiss the suit, but without costs.

The plaintiffs appealed, on the ground that the Judge was wrong in holding—

(1) that the alleged staleness of the claim disentitled them to a decree;

(2) that the doctrine of laches had any application to the case;

(3) that the delay and the nature of the acts done during the interval and the changed circumstances of the defendant would render a decree for the plaintiffs unjust and unequitable.

The defendant also filed cross objections to the decree. He contended that the Judge erred (1) in not holding that the suit was barred by limitation; (2) in holding that the words "local trade" in the memorandum and articles of association of the company did not include dealing in shares.

Lang (Acting Advocate General) and *Scott*, for the appellants (plaintiffs) :—The defendant was one of the directors of the company. As such he was a trustee. He and his co-directors invested the money of the company in the purchase of shares. The Court below has found the first and third issues in our favour, but has dismissed the suit, as it found the second issue for the defendant. Under the memorandum of association the directors were not justified in dealing in shares—*In re Asiatic Banking Corporation* (1); Chadwyck Healey on Companies, p. 21; *Ashbury Railway Carriage, &c., Co.* v. *Riche* (2). As to whether the suit was barred by limitation, the following authorities were cited :—Section 10 of the Limitation Act (XV of 1877); *Metropolitan Bank* v. *Heiron* (3); *Balwant Rao* v. *Purun Mal* (4); *In re Oxford Benefit Building and Investment Society* (5); *Flitcroft's case* (6); *Ramskill* v. *Edwards* (7); Buckley on Companies (6th Ed.), pp. 495 to 497; *In re Hallett's Estate* (8).

Where the Act of Limitation applies, the equitable doctrine with regard to staleness of claim does not apply. They referred [126] to Buckley on Companies (6th Ed.), p. 411; *Stringer's Case* (9); *Erlanger* v. *New Sombrero Phosphate Co.* (10); *Rama Rau* v. *Raja Rau* (11); *Peddamuthulaty* v. *N. Timma Reddy* (12); *Tarack Chunder Bhuttacharjee* v *Huro Sunkur Sandyal* (13); *In re Sharpe, &c.* (14); *The New Fleming Spinning and Weaving Co.* v. *Kessowji Naik* (15); *Juggernath Sahoo* v. *Syud Shah Mahomed* (16); *In re Hallett's Estate* (17); *Cunningham* v. *Foot* (18); *Lindsay Petroleum Co.* v. *Hurd* (19); *In re Mammoth Copperopolis of Utah* (20); *In re Alexandra Palace Co.* (21).

---

(1) L. R. 4 Ch. 252.
(2) L. R 7 H. L. 653.
(3) 5 Ex. D. 319.
(4) 10 I. A. 90.
(5) 35 Ch. D. 502 (509).
(6) 21 Ch. D. 519.
(7) 31 Ch. D. 100.
(8) 13 Ch. D. 696.
(9) L. R. 4 Ch. 475.
(10) 3 Ap. Ca. 1218 (1278).
(11) 2 M H C.R. 114.
(12) 3 M.H.C.R. 270.
(13) 22 W.R. C. R. 267.
(14) L.R. (1892), 1 Ch. 154.
(15) 9 B. 373.
(16) 2 I.A. 48.
(17) 13 Ch. D. 709.
(18) 3 Ap.Ca. 974.
(19) L R. 5 P.C. 221.
(20) 50 L.J. (Ch.) 11.
(21) 21 Ch.D. 149.

1893
SEP. 22.
ORIGINAL
CIVIL.
18 B. 119.

Inverarity (with *Macpherson*) for the respondent (defendant).—We contend that the Limitation Act (XV of 1877) applies to this case, and that the suit was barred at the end of six years by art. 120 of the schedule of that Act. In cases to which s. 10 of that Act applies it is true that no lapse of time is a bar to an action. But that section does not apply here. It applies only when the suit is a suit against "persons in whom property has been vested in trust for some specific purpose." But a director of a company is not such a person. He is not a trustee, and he is not a person in whom property is vested for a purpose. He is, no doubt, in a fiduciary position and may be guilty of a breach of duty or a breach of trust, but that does not necessarily make him a trustee. Persons in a fiduciary position are loosely and for convenience called trustees, but they are not necessarily trustees. Section 10 does not apply to all persons in a fiduciary position. It does not apply to all cases of breach of duty or breach of trust. It is expressly limited to breaches of trust by persons who are strictly and properly trustees. Compare Stat. 3 and 4 Will. IV, s. 25, from which s. 10 is taken. For a definition of breach of trust, see Wharton's Law Lexicon, p. 102. No person is properly called a trustee except a person in whom property is vested. Directors of a company have merely an authority or power to manage the property of the company, but no estate is vested in them. As to the meaning of "vest," see **[127]** Lord Westbury's judgment in *Dickenson* v. *Teasdale* (1); *Kherodemoney* v. *Doorgamoney* (2); *Coverdale* v. *Charlton* (3); *Greender* v. *Mackintosh* (4). Compare the Indian Insolvent Act (Stats. 11 and 12 Vic., c. 21), s. 7; Act V of 1881, s. 4; Bombay Municipal Act III of 1888, s. 298; *Rolls* v. *The Vestry of St. George, the Martyr of Southwark* (5); *Queensbury Industrial Society* v. *Pickles* (6); Lindley on Companies (5th Ed.), pp. 364—374. Directors are not trustees: see per Bowen, L. J., in *Imperial Hydropolis Hotel Company* v. *Hamson* (7); *In re Faure Electric Accumulator Co.* (8); *Sheffield, &c., Building Co.* v. *Aizlewood* (9); *Knowles* v. *Scott* (10); *Smith* v. *Anderson* (11); *The London Trust Co.* v. *Mackenzie* (12).

Under the Indian Trusts Act a director is not a trustee: see s. 3. That Act regards a trustee as owner of the property: see s. 88. Counsel also cited *Balvantrav* v. *Purshotam* (13); *Umiashankar* v. *Chhotalal* (14); *Luchmee Buksh Roy* v. *Runjeet Ram Panday* (15); *Greender* v. *Mackintosh* (4); *Kherodemoney* v. *Doorgamoney* (2); *Arunachala* v. *Ramasamya* (16); *Thackersay Dewraj* v. *Hurbhum Nursey* (17); *Zemindar of Palcondah* v. *Secretary of State for India* (18); *Balwant Rao Bishwant* v. *Purun Mal* (19); Lindley on Company Law (5th Ed.), p. 526; *Trevor* v. *Whitworth* (20). We contend that the suit is barred by limitation.

Lang, in reply, as to the meaning of the word "vest" referred to *Sethu* v. *Krishna* (21); *Sethu* v. *Subramanya* (22); *Metropolitan*

(1) 1 DeG.J. and S. 52 (59).
(2) 4 C. 455.
(3) 4 Q.B.D. per Butt, J. 120.
(4) 4 C. 897.
(5) 14 Ch. D. 785.
(6) L.R. 1 Ex. 1.
(7) 23 Ch. D. 12.
(8) 40 Ch. D. 141 (150).
(9) 44 Ch. D. 452.
(10) L.R. (1891), 1 Ch. 722.
(11) 15 Ch. D. 275.
(12) 62 L. J. Ch. 870.
(13) 9 B. H. C. R. 99 (111).
(14) 1 B. 19.
(15) 13 B. L. R. (P.C.), 177.
(16) 6 M. 402.
(17) 8 B. 432.
(18) 12 I. A. 120.
(19) 10 I. A. 90.
(20) 12 Ap. Ca. 409.
(21) 14 M. 61.
(22) 11 M. 274 (279).

1893
SEP. 22.

ORIGINAL CIVIL.

18 B. 119.

Bank v. *Heiron* (1); Stroud's Judicial Dictionary (1890); The English Judicature Act, 1873, s. 25.

JUDGMENT.

[128] SARGENT, C. J.—The suit, which has given rise to this appeal, was brought by the liquidator of the Kathiawar Trading Company against the defendant, who was one of the directors during the short existence of the company before going into liquidation, to recover the balance of money expended by the directors in the purchase of shares of various companies, and which have not been accounted for, on the ground that such share transactions were *ultra vires*, the company and, therefore, the directors. The transactions as alleged in the plaint are not disputed by the defendant, who is the only surviving director with the exception of Jugjivan Hemji and Gopalrao Bulwant, who have become insolvents.

The first question, therefore, for consideration is whether the trading in shares by the directors was within the words of the memorandum of association, which determines the purposes for which the company was incorporated. (His Lordship read the clause in the memorandum above set forth and continued :—)

It has been contended for the defendant that it came within the general words "and carry on such local trade as may seem profitable." It would, we think, be difficult to say that the term "trading" necessarily excludes trafficking in shares ; but such general words must, according to well-established principles of construction, be read in conjunction with what has gone before in the memorandum. The case of *Ashbury Railway Carriage, &c., Company* v. *Riche* (2) is a good illustration of the application of that principle of construction. Now the primary object for which this company was established was to do commission agency, a general trading in cotton and other staple products, to be procured, as far as possible, from the producers in Kathiawar, Gujarat, Marwar and parts of the interior of the country, with the view of disposing of the same either in Bombay or shipping them to England ; and, secondly, general trading in goods and commodities suited for the market in the interior of India. So far the object of the company (as stated by the memorandum of association) is to trade with the interior of India ; but, if found desirable, the company might purchase cotton and produce in [129] Bombay and ship to England and "carry on such local trade as might seem profitable." In other words, the memorandum contemplates the possibility of its being found desirable to purchase cotton and produce in Bombay for the purpose of shipping to England and carrying on such local trade as may seem profitable." By "such local trade" must be meant trade in Bombay of the same nature as before mentioned, *viz.*, goods and commodities ;" the choice being left as to the particular goods and commodities they should trade in. "Goods and commodities" cannot, we think, according to the ordinary use of those terms, be held to include, "shares in companies," and we agree, therefore, with the Judge of Division Court that the transactions were *ultra vires*.

Assuming, then, that the moneys of the company were misapplied by the directors in the sense of being applied to a purpose, which was *ultra vires*, there can be now no doubt, upon the English authorities that the directors are liable to replace the moneys. I need only refer to the judgment of Sir G. Jessel in *In re National Fund Association*(3) where the payment of dividends out of capital was held to be *ultra vires*, and of Lord Justice Lindley

(1) 5 Ex. D. 325. (2) L. R. 7 H. L. 664. (3) 10 Ch. Div. 128.

in *In re Sharpe*(1) when he says " as soon as the conclusion is arrived at that the Company's money has been applied by the directors for purposes which the company cannot sanction, it follows that the directors are liable to replace the money, however honestly they may have acted."

The more difficult question in the case remains for consideration, namely whether the right to recover the moneys by the liquidator is barred by the Act of Limitation or by the staleness of the demand on the principles laid down by the Privy Council in *Lindsay Petroleum Co.* v. *Hurd*(2) and Lord Blackburn in *Erlanger* v. *New Sombrero Phosphate Co.*(3). Apart from the operation of s. 10 of the Act of Limitation on which the plaintiffs rely, such a claim would be barred, we apprehend, in six years under art. 120 of the Act, which period has long expired, and it has been contended for the defendant that the language of the above section is not applicable to the present case. Now that directors are *quasi*-trustees in respect of the capital **[130]** of the company, and it is said that, in the event of their applying the funds of the company in a manner which is *ultra vires* the memorandum of association, the relief which the Court will give against them is not barred by the Statute of Limitations is treated as settled law by Kay, J., in *In re Oxford Benefit Building and Investment Society*(4), and was so regarded by the Court of Appeal in *In re Sharpe* (1).

It is, however, to be remarked that directors of a company are precluded, in England, from pleading the bar of the statute by virtue, either of a general rule of the Court of Equity applicable to all trustees or *quasi*-trustees, or else by the Judicature Act of 1873, which is applicable to all persons "holding" property upon trust, but that the question, whether they are precluded in this country, depends exclusively upon whether they can, in the language of s. 10 of the Statute of Limitations, be regarded as "persons in whom the property of the company is vested in trust for a specific purpose." It is certainly not vested in them, as is the case with trustees of a settlement or will. Lord Justice James remarks on this distinction in *Smith* v. *Anderson.* (5) He says : "The same individual may fill the office of director and also be a trustee having property, but that is a rare, exceptional and casual circumstance."

Mr. Justice Kay in *In re Faure Electric Accumulator Co.* (6) alluding to the same distinction says : "One obvious distinction, (*i. e.*, between directors and trustees of a settlement or will), is that the property of the company is not legally vested in them, but at the same time they have large powers of management and control vested in them over the property of the company." It is doubtless by reason of such management and control that they are held liable for the misappropriation of the trust funds, as explained by Sir G. Jessel in *In re Forest of Dean Coal Mining Company*(7) but it is certainly contrary to the ordinary accepted meaning of the term "vesting" to say that property is vested in persons by reason merely of their having control over it. "Vesting" as explained by Brett and Cotton, JJ., in *Coverdale* v. **[131]** *Charlton*(8) when applied to the subject-matter of property according to its ordinary legal acceptation gives the property in it and not merely the control over it. Again, in *Dickenson* v. *Teasdale*(9) Lord Westbury construing " vesting " in 3 and 4 Will. IV s. 25, which is substantially the same as s. 10 of the Limitation Act of 1877, c. 27, held that "vesting" implied property in the subject-matter that a person who

---

(1) L. R. (1892) 1 Ch. 165. (2) L. R. 5 P. C. 221. (3) 3 Ap. Ca. 1218.
(4) 35 Ch. D. 509. (5) 15 Ch. D. 275. (6) 40 Ch. D. 150.
(7) 10 Ch. D. 451. (8) 42 Q.B.D. 120. (9) 1 Deg. J. & S. 52.

1893
SEP. 22.
ORIGINAL CIVIL.
18 B. 119.

had merely power to charge the land did not, therefore, come under the section. On the whole, although directors of a company are *quasi*-trustees, we think it would be unduly straining the language of s. 10 to say that they are persons in whom the property of the company is vested as contemplated by that section. It may perhaps be subject of regret that such should be the conclusion on the language of the section. If so, it will be for the Legislature to amend the section.

This is sufficient for the decision, but we think it right to express an opinion that, in any view of s. 10, the staleness of the present demand is a valid defence to the action. In *In re Mammoth Copperopolis of Utah*(1), Hall, V. C., held that the claim against the directors could not be enforced on the ground of great default on the part of the liquidators and the difficulty in which the directors would be consequently placed by such default. It is true that in *In re Sharpe* two of the Lords Justices, Lindley and Fry, L. JJ., reserved their opinions whether the doctrine of staleness of the demand is applicable to a demand against directors to restore the funds applied *ultra vires*, but as the liquidation is for the purpose of settling all claims arising out of the working of the company and all interests, whether of the creditors or the shareholders, are fully represented for that purpose by the liquidators, it is difficult to understand why the doctrine when the liquidators are in fault should not equally apply to such a demand. In the present case the liquidators, as admitted by the present liquidator, had full knowledge that the capital of the company had been applied in trafficking in shares. That is shown by the directors' report and the schedule of debts **[132]** produced by the liquidators at the commencement of the liquidation. Nevertheless the liquidators never made any claim or took any steps to make the directors liable until the present suit was brought. During the long period of twenty-three years which has elapsed since the company went into liquidation the co-directors of the defendant have either died or become insolvent, and the defendant's right to contribution from them in the event of his being held liable is thus rendered practically valueless—a circumstance much relied on by Lord Campbell, in *Bright* v. *Legerton* (2), as showing the unreasonableness of a stale demand in that case and which the cases show is the foundation of the doctrine. In *Erlanger* v. *New Sombrero Phosphate Co.*, Lord Blackburn says: "It must always be a question of more or less dependence on the degree of diligence which might reasonably be required and the degree of the change which has occurred whether the balance of justice or injustice is in favour of granting the remedy, or withholding it." In the present case, after such a period of time and such changes, we cannot doubt the balance is in the favour of the latter, and that the Division Court was right in so holding.

For these reasons we must confirm the decree, except as to costs. The plaintiff to have his costs here and in the Division Court.

Decree confirmed.

Attorneys for the plaintiffs :—Messrs. *Crawford, Burder and Co.*
Attorneys for the defendant :—Messrs. *Bhaishankar and Kanga.*

(1) 50 L. J. Ch. 11.

(2) 2 DeG. F. and J. 606.

18 B. 133.

1893
JAN. 30.

APPELLATE CIVIL.

18 B. 133.

[133] APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Bayley.

GOPAL KRISHNA PARACHURE (*Original Plaintiff No.* 2), *Appellant v.* SAKHOJIRAV (*Original Defendant*), *Respondent.** [30th January, 1893.]

Khoti Act (*Bombay Act I of* 1880, *ss.* 17 †, 20 ‡, 21 § *and* 22¶)—*Entry in the Settlement Officer's record*—"*Conclusive and final evidence of the liability*"—*Reference to debate in Legislative Council*—*Construction.*

An entry in the Settlement Officer's record referred to in s. 17 of the Khoti Act (Bombay Act I of 1880) is conclusive as to the nature and amount of rent. The words "conclusive and final evidence of the liability" in s. 17 have the effect of shutting out any other evidence on the subject which might be adduced before the Civil Court.

The words "when not final" in s. 21 of the Act refer to the finality ascribed in s. 17 to the entries of the nature therein mentioned, and which follow as contemplated in s. 20 on the survey officer arriving at his decision.

For the purpose of construing an Act, the debate upon the Bill when before the Legislative Council is not to be referred to.

[F., 20 B. 475; 20 B. 729 (731); 21 B. 467 (472); **R.**, 21 B. 235 (242); 21 B. 480 (487.]

SECOND appeal from the decision of J. Fitzmaurice, Acting District Judge of Ratnagiri.

[134] The plaintiff sued to recover from the defendant the balance of profits for the years 1886-1887 and 1887-1888 on account of the cultivation of certain lands in a village of Doncavali, of which the plaintiffs' agent was the managing khot. The suit was filed on the 20th July, 1888.

Defendant contended (*inter alia*) that the plaintiff was not entitled to recover *thal* (rent in kind) for the lands which were liable only to a permanent *makta* (rent in cash); that on the 12th June, 1887, it had been decided by the Special Assistant Collector and Settlement Officer that the lands were liable to *makta*; that the suit not having been instituted within one year from the date of that decision was time-barred; that the *makta* for the year 1886-1887 was already paid, and that he was ready and willing to pay the balance of *makta* for the year 1887-1888, but the plaintiff had declined to accept it.

---

* Second Appeal, No. 725 of 1891.

The following are the sections of the Act referred to:—

† 17. The other records prepared under the said section shall specify the nature and amount of rent payable to the khot by each privileged occupant according to the provisions of s. 33, and any entry in any record duly made under this section shall be conclusive and final evidence of the liability thereby established.

‡ 20. If it shall appear to the survey officer, who frames the said register or any other record, that there exists any dispute as to any matter which he is bound to record, he may, either on the application of any of the disputant parties, or of his own motion, investigate and determine such dispute and frame the said register or other record accordingly.

§ 21. In any such matter the decision of the said survey officer, when not final, shall be binding upon all the parties affected thereby until reversed or modified by a final decree of a competent Court.

¶ 22. No suit shall lie against the said survey officer, or against Government, or any officer of Government to set aside any such decision of a survey officer; but the record from time to time be amended by the said survey officer, or when the survey settlement is concluded by the Collector, in accordance with any such decree as aforesaid which the parties may obtain *inter se* on an application, accompanied by a certified copy of such decree, being duly made to the said survey officer, or to the Collector for that purpose.

1893
JAN. 30.
APPELLATE CIVIL.
18 B. 133.

The Subordinate Judge found that the custom of the payment of the *makta* alleged by the defendant was proved: that the suit was not barred by the order passed by the Settlement Officer, but that it was barred by art. 14, sch. II of the Limitation Act (XV of 1877) only with respect to the lands comprised in that order and not with respect to others. The Subordinate Judge, therefore, allowed the claim to the extent of Rs. 28-3-10.

The plaintiff appealed to the District Court, and the defendant presented cross-objections under s. 561 of the Civil Procedure Code (Act XIV of 1882).

The District Judge held that the entries of the nature of the amount and rent contained in the decision of the Settlement Officer were absolutely final. In his judgment he said:—

"Now s. 17 of the Khoti Settlement Act, 1880, says that 'any entry in any record duly made under this section shall be conclusive and final evidence of the liability thereby established.' Sections 20 and 21 must relate to disputes as to other matters than 'the nature and amount of rent payable to the khot by each privileged occupant;' for s. 21 says 'in any such matter the decision of the said survey officer, when not final, shall be binding * * * until reversed or modified by a final decree of a competent Court.'

[135] "A distinction is plainly made between the effects of entries in regard to the particular matters referred to in s. 17 and the effects of those made under s. 20, the latter being liable to be upset by the Civil Courts, while the former are 'conclusive and final evidence of the liability thereby established.'

"That the entries under s. 17 are intended by the Legislature to be final,—that is, not liable to be upset by the Civil Court,—is, I think, shown by the debate in Council on the Bill, which took place on the 6th January, 1880." (The Judge then quoted passages from the debate and continued:—) "I am, therefore, of opinion that the entries shown in Ex. 18 referring to some of the lands in dispute are final evidence that those lands are liable to *makta* at the rates laid down."

The Judge having come to the above conclusion, the parties consented to a decree being passed for the plaintiff for the amount awarded by the Subordinate Judge with costs; the right of appealing against the decision of the Judge being reserved.

The plaintiff preferred a second appeal to the High Court.

Ganesh Krishna Deshamukh, for the appellant (plaintiff):—The lower Court has misconstrued s. 17 of the Khoti Act. That section must be read along with s. 22. An entry made by a settlement officer under the provisions of s. 17 is conclusive of the liability mentioned in the entry itself and no further. The entry is final and conclusive so long as it exists, but not for ever. Section 22 contemplates the modification of the entry made under s. 17. Section 17 should be construed in a manner consistent with the tenor of the whole Act. A Civil Court cannot go behind the entry so long as it stands, but a Civil Court may entertain a suit for the cancellation of the entry. If the Legislature had intended that the entry should be final, then the section would have ended with the word "final," and there would have been no addition of the other words. The present suit is brought for the purpose of getting the entry cancelled. In interpreting ss. 17 and 21 of the Khoti Act the Judge was wrong in

referring to the debate in the Legislative Council. Act X of 1876, s. 12, was cited.

[136] *Ganpat Sadashiv Rao*, for the respondent, was not called upon.

JUDGMENT.

SARGENT, C. J.—The District Court was wrong in referring to the debate on the bill for the purpose of construing s. 17 of the Act, but we agree with him in his conclusion that the entry in the Settlement Officer's record was conclusive as to the nature and amount of the rent. The words "conclusive and final evidence of the liability" must, in the ordinary and grammatical meaning, have the effect of shutting out any other evidence on the subject which might be adduced before the Civil Court.

It was argued indeed that s. 21 provides for the entries being only binding on the parties until the decision of the survey officer has been reversed by a competent Court, and that the words "when not final" in s. 21 refer only to such matter as by the Revenue Jurisdiction Act of 1876 has been withdrawn from the jurisdiction of the Civil Courts. If that had been the intention we should expect it to be expressed in very different terms. The object of ss. 20, 21, 22 is to point out the course the survey officer is to pursue, when there are disputes between the parties, in order to enable him to make the entries required by s. 17. And the words "when not final" can only, therefore, properly refer to the finality ascribed in s. 17 to the entries of the nature therein mentioned and which follow as contemplated by s. 20 on the survey officer arriving at his decision.

We must, therefore, confirm the decree with costs.

Decree confirmed.

---

18 B. 136.

APPELLATE CIVIL.

Before Mr. Justice Candy and Mr. Justice Fulton.

DEVSHANKAR NARANBHAI AND OTHERS (*Original Plaintiffs*), *Appellants v.* MOTIRAM JAGESHVAR (*Original Defendant*), *Respondent.** [30th January, 1893.]

Hindu law—Will—Bequest to dharmada—Dharmada—Dharma.

A bequest in favour of *dharmada* is void by reason of uncertainty. The law on this point is the same in the Mofussil as in the Presidency town.

[R., 22 B. 774 (773) ; 31 C. 895 (897)=8 C. W. N. 653.]

[137] SECOND appeal from the decision of G. McCorkell, District Judge of Ahmedabad, reversing the decree of Rao Saheb Maneklal Narotamdas in suit No. 589 of 1889.

The plaintiffs sued, as executors of the will of one Jethalal Jageshvar, to recover possession of certain moveable property belonging to the testator, or for its value, and for an injunction restraining the defendant from obstructing them in taking possession of the property in dispute.

---

* Second Appeal, No. 864 of 1891.

1893
JAN. 30.
—
APPEL-
LATE
CIVIL.
—
18 B. 136.

The material portions of the will in question were as follow:—

"After my death my executors shall cause my obsequies to be performed by my brother Motilal and his son Amritlal conformably to the custom of my caste and with reference to the amount of my property. The executors shall pay out of my property Rs. 100 to my brother Motilal and his sons. Should they not perform my funeral ceremonies the same should be performed by my sister's son. And the amount ordered to be paid to my brother should be paid to him. The ceremonies should be performed up to my anniversary. *Should any property remain after what is expended as above, the whole of it should be expended for dharmada after my death by the trustees as they think proper.*"

The defendant contended (*inter alia*) that the will was invalid, and that the residuary bequest to *dharmada* was void for uncertainty.

The Subordinate Judge held that the will was valid; that the residuary bequest was not void on the ground of uncertainty, and that the plaintiffs, as executors, were entitled to recover the property in dispute. He, therefore, awarded the plaintiffs' claim.

This decision was reversed, on appeal, by the District Judge, who held, on the authority of *Lakshmishankar* v. *Vaijnath* (1), that the bequest to *dharmada* was void, and that though the will was valid so far as it related to the performance of the funeral ceremonies and the payment of Rs. 100 to the testator's brother, the plaintiffs were not entitled to recover, as the funeral obsequies had been already performed by the deceased's brother, who was willing to allow his claim for those expenses to be merged in his general title.

[138] Against this decision the plaintiffs preferred a second appeal to the High Court.

Goverdhan M. Tripati, for appellants:—The question in this case is whether a gift in *dharmada* is void for uncertainty. The word *dharmada* is not synonymous with *dharma*. The latter is a term of very wide import, as denoting religion, charity, benevolence, virtue, justice, &c., whilst the term *dharmada* is restricted in its meaning to charitable gifts alone. Bequests to charity are valid under the English law—*In re Douglas* (2); *Wilkinson* v. *Lindgren* (3); *In re Sutton* (4); *Lewis* v. *Allenby* (5). But assuming that *dharmada* and *dharm* are convertible terms, still the law on this subject, as laid down by this High Court in the Presidency town, has no application to the Mofussil. The rulings in *Gangbai* v. *Thavar Mulla* (6) and *Cursandas Govindji* v. *Vundravandas* (7) do not govern the present case. These cases are decided by analogy to Statute 43 Eliz., c. 4. But it would be wrong to extend the analogy of this statute to cases arising in the Mofussil—*The Advocate General* v. *Vishvanath* (8); *Parmanandas Jivandas* v. *Venayekrao* (9).

Manekshah Jehangirshah, for respondent.—There is no difference in meaning between *dharma* and *dharmada*. *Dharmada* is property set apart for *dharma*. It would be wrong to restrict the meaning of *dharmada* to charitable gifts alone. The reason why a bequest to charity is valid under the English law is because the Courts of Equity in England have always attached a definite meaning to the term "charity." Has the word *dharma* such a definite meaning here? It means any kind of charitable, religious, or benevolent objects. It is too vague and uncertain. It is on this account that a bequest in *dharma* is held void. The Court cannot give any effect

(1) 6 B. 24. (2) 35 Ch. D. 472. (3) L.R. 5 Ch. 570.
(4) 28 Ch. D. 464. (5) L.R. 10 Eq. Ca. 668. (6) 1 B. H. C. R. 71.
(7) 14 B. 482. (8) 1 B. H. C. R. App. 9. (9) 7 B. 19.

to such bequest. And the law on this point is now too well settled to be called in question.

JUDGMENT.

FULTON, J.—We have carefully considered the arguments of Mr. Govardhanram, but are unable to hold that there is any real distinction between a bequest to be expended on *dharmada* and [139] a bequest for *dharm*. If it be the case that the latter is void as being too vague a specification of the objects on which the testator desired his money to be expended, it appears to us to follow that a bequest for *dharmada* must equally fail by reason of uncertainty.

Mr. Maneklal Narotamdas, in an able judgment, questioned the correctness of the decisions in which it has been held that bequests for *dharm* are ineffectual; but we think that the point has been settled in this Presidency for so long a time that it is now impossible to reconsider it. The earliest ruling on the subject to which our attention has been called is that of Sir Erskine Perry and Sir W. Yardley in the *Advocate General* v. *Damothar* (1), which was followed in *Pranjivandas* v. *Deokuvarbai* (2) by Sir M. Sausse, C.J., and recently by Mr. Justice Parsons in *Cursandas* v. *Vundravandas* (3). It was urged that these decisions were passed either by the Supreme Court or by the High Court on its original side, and were, therefore, not determinative of the law in the Mofussil; but it appears to us that in a matter of this kind there can be no difference between the law in force in the Presidency town and that of the other parts of the Presidency. The Charter of the Supreme Court required it to be guided by the laws and usages of the Hindus, just as the Mofussil Courts are bound by Reg. II of 1827 to give effect to them. It can hardly be contended that there was any established law or usage regulating the phraseology of Hindu wills in the island of Bombay at variance with the law and usage on the same subject in the district of Ahmedabad; and, therefore, it follows that, if the Supreme Court correctly applied that law and usage in the case of *Advocate General* v. *Damothar*, that application must be followed in the Mofussil just as much as in the town of Bombay. This principle appears to have been recognised by Melvill, J., in *Lakshmishankar* v. *Vaijnath* (4), in which he does not seem to have doubted that a devise to *dharm* without any qualifying expression was too vague an indication of the testator's intention to constitute a valid gift to charity, or to have questioned the propriety of relying [140] on the decisions above referred to as precedents in a Mofussil case.

Whatever, then, might have been our opinion, if the matter had come before us unaffected by previous decisions, we do not feel justified now in re-opening the subject. It is clear that, when the object of a bequest is so vaguely described that it cannot be ascertained, the gift must fail, but the exact point at which the line should be drawn between reasonable certainty and vagueness must necessarily give rise to a good deal of difference of opinion. If, then, there is to be any consistency in the decisions of Courts, and each case is not to be left to the individual opinion of the Judge who happens to try it, it is manifest that, when the vagueness of a word or expression has been pronounced in a course of decisions by Judges of high authority to be such as to render void the bequest to which it has been applied, it becomes the duty of other Judges

(1) Perry's Oriental Cases, 526.
(2) 1 B.H.C. R. 76, note.
(3) 14 B. 482.
(4) 6 B. 24.

1893
JAN. 30.
APPELLATE CIVIL.
18 B. 136.

to accept their views, unless it can be said with reasonable certainty that they are erroneous. In the present case, however, this cannot be said; for though there may be some difficulty in distinguishing between many of the objects included in the word "*dharm*" and those comprised in the term "charity," and it may be unsafe to hold that the latter covers a narrower range than the former, we think that the ground on which the decision in the *Advocate General* v. *Damodhar* was based, namely, that the reasons which led the Court of Chancery to uphold the validity of gifts to charity, were inapplicable to gifts to *dharm*, can hardly be disputed. Other reasons might possibly be assigned for holding that the expression "*dharm*" or "*dharmada*" is not vague or indefinite; but apart from English precedents, we think that this question is of so uncertain a character that we ought to be guided by the decisions of the Judges who have already considered it. In a purely discretionary matter of this kind the earlier decisions must prevail in settling the law.

We, therefore, hold that the bequest in favour of *dharmada* was void by reason of uncertainty, and confirm the decree. All costs throughout to be paid out of the testator's estate.

Decree confirmed.

---

18 B. 141.

[141] APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Bayley.

DAYABHAI LALLUBHAI AND ANOTHER (*Original Defendants Nos.* 1 *and* 4), *Appellants* v. GOPALJI DAYABHAI (*Original Plaintiff*), *Respondent.** [2nd February, 1893.]

Landlord and tenant—Joint family—Manager—Lease granted by manager—Right to sue for rent under such lease—Co-sharers—Parties—Practice.

A manager of a joint Hindu family who, as such, has granted a lease, is during his lifetime the only person to sue for rent due under the lease, but after his death his son, who has not succeeded his father in the management, cannot sue without joining the other members of the joint family as parties.

Dada v. *Bahu* (1) and *Sayad Fatula* v. *Bola* (2) followed.

[Rel., 22 M. 326 (327).]

SECOND appeal from the decision of J. B. Alcock, District Judge of Surat.

Suit for rent. The plaintiff sued the defendants for Rs. 139-8, the balance of rent for the year 1946 due on a rent-note alleged to have been passed by the defendants to the plaintiff's father Dayabhai Morarji.

Defendants Nos. 1 and 4 pleaded (*inter alia*) that they had passed the rent-note to the plaintiff's father Dayabhai as the manager of the united family to which the plaintiff belonged, and that the plaintiff could not sue alone, as the other members of the family had a share in the sum sued for.

Defendants Nos. 2 and 3, Bhula Sura and Bhimbhai Bhulabhai, admitted the claim.

---

* Second Appeal No. 884 of 1891.

(1) P.J. 1876, p. 11.

(2) P.J. 1884, p. 33.

1893
FEB. 2.
APPELLATE CIVIL.
18 B. 141.

The Subordinate Judge held that the plaintiff could not sue alone, as the land in question was admittedly joint family property, and that the plaintiff was not shown to be manager of the family. He held that the other co-sharers were necessary parties, and he, therefore, dismissed the suit as against defendants Nos. 1 and 4.

On appeal by the plaintiff, the District Judge held that, as the defendants had paid rent to the plaintiff, they were estopped from disputing his title to receive rent from them, and that the other members of the family were not necessary parties. He reversed the lower Court's decree and awarded the plaintiff's claim.

[142] Defendants Nos. 1 and 4 preferred a second appeal.

Manekshah J. Taleyarkhan, for the appellants (defendants) :—The plaintiff succeeded his father as one of the heirs, but not as manager of the family. Therefore, the suit brought by him alone without joining the other co-sharers, who are equally interested in the estate, cannot lie.

Mahadeo Chimnaji Apte, for the respondent (plaintiff). He cited *Dada* v. *Bhau* (1) ; *Sayad Fatulla* v. *Bola* (2) ; *Jethu Jadhavji* v. *Ganpatrav*(3).

JUDGMENT.

SARGENT, C. J.—The decisions in *Dada* v. *Bhau* (1) and *Sayad Fatulla* v. *Bola* (2) show doubtless that the plaintiff's father, who was manager and has such granted the lease, was the only person to sue for the rent whilst he was alive. But when he died, the plaintiff did not succeed to the management, and had, therefore, no exclusive right to sue for the rent.

We must, therefore, reverse the decree with costs here and in the lower appellate Court, and restore that of the Subordinate Judge.

Decree reversed.

---

18 B. 142.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Bayley.

MANAKU KOM PEDRU (*Petitioner*) *v.* SITARAM ATMARAM VAGH (*Opponent*).* [6th February, 1893.]

Practice—Procedure—**Ex parte** *decree—Co-defendants—Small Cause suit*—**Ex parte** *decree against one of several defendants—Application by co-defendant to set aside decree—Case re-opened with respect to the applicant only—Civil Procedure Code* (*Act XIV of* 1882), ss. 106, 108.

Where a decree is set aside on the application of a defendant against whom it was passed *ex parte*, the case is not re-opened as against a co-defendant who had appeared and defended the suit.

[**N. F.**, 24 A. 383 (390) = 22 A.W.N. 76 (**F. B.**) ; **F.**, 31 M. 454 (457) = 18 M.L.J. 453 = 4 M.L.T. 230 ; 6 C. L. J. 226 (231) ; 15 C.P.L. R. 179 (181).]

REFERENCE made by Rao Bahadur Raghavendra Ramchandra Gangolli, First Class Subordinate Judge of Karwar, under s. 617 of the Civil Procedure Code (Act XIV of 1882).

---

* Civil Reference No. 1 of 1893.

(1) P. J. (1876), p. 11. (2) P. J. (1884), p. 33. (3)P. J. (1884), p. 286.

1893

FEB. 6.

APPELLATE CIVIL.

18 B. 142.

[143] The opponent Sitaram Atmaram Vagh brought a suit against Francis Pedru and his mother Manaku in the Court of the First Class Subordinate Judge of Karwar, in its Small Cause jurisdiction, to recover Rs. 476-9-0 due upon a promissory note jointly passed by them. At the hearing only the first defendant appeared and resisted the claim. The second defendant, Manaku, was absent. The Subordinate Judge passed a decree against both the defendants. Subsequently Manaku (defendant No. 2) applied to set aside the decree, and the question arose as to whether, if the application were granted, the case would be re-opened with respect to defendant No. 1. The Subordinate Judge referred the question as follows :—

"Whether an application by a co-defendant praying for setting aside an *ex-parte* decree in a Small Cause suit, if granted, re-opens the case against the defendant or defendants who were present and who conducted the defence in the original trials in cases where there is a common cause of action against all the defendants."

The opinion of the Subordinate Judge was in the negative. He referred to the following cases :—*Brojonath Surmah* v. *Anund Moyee Debia* (1) ; *Huro Krishno Doss* v. *Motee Chand Baboo* (2) ; *Dookhee Khan* v. *Rajessuree Ranee* (3) ; *Nistarinee Dassee* v. *Debnath Bose* (4).

Purushotam Parashuram Khare (*amicus curiæ*), for the petitioner.

Vasudeo Gopal Bhandarkar (*amicus curiæ*), for the opponent.

OPINION.

SARGENT, C. J.—Having regard to the language of ss. 106 and 108 of the Civil Procedure Code (Act XIV of 1882) the question must be answered in the negative.

Order accordingly.

---

18 B. 144.

[144] APPELLATE CIVIL.

Before Mr. Justice Candy and Mr. Justice Fulton.

KRISHNAJI (*Original Plaintiff*), *Appellant v.* WAMNAJI (*Original Defendant*), *Respondent.** [9th February, 1893.]

Fraud—Plaint—Form of plaint—Charges of fraud—Amendment of plaint—Practice—Procedure.

Where a plaintiff seeks relief on the ground of fraud, and the plaint contains general allegations, but no specific instances, of the alleged fraud, it ought to be immediately, on presentation, rejected or returned for amendment, as it does not disolose a cause of action.

The plaintiff sued to recover damages caused by the defendant's fraud during his management of the plaintiff's estate from 1870 to 1884. The plaint disclosed no specific instances of the fraud imputed to the defendant. The Court of first instance, without going into evidence, rejected the plaintiff's claim, on the preliminary ground that the plaintiff had no right to sue during the lifetime of his adoptive mother. In second appeal, the respondent objected that the plaint was defective. The plaintiff's pleader asked for leave to amend it by specifying certain instances of the alleged fraud.

---

* Second Appeal No. 656 of 1891.

(1) 7 W. R.C.R. 237.
(2) 8 W. R. C. R. 260.
(3) 15 W. R.C. R. 371.
(4) 20 W. R. C. R. 286.

Held, that the amendment could not then be allowed, and the suit must fail. When fraud is charged, the evidence must be confined to the allegations.

[R., 19 B. 593 (601) ; 5 Ind. Cas. 179 (180).]

1893
FEB. 9.

APPELLATE CIVIL.

18 B. 144.

SECOND appeal from the decision of J. Fitzmaurice, Acting District Judge of Ratnagiri, in appeal No. 270 of 1889.

The plaintiff sued to recover Rs. 3,000 as damages sustained by him by reason of defendant's fraud and misconduct whilst acting as agent under plaintiff's adoptive mother in the management of his estate.

The plaint was as follows :—

"One Ramchandra Bapuji Thakur adopted me (the plaintiff) and died in March, 1870, whilst the plaintiff was a minor.

"Ramabai, the plaintiff's mother, carried on the management of the whole estate through the defendant Therein he committed a good many frauds, and misappropriated considerable property, and removed the documents. And with a view to escape the consequences of his fraud he gave up the management in July, 1884, and fraudulently obtained a release from Ramabai by misrepresenting and misstating matters therein.

"**[145]** Subsequently in August, 1884, Ramabai delivered over to me, the plaintiff, all the management, the letters and documents, &c., received by her. Thereafter on my examining the said letters, documents and accounts relating to the management of the defendant, I found that he had not faithfully carried on the management of my property as my agent from March, 1870, to August, 1884, but had greatly benefited himself by fraudulently misappropriating the said property and writing false accounts.

"The plaintiff seeks to recover the damages caused by the defendant's fraud and breach of trust."

Defendant denied the alleged fraud and contended that the plaintiff had no right to sue during the lifetime of his adoptive mother, inasmuch as his adoptive father had left a will under which an absolute right of management was conferred on her during her lifetime.

Both the lower Courts rejected the plaintiff's claim on the preliminary ground that, under the will of plaintiff's adoptive father, Ramabai (the adoptive mother) was absolute owner and manager of the estate during her lifetime ; that defendant was accountable to Ramabai alone ; and that as she did not come forward to complain of his mismanagement, plaintiff had not the right to do so.

Against this decision the plaintiff preferred a second appeal to the High Court.

Mahadeo Chimnaji Apte, for the respondent, took the objection that the plaint disclosed no cause of action and ought not to have been accepted. It did not mention any specific instances of fraud. It contained merely general allegations of fraud—*Gunga Narain Gupta* v. *Tiluckram Chowdhry* (1).

Manekshah Jehangirshah :—I admit that the plaint is defective. But I ask to be allowed to amend the plaint by specifying certain instances of fraud, which are proved in the case. A plaint can be amended even at this stage—*Joseph* v. *Solano* (2) and *Mohummud Zahoor Ali Khan* v. *Mussumat Thakooranee Rutta Koer* (3).

JUDGMENT.

[146] FULTON, J.—We think that the objection, taken by Mr. Apte, that the plaint discloses no specific instances of fraud, must be allowed.

(1) 15 C. 533. (2) 9 B.L.R. 441. (3) 11 M.I.A. 468.

1893
FEB. 9.
—
APPEL
LATE
CIVIL.
—
18 B 144.

The decision of the Privy Council in *Ganga Narain Gupta* v. *Tiluckram Chowdhry* (1) shows that "with regard to fraud, if there be any principle, which is perfectly well settled, it is that general allegations, however strong may be the words in which they are stated, are insufficient even to amount to an averment of fraud of which any Court ought to take notice." Such being the case the plaint ought, immediately on presentation, to have been rejected or returned for amendment, as it did not disclose a cause of action. Mr. Manekshah admits the defective nature of the plaint, but asks to be allowed to amend it by specifying certain instances alluded to in the Commissioner's reports, and offers to pay the costs of both appeals. Had the evidence on both sides, regarding these alleged frauds, been taken, this course might, perhaps, have been adopted; but the Subordinate Judge dismissed the suit on another point without taking the evidence for the defendant, or finishing the evidence for the plaintiff. The frauds are alleged to have taken place before 1884, and the effect of the amendment would be that now, in the year 1893, the defendant would be required to give evidence to defend himself from charges of fraud which have never yet been clearly specified, and which were not embodied (and could not on the pleadings be embodied) in the issues in the Court of first instance. Under these circumstances, we think the amendment should not now be allowed.

We were referred to the decisions in *Joseph* v. *Solano* (2) and *Mohummud Zahoor Ali Khan* v. *Mussumat Thakooranee Rutta Koer* (3) as showing at how late a stage amendment may be allowed; but in the latter case (which was followed in the former), it appears that there was a total misconception of the nature of the suit. In the present case this does not seem to have occurred. Either the plaintiff when he presented his plaint, knew the instances of fraud alleged to have been committed by the defendant, in which case his omission to specify them suggests the belief that he [147] preferred not to do so, with a view to keeping it open for himself to shape his allegations as he went along to meet the evidence; or he did not know of them and began a suit without any ground to go upon and simply in the hope that he would be able to make out a ground by evidence later on. In either alternative, it does not seem desirable now, nine years after the alleged frauds, to allow the amendment of the plaint. Without such amendment, however, it is clear that the suit must fail, as it is well settled that when fraud is charged, the evidence must be confined to the allegations.

On these grounds, then, we confirm the decree of the Courts below with costs.

Decree confirmed.

(1) 15 C. 533. (2) 9 B.L.R. 441 (453). (3) 11 M. I. A. 468.

18 B. 147.

1893
FEB. 10.

APPELLATE CIVIL.

APPELLATE CIVIL.

18 B. 147.

Before Mr. Justice Telang and Mr. Justice Fulton.

JANKIBAI (*Original Plaintiff*), *Appellant v.* MAHADEV AND OTHERS (*Original Defendants*), *Respondents.** [10th February, 1893.]

Hindu law—Joint family—Family debt—Liability of family property—Manager—Decree against manager—Execution sale—Questions for Court to decide in determining the quantum *of interest which passes to the auction-purchaser.*

Where the manager of a joint Hindu family is sued for the recovery of a debt, and his right, title and interest in the family property are sold in execution, the questions which the Court has to decide in determining the *quantum* of interest which has passed to the auction-purchaser are : (1) whether the debt was one for which the entirety might, by proper procedure, have been brought to sale, and (2) whether, as a matter of fact, the purchaser bargained and paid for the entirety.

A, and his three younger brothers B. C. and D were members of a joint Hindu family. A was the manager of the family. After A's death, B, C, and D were sued as his legal representatives in respect of a debt which A had contracted for the benefit of the family. A decree was passed against them as A's representatives, directing the recovery of the debt by sale of A.'s estate. In execution of this decree, A's right, title and interest in certain family property was put up to sale.

Held, that the sale affected the rights of all the members of the joint family. Under the circumstance what was meant to be brought to sale was the right, title and interest of the family of which Sakharam had been the manager, and for the benefit of which the debt had been incurred.

[R., 21 B. 205 (219) ; 21 B. 616 (618) ; 3 Bom. L.R. 322 (356); 10 C.P.L.R. 67 (69).]

[148] SECOND appeal from the decision of Rao Bahadur N. G. Phadake, First Class Subordinate Judge, A. P., of Satara in appeal No. 282 of 1889.

Suit for redemption of certain land. The land in question was family property and belonged to four brothers, *viz.*, Sakharam, Sitaram, Govind and Antaji.

Sakharam was the manager of the family. In 1871 he mortgaged the property to Vinayak, the father of defendant No. 1.

In 1872 and 1873 he passed two other bonds in favour of Vinayak to secure certain debts contracted for the benefit of the family.

After Sakharam's death, his brothers were sued as his legal representatives on the two bonds of 1872 and 1873, and a money decree was passed against them, directing that the decretal amount should be recovered out of the property of the deceased Sakharam.

In execution of this decree, Sakharam's right, title and interest in the property in dispute were put up to sale on the 13th October, 1875, and purchased by defendants Nos. 2, 3 and 4.

By a deed of sale dated 15th February 1884, Sitaram, Govind and Lakshumibai, widow of Antaji, conveyed their interests in the lands in suit to plaintiff No. 1.

In 1887 the present suit for redemption was filed by plaintiff No. 1. Plaintiffs Nos. 2 and 3 were joined subsequently to the institution of the suit, as persons interested in the equity of redemption.

The main question at issue between the parties was, whether the interest of Sakharam alone, or the interests of his brothers also, passed to

* Second Appeal No. 266 of 1891.

1893
FEB. 10.
——
APPEL-
LATE
CIVIL.
——
18 B. 147.

the defendants Nos. 2, 3 and 4 at the Court-sale held in 1875 in execution of the money decree obtained by Vinayak, the father of defendant No. 1.

On this point both the lower Courts found that Sakharam was manager of the family; that the debt for which the decree was passed, and the property sold in execution, was contracted [149] by Sakharam for the benefit of the family, and that, therefore, the interests of all the brothers passed to the defendant Nos. 2, 3 and 4 as auction-purchasers.

The lower Courts, therefore, held that the plaintiffs were not entitled to redeem that portion of the property which was purchased by defendants Nos. 2, 3 and 4.

Against this decision plaintiff preferred a second appeal to the High Court.

Mahadeo Chimnaji Apte, for the appellant:—The decree in execution of which the property in dispute was sold, was a decree against Sakharam's property in the hands of his heirs. It was a money decree for the recovery of a debt contracted by Sakharam alone. The decree and the sale in execution affected only Sakharam's interest in the family property. Even in the case of a father, a sale in execution of a money decree against him passes his interest only, in the absence of any special circumstances showing an intention to put up to sale the entire interest of the family—*Maruti Sakharam* v. *Baboji* (1); *Pandu* v. *Maniklal* (2), *Basaya* v. *Fakirgavda* (3).

M. B. Chaubal, for respondent No. 1.

Shivram Vithal Bhandarkar, for respondents Nos. 2 to 4:—What was sold is a question of fact, and both the lower Courts have found, as a fact, that the interest of the whole family was put up to sale and purchased by the respondents. This finding is conclusive in second appeal—*Appaji Bapuji* v. *Keshav* (4). At the time of the suit, Sakharam's brothers were not minors. They were parties to the suit, and they raised no objection in the execution proceedings to the sale of the entire family estate. They are, therefore, estopped, and so is the plaintiff, their assignee, from contending that Sakharam's interest alone passed to the auction-purchasers. Cites *Nimba* v. *Sitaram* (5); *Punchanun* v. *Rabia Bibi* (6); *Hari Vithal* v. *Jairam* (7); *Jagabhai* v. [150] *Vijbhukandas* (8); *Jairam* v. *Joma* (9); *Kagal Ganpaya* v. *Manjappa* (10); *Vishnu* v. *Venkatrav* (11); *Vasudev* v. *Krishna* (12).

Mahadeo Chimnaji Apte, in reply:—The decree is plain on the face of it. It binds only Sakharam's interest in the family property—*Kisansing Jivansing* v. *Moreshwar* (13).

JUDGMENT.

FULTON, J.—The only point argued in this appeal was whether the District Court was correct in holding that the rights of Sitaram, Antaji and Govind in certain portions of the property in dispute were conveyed to defendants Nos. 2 to 4 by the auction sales referred to in certificates 84, 86 and 88.

Sakharam was, it has been found, the manager of the family, and the debt, to recover which the auction sale took place, was, according to the finding of the Court of first instance, contracted for family purposes. Against

(1) 15 B. 87. (2) P. J. (1891), p. 124. (3) P. J. (1892), p. 141.
(4) 15 B. 13. (5) 9 B. 458. (6) 17 C. 711.
(7) 14 B. 597. (8) 11 B. 37. (9) 11 B. 361.
(10) 12 B. 691. (11) P.J. (1889), p. 248. (12) P.J. (1891), p. 18.
(13) 7 B. 91.

1893
FEB. 10.
APPELLATE CIVIL.
18 B. 147.

this finding no express appeal was made to the District Court, and no issue was sought for on the subject. Under these circumstances, we think the District Court could rightly regard the debt as a family debt, and that we are bound to treat it as such. When the suit was brought to recover this debt, Sakharam was dead, and it was accordingly filed against his brothers Sitaram, Govind, and Antaji as his representatives. A decree was passed against them in this capacity directing the recovery of the debt by the sale of Sakharam's estate. In execution of this decree the deceased Sakharam's right, title and interest were sold, and the question now arises whether the sale affected the rights of all the members of the joint family in the property or not.

As the debt was a family debt it is obvious that all those rights could be sold to satisfy it, and the question, therefore, is narrowed to one of procedure. Strictly speaking, at the time of the sale, Sakharam's estate had ceased to exist; for, at his death, his interest, in the joint property, passed to his brothers, but under the circumstances we think the lower Court was right in holding that what was meant to be brought to sale and conveyed was the right, title and interest of the family of which [151] Sakharam had been the manager, and for the benefit of which the debt had been incurred. An examination of the various reported decisions in suits in which a manager, whether a father or a brother, has been sued for the recovery of the debt and in which his right, title and interest have been sold in execution, leads to the conclusion that the questions, which the Court has to decide, are whether the debt was one for which the entirety might by proper procedure have been brought to sale, and whether, as a matter of fact, the purchaser bargained and paid for the entirety—*Hari Vithal* v. *Jairam Vithal* (1), and this conclusion seems, in no way, inconsistent with the decision in *Pandu* v. *Maniklal* (2), which merely shows that the sale of a manager's interest will not, in the absence of the above special circumstances, affect the rest of the family.

In the present case the suit was brought in a very awkward form against the three brothers as representatives of their deceased brother, but we think that the principle which governed the decision in *Hari Vithal* v. *Jairam Vithal*(1) and other cases relating to the same subject, left it open to the District Court to decide whether the purchasers, as a matter of fact, bargained and paid for the whole family interest. On this issue the First Class Subordinate Judge's judgment (though not quite so clear as might have been desired) amounts to a finding in the affirmative. This finding is in accordance with probability, as the Court cannot have intended to sell, or the purchasers to buy, merely an interest which was non-existent at the time of the sale, and Sitaram, Antaji and Govind, who were parties to the suit, do not seem to have made any objection to the proceedings in execution; but in any case it is not a finding which we can now question.

We must, therefore, confirm the decree of the First Class Subordinate Judge, A. P. The appellant to pay separate costs for the respondents, represented by Mr. Chaubal and Mr. Bhandarkar respectively.

Decree confirmed.

(1) 14 B. 597.

(2) P. J. (1891), p. 124.

1893
FEB. 20.

APPELLATE CIVIL.

18 B. 152.

18 B. 152.

[152] APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Bayley.

BHIMBHAI AND OTHERS (*Appellants*) *v.* ISHWARDAS JUGJIWANDAS AND ANOTHER (*Respondents.*)* [20th February, 1893.]

Company—Indian Companies Act (VI of 1882), s. 13—Contributory—Increase of capital—Illegal issue of shares—Reduction of capital.

The Nawab of Beyla Spinning, Weaving Manufacturing Company, Limited, was registered under the Indian Companies Act (X of 1866). The original capital of the company consisted of Rs. 4,00,000, divided into 1,600 shares of Rs. 250 each. In 1882 the capital of the company was increased by Rs. 1,00,000 divided into 1,600 shares of Rs. 62-8. The resolution to increase the capital was not passed in accordance with the articles of association, *i.e.*, "with the sanction of a special resolution of the company passed at a general meeting." On the 5th November, 1884, a resolution was passed at a general meeting of the company that the shareholders should take up the 459 shares of the original capital and 1,027 shares of the increased capital, which were then in the hands of the company, in the proportion of one share to every two shares already held by them. In pursuance of this resolution the appellants took up several shares of the original capital as well as of the new capital. On 19th October, 1885, a general meeting of the company was held at which it was resolved that the resolution of the 5th November, 1884, and all acts done in connection with it should be set aside, that the shares taken by the shareholders in pursuance of that resolution should be taken back by the company, and such amounts as had been paid by them on those shares should be credited to their names in the company's books. This was accordingly done, and the shares were transferred to the name of the company. In October, 1896, the company was wound up by order of the Court. In settling the list of contributories, the District Judge of Surat held that the appellants were liable, as contributories, in respect of all the shares which they had taken up in pursuance of the resolution of 5th November, 1884. On appeal from this decision,

Held, that with respect to the shares of the original capital, the resolution of the 19th October, 1885, was illegal and invalid. It operated, not as an investment by the company of its funds in its own shares, but as an extinguishment of the shares, and such extinguishment was virtually a reduction of the capital, which could not be done without complying with the provisions of s. 13 of the Indian Companies' Act (VI of 1882). The holders of such shares were, therefore, properly placed on the list of contributories.

Held, also, that the issue of the shares of the new capital was illegal, as the resolution to increase the capital had not been come to in accordance with the articles of association. It was, therefore, open to the company to set aside the resolution of 5th November, 1884. When it was set aside, the persons who held the new shares ceased to be shareholders, and could not, therefore, be held liable as contributories.

[F., 20 B. 654; R., 14 Bom. L.R. 521=16 Ind. Cas. 49.]

[153] APPEALS from the orders of J. B. Alcock, District Judge of Surat, in the matter of settling the list of contributories of the Nawab of Beyla Spinning, Weaving and Manufacturing Company, Limited, in liquidation.

The company was formed and registered in 1881 under the Indian Companies Act X of 1866.

The original capital of the company consisted of four lakhs of rupees, divided into 1,600 shares of Rs. 250 each.

In November, 1882, the capital of the company was increased by a lakh of rupees by the issue of 1,600 shares of Rs. 62-8-0 each.

* Appeals Nos. 121, 146, 147 and 166 of 1892.

The resolution to increase the capital was not passed, in accordance with the articles of association, under which "the sanction of a special resolution of the company passed in a general meeting" was required before the capital could be increased. No such sanction was obtained for the issue of the new shares.

On 5th November, 1884, a general meeting of the company was held, at which a resolution was passed calling on each shareholder to take up one additional share either of the original or of the new capital for every two shares originally held by him. The material portion of the resolution was to the following effect:—

"At present there are in the Company's hands 459 shares of the original capital of Rs. 250 each, and 1,027 shares of the increased capital of Rs. 62-8-0 each. The present shareholders must take up the unallotted shares in the proportion (of one share for every two shares already held). The shareholders must pay the whole of the amount due on the said shares within eight days from this date and take the shares."

In pursuance of this resolution the appellants, in common with the other shareholders, took up a certain number of shares of the original as well as of the new capital.

On 19th October, 1885, it was resolved at a general meeting of the shareholders to set aside the resolution of the 5th November, 1884, and all acts done under that resolution. This resolution was to the following effect:—

[154] "It is hereby resolved that the resolution (of the 5th November, 1884) and the notices issued thereunder and all orders passed and acts done in connection therewith be set aside. And in order to return such amounts as have been paid by the shareholders under the said resolution, the same are to be credited to the names of such shareholders with interest at 12 annas per cent. per mensem from the date on which the same may have been paid by them; and when the company gets money, it is to pay to such shareholders all such moneys with interest as may stand credited in their names. And the company is to take back from the shareholders the share certificates issued to them under the said resolution hereby set aside. And the moneys received under the said resolution having been credited to the names of the shareholders, who may have paid them, are to be deducted from the capital account, and the shares taken back are to be shown as a balance in the capital account."

Accordingly on the 19th June, 1886, the shares, which the appellants had taken up in pursuance of the resolution of the 5th November, 1884, were taken back and transferred from their names to the company, and the moneys which they had paid on those shares were credited to their account in the company's books.

On 30th October, 1886, the company was wound up by and under the order of the Court.

In settling the list of contributories of the company, the District Judge of Surat was of opinion that the resolution of the 19th October, 1885, was illegal and *ultra vires*, as it had the effect of reducing the capital of the company without the formalities required by s. 13 of the Indian Companies Act (VI of 1882), and also because the company had no power to purchase its own shares, in contravention of s. 282 of the Act. He, therefore, held that the appellants were shareholders of the company at the date of its winding up, and as such liable to be placed on the list of contributories, in respect of all the shares they had taken up in pursuance of the resolution of the 5th November, 1884.

1893
FEB. 20.
APPELLATE CIVIL.
18 B. 152.

Against this decision the present appeals were preferred to the High Court.

[155] *Kalabhái Lalubhai* (with *Manekshah Jahangirshah* and *Manchubhai Narsidas Choksi*), for appellants :—The appellants are not liable in respect of the shares taken by them under the resolution of the 5th November. As to the new shares the resolution by which the capital of the company was increased was illegal and *ultra vires*. It was not a 'special resolution' as required by the articles of association. Nor was the resolution of the 5th November, 1884, compelling the shareholders to take up additional shares against their will, legal and binding on the shareholders. The company saw its mistake in time, and cancelled this resolution. The lower Court has held that this could not be done, as it had the effect of reducing the capital. This view of the matter is clearly wrong. It was perfectly competent to the company to undo an illegal act, and cancel the new shares which had been illegally issued. We never acquiesced in the illegality ; we are, therefore, not estopped from pleading it as a complete defence to the present proceedings. *Campbell's case* (1) has no application to the present case. If any person is estopped, it is the official liquidators as representing the company. It is not open to them to say that the resolution of the 19th October, 1885, passed by the whole body of shareholders was null and void. That resolution does not effect, and was not intended to effect, a reduction of the capital of the company. It only transfers the shares back to the company, and amounts to an "investment by the company of its funds in its own shares" as provided by cl. (*j*) of s. 3 of the memorandum of association. The official liquidators cannot, therefore, impeach the exercise of this power as illegal or invalid—*In re Mercantile Credit and Financial Association* (2) ; *Jehangir Rustomji Modi* v. *Shamji Ladha* (3) ; *Sewell's case* (4) ; *Feiling's and Rimington's case* (5).

Gonpat Sadashiv Rao, for respondents (official liquidators).—The shares in respect of which the appellants are placed on the list of contributories are partly shares of the original capital and partly of the new capital. As regards the shares of the original [156] capital, the resolution of the 19th October, 1885, was absolutely null and void. The company had no power to take back these shares, and credit the shareholders with the moneys they had paid on those shares. That had clearly the effect of reducing the original capital, and this could not be done except in accordance with s. 13 of Act VI of 1882. It is admitted that the formalities prescribed by that section have not been complied with. The resolution, therefore, so far as it effects a reduction of the original capital, is illegal. It is, however, urged that the effect of the resolution is to invest the funds of the company in its own shares, and that cl. (*j*) of s. 3 of the memorandum of association empowers the company to make such an investment. The proper construction to put upon this clause in the memorandum of association would be that such investment can only be made if there is actual cash in the hands of the company. But at the date of the resolution in question the company had no funds in its hands. It was deeply indebted. If there were no funds to invest, how could there be any investment at all? The object of the resolution was not to make the investment as suggested, but to cancel the shares and reduce the capital *pro tanto*. Such a reduction was illegal. Even if the

(1) L. R. 9 Ch. 1. (2) 3 B.H.C.R. O.C.J. 125. (3) 4 B.H.C.R. O.C.J. 185.
(4) L. R. 3 Ch. 131. (5) L. R. 2 Ch. 714.

transaction be treated as a purchase by the company of its own shares, it is still invalid. See s. 249 of Act VI of 1882, and *Trevor* v. *Whitworth* (1). Under either aspect of the case, the resolution of the 19th October, 1885, should be treated as null and void.

As regards the shares of the new capital, there was, no doubt, an irregularity in the issue of these shares. But that will not relieve the shareholders from liability as contributories. They took the shares with full knowledge of the irregularity. They have acquiesced in it. They are, therefore, estopped from impugning the validity of the issue of the shares—*In re Miller's Dale and Ashwood Dale Lime Company* (2); *Challis case* (3); *Hare's case* (4); *Stace and Worth's case* (5); *Campbell's case* (6); *Sewell's case* (7).

JUDGMENT.

[157] SARGENT, C. J.—The question in these appeals from the orders of the District Judge directing the appellants to be retained on the list of contributories turns upon the legal effect of the proceedings of the company commencing in 1882 and down to 10th October, 1886, when the order for winding up the company began to operate. It appears that in 1882, the company being anxious to extend its business, the directors passed a resolution that each of the shareholders should take up a new share of Rs. 62-8-0. Some shares were accordingly taken up under this resolution; but the requisite capital not being forthcoming, a general meeting of the company was held on the 5th November, 1884, on which occasion it was resolved that the shareholders should take up the 459 shares of the original capital at Rs. 250 per share and 1,027 shares of increased capital at Rs. 62-8-0 then in the hands of the company in proportion to the shares held by them, and in pursuance of that resolution a great many shares of the original and new capital were taken up, both of which form the subject of one or other of the present appeals.

The shares in respect of which it is sought to place the appellants on the lists of contributories were taken up in pursuance of that resolution. However, on the 19th October, 1885, at a general meeting it was resolved "that the resolution of 5th November, 1884, and the notices issued thereunder and the orders passed and all the acts done in connection therewith be set aside, and in order to return such amounts as had been paid by the shareholders under the said resolution it was resolved that the same should be credited to the names of such shareholders with interest whatsoever it might amount to at 12 annas per cent. per mensem from the date on which the same might have been paid by them, and when the company should get money it should pay such shareholders all such moneys and interest as might stand credited in their names, the company to obtain receipts from them and to take back from the shareholders the share certificates granted to them under the said resolution so set aside, the moneys received having been credited to the names of the shareholders who may have paid them to be deducted from the capital account and the shares taken up to be shown as a balance in the capital account." The important question in the case is as to **[158]** the effect of this resolution on the shares taken up by the resolution of 5th November, 1884.

---

(1) 12 Ap. C. 409 (437). (2) 31 Ch. D. 211. (3) L. R. 6 Ch. 266.
(4) L. R. 4 Ch. 503. (5) L.R. 4 Ch. 682. (6) L.R. 9 Ch. 1.
(7) L R. 3 Ch. 131.

1893
FEB. 20.
APPELLATE CIVIL.
18 B. 152.

First, we will consider its effect on the shares which formed part of the original capital. They could of course be issued whenever the company might think proper, but when issued they became part of the capital of the company, which could only be subsequently reduced by complying with the provisions of s. 13 of the Companies Act of 1882, which was admittedly not done in this case. But it was said that what was intended to be done by the resolution of October, 1885, was the extinguishment or cancellation of shares, and was not in form a reduction. It is plain, however, that it would virtually be a reduction, as pointed out by Lord Justice James in *Hope* v. *International Financial Society* (1). Referring to the transaction of that society he says: "It was either a purchase of shares in the sense of trafficking in shares, which is a purchase not authorized by the memorandum of association," or "it is an extinguishment of shares and, therefore, a reduction of capital." These remarks are referred to with approval by Lord Herschell in the important case of *Trevor* v. *Whitworth* (2). Again, it has been contended for the appellants that the resolution operated as an investment by the company of its funds in its own shares, and which, it was said, was authorized by sub-cl. (*j*) of s. 3 of the memorandum of association, which provides that among the objects for which the company was established "was to invest the funds of the company from time to time in the shares of the company, provided that the company shall at no time hold more than one-fourth of the total number of shares for the time being of the company." In answer to this it has been argued for the official liquidators that such a power of investment by the company being virtually a power to purchase its own shares was *ultra vires* although found in the memorandum of association. There is no express decision of the English Courts, although a strong opinion was expressed by Lord Macnaghten to that effect in *Trevor* v. *Whitworth* (2). It is true that by s. 249 of the Act of 1882 a purchase by a company of its own shares is strictly forbidden, which Act was in force when the transaction in [159] question took place; but every "right acquired" under the Act of 1866, which would, we think, include a right of the company to invest in its own shares under its memorandum of association registered under that Act, was saved by cl. (*b*) of s. 2 of the Act of 1882. However, it is not necessary, in the view we take of the transaction, to express a decided opinion as to whether such a power of investment could have been validly exercised in 1885, as we are clearly of opinion that the transaction in question cannot be sustained as an investment, but that it was really an extinguishment of the shares. The resolution is distinct in its terms as undoing what had been done in November, 1884, with a *restitutio in integrum*—the money was to be returned with interest to the shareholders, and the share certificates taken back by the company, and the shares "shown as a balance in the capital account." There was no intention of re-issuing these shares, and the result of the resolution, if carried out, would, therefore, have been, not an investment of the funds of the company in its shares, but the extinguishment of the capital represented by those shares. This is clearly pointed out by the present Master of the Rolls in *Hope* v. *International Financial Society* (1), and by Lord Herschell in *Trevor* v. *Whitworth* (2). It is impossible, therefore, in our opinion to say that the resolution operated as an investment of the company's

(1) 4 Ch. D. (327) 340.

(2) 12 Ap. Ca. 419.

funds in its shares, and we must, therefore, decide that the holders of such shares were properly placed on the list of contributories to the extent of so much of the Rs. 250 on each share as had not been already paid to the company at the time of the winding up.

As to the shares of the issue of new capital, they stand on a different footing. That issue was admittedly invalid, the resolution to increase the capital not having been come to in accordance with ss. 4 and 5 of the articles of association,—that is, "with the sanction of a special resolution of the company passed in general meeting." The shares, therefore, not having been validly issued by the company, and the invalidity not having been subsequently cured, as was done in *Sewell's case* (1), they never became a legal part of the capital of the company ; and it [160] was, therefore, in the power of the company by a resolution of a general meeting to set aside the resolution of November, 1884, so far as that issue of shares was concerned, and validly undo what had been done under that resolution. This was effected by the resolution of 19th October, 1885, which set aside all that had been done under the resolution of 5th November, 1884, and virtually cancelled the shares issued under it. The persons who had taken up these shares ceased then to be holders of the shares and became creditors of the company in respect of the moneys they had paid on the shares and for which they were credited in the company's books in June, 1886 ; they cannot, therefore, be regarded as having been shareholders in respect of those shares when the winding up commenced. This case differs, therefore, from *In re Miller's Dale and Ashwood Dale Lime Company* (2), where there had also been an invalid increase of capital, but which had never been undone, and the shareholders who sought not to be placed on the list of contributories had kept the shares which had been invalidly issued for several years and were on the list of shareholders when the winding up commenced.

We must, therefore, reverse the orders appealed from of the Court below and send back the cases for fresh decisions having regard to the above remarks. Costs to abide the result.

Orders reversed.

---

18 B. 160.

APPELLATE CIVIL.

Before Mr. Justice Bayley (Acting Chief Justice), Mr. Justice Jardine and Mr. Justice Telang.

CHUNILAL VITHALDAS (*Original Defendant No.* 2), *Appellant v.* FULCHAND (*Original Plaintiff*), *Respondent.** [20th February, 1893.]

Mortgage—Marshalling of securities—Notice of prior mortgage to subsequent mortgagee —Doctrine of marshalling applicable to mortgages in the Mofussil.

Before the extension of the Transfer of Property Act, 1882, to the Bombay Presidency, where two properties had been mortgaged to one person, and one of them was subsequently mortgaged to another person with notice of the former mortgage.

Held, such subsequent mortgagee had an equity to call for a marshalling of the securities in his favour so as to require the first mortgagee to proceed to realize

---

* Second Appeal No. 224 of 1891.

(1) L.R. 3 Ch. 139. (2) 31 Ch. Div. 215.

1893
FEB. 20

APPELLATE CIVIL.

18 B. 160.

[161] his security in the first instance out of the property not mortgaged to the second mortgagee. *Jardine, J., diss.*

The English doctrine of marshalling of securities applies to mortgages in the Mofussil.

[F., 22 B. 304 (314).]

SECOND appeal from the decision of the First Class Subordinate Judge with appellate power at Ahmedabad, in appeal No. 11 of 1890.

Baria Pahadbhai Jalumji mortgaged two fields (Survey Nos. 83 and 695) to Vithaldas Bhagvan for Rs. 2,000 by a *san-khat* dated 15th November, 1876.

After the death of Vithaldas, his son Chunilal (defendant No. 2) and his grandson (the plaintiff) made a division of their joint family property. At that division the mortgage-debt due under the *san-khat* of 1876 was divided equally between the plaintiff and Chunilal (defendant No. 2).

In 1888 Chunilal obtained from the mortgagor a fresh mortgage-bond for his share of the debt due under the *san-khat* of 1876, and, by this new mortgage, field No. 83 alone was mortgaged.

Plaintiff then filed the present suit to recover his half share of the debt secured by the *san-khat* of 1876 and prayed for the sale of both the fields (Survey Nos. 83 and 695) included in the *san-khat*.

Defendant No. 1 (the mortgagor) pleaded that under the second mortgage-bond of 1888, which he had executed in favour of Chunilal (defendant No. 2), the latter had agreed to satisfy the plaintiff's half share of the debt, and that, therefore, he (the defendant No. 1) was not liable for the claim.

Chunilal (defendant No. 2) pleaded (*inter alia*) that the plaintiff must first proceed against field No. 695, and that, if any part of the money due to him remained unpaid, he might then be allowed to enforce his mortgage lien against the other field (No. 83), which was included in his own further mortgage of 1888.

The Subordinate Judge passed a decree for the plaintiff for Rs. 1,467-6 and costs to be realized by the sale of half of each of the two fields (Nos. 83 and 695), allowing the remaining half of both fields to defendant No. 2 for the portion of the debt due to him.

[162] On appeal, the lower appellate Court was of opinion that the English doctrine of "marshalling of securities" was not applicable to mortgages in the Mofussil, and following *Lala Dilawar Sahai* v. *Dewan Bolakiram* (1) and *Tadigotla Timmappa* v. *Lakshmamma* (2) held that Chunilal was not entitled to compel the plaintiff to proceed first against field No. 695. As a puisne mortgagee he had, however, a right to redeem plaintiff's mortgage.

The decree of the Subordinate Judge was, therefore, varied by declaring that Chunilal (defendant No. 2) had a right to redeem the plaintiff's mortgage on payment of Rs. 1,467-6-0 within three months from the date of the decree. On failure to redeem as directed, the plaintiff was at liberty to recover his debt by sale of both fields Nos. 83 and 695.

Against this decision Chunilal (defendant No. 2) preferred a second appeal to the High Court.

Rao Saheb *Vasudev J. Kirtikar*, for appellant (defendant No. 2).

Gokuldas Kahandas Parekh and *Nagindas Tulsidas*, for respondent (plaintiff).

---

(1) 11 C. 258.

(2) 5 M. 385.

The following authorities were cited in argument:—

Ram Dhun Dhur v. *Mohesh Chunder Chowdhry* (1); *Moro Raghunath* v. *Balaji Trimbak* (2); *Nawab Azimat Ali Khan* v. *Jowahir Singh* (3); *Gossyen Luchmee Narain Poori* v. *Bicram Singh*(4); *Lala Dilawar Sahai* v. *Dewan Bolakiram*(5); *Gaya Prasad* v. *Salik Prasad* (6); *Bhat Khushalji Kuber* v. *Hari Prasad* (7); *Tadigotla Timmappa* v. *Lakshmamma* (8); Macpherson on Mortgages, p. 326; Tagore Law Lectures on Mortgages, p. 299; Transfer of Property Act (IV of 1882), s. 81.

1*st August*, 1892. JARDINE, J.—Defendant No. 1 mortgaged his two fields Nos. 83 and 695 to Vithaldas for Rs. 2,000 by a *sankhat*. After the death of Vithaldas, his heirs, the plaintiff and defendant No. 2, divided the interest of the mortgagee between them, taking in moieties, each moiety being, like the mortgage itself, secured on both the fields mortgaged. Afterwards defendant **[163]** No. 2 obtained from defendant No. 1 (the mortgagor) a fresh mortgage for his moiety of the debt; and for this fresh mortgage the field No. 83, and not the field No. 695, was made security. When the present suit was brought by the plaintiff to recover his moiety of the mortgage-debt by sale of the two fields, defendant No. 2 called evidence to prove that the plaintiff had relinquished in his favour his right to proceed against No. 83. The lower Court of appeal has found, on the facts, that there was no such relinquishment.

The case differs from those for which the 81st section of the Transfer of Property Act (IV of 1882) will make provision when that Act is extended to this Presidency, as it only applies the equitable rule of marshalling to cases where the subsequent mortgagee is without notice of the prior mortgage. This is the rule as stated in the second volume of Fisher on Mortgage from *Lanoy* v. *Duke of Athol* (9). As Chunilal had notice of the original mortgage, the case of *Khetoosee Cherooria* v. *Banee Madhub Doss*(10) is in point. There, after suggesting a *quære* whether the doctrine of marshalling securities should be introduced into India, the learned Judges declined to apply it in the case before them.

It is said at p. 491 of Macpherson on Mortgages (7th Ed.) that there does not appear to be a case in which the doctrine of marshalling has been applied to Mofussil mortgages. The case does not resemble *Moro Raghunath* v. *Balaji Trimbak*(2), where equity was applied, because the mortgagee had himself become interested in the equity of redemption. In the case of *Tadigotla Timmappa* v. *Lakshmamma* (8) the Court refused to apportion the debt, holding that the mortgagee was at liberty to claim that his security shall not be divided against his will. In *Indukuri Rama* v. *Yerramilli Subbarayudu* (11), the Court declined to deprive him of his legal rights. The English doctrine of marshalling is limited to cases where it will not prejudice the mortgagee's rights or improperly control his remedies. In the present case the **[164]** maxim "*sic utere tuo ut alienum non lædas*," on which Story in his Equity Jurisprudence, s. 633, bases the doctrine, does not apply in derogation of rights, as defendant No. 2 at the time of the partition or afterwards might have made arrangements with the plaintiff.

I am of opinion that the lower Court of appeal was right in declaring that the plaintiff might recover his mortgage-debt by sale of both the fields, and that the appellant, defendant No. 2, has no good reason to complain about the decree made, which I would, therefore, confirm with costs.

---

(1) 9 C. 406. (2) 13 B. 45. (3) 13 M. I. A. 404. (4) 4 C.L.R. 294
(5) 11 C. 258. (6) 3 A. 682. (7) P.J. for 1888, p. 355. (8) 5 M. 385.
(9) 2 Atk. 444. (10) 12 W. R. 114. (11) 5 M. 387.

1893
FEB. 20.

APPELLATE CIVIL.

18 B. 160.

But as I have the misfortune to differ from my learned brother, we refer the appeal, under s. 575 of the Code, to the Acting Chief Justice.

1*st August*, 1892. TELANG, J.—The question which arises for decision in this case, on the facts found by the Court below, is whether when two properties are mortgaged to one person, and one of those properties is subsequently mortgaged to another person with notice of the former mortgage, such second mortgagee has any equity to call for a marshalling of the securities in his favour, so as to require the first mortgagee to proceed to realize his security, *in the first instance*, out of the property not mortgaged to the second mortgagee. The Subordinate Judge with appellate powers has decided, that the puisne mortgagee in this case has no such equity, relying on the decision in *Lala Dilawar Sahai* v. *Dewan Bolakiram*(1). In that case, however, the subsequent mortgagee's contention, which was negatived by the Court, went a good deal further than the contention we have to deal with, for there, as the Court points out, the defendants contended that "the plaintiff is *not entitled to a declaration* that the property is liable to attachment and sale, *unless he has shown* that he has exhausted the other property." The decision there consequently does not govern the present case. In the course of the judgment, however, reference is made to a case before Lord Chancellor Sugden, in which he pointed out, that while there might be a difficulty in working out a subsequent mortgagee's equity in England, where the prior mortgagee has "a right to compel **[165]** the debtor to redeem, or he may foreclose," it might be done in Ireland, "where the decree is ordinarily one not for foreclosure but for sale, and the mortgagee would be entitled to no more than his money, and the Court would deal with the surplus in such manner as it might think fit." This opinion of Sir E. Sugden is of very special authority in this Presidency, where, as Westropp, C. J., has laid down, the ordinary decree on a mortgage ought to be, as in Ireland, one, not for foreclosure, but for sale, and where the mortgagee is only entitled to his principal, interest and costs—*Ganpat* v. *Adarji* (2).

The learned Subordinate Judge relies also on two other authorities. The first of these—*Tadigotla Timmappa* v. *Lakshmamma* (3)—appears mainly to have turned on an entirely different question than the one before us, namely, the question raised by the claim of the defendant there to split up the mortgage security, and pay only a part of the whole mortgage money proportionate to the share of the mortgaged property purchased by him. This the High Court did not permit. Besides, the question there was apparently raised when the plaintiff had already sold and himself purchased the property on which he and the defendant both had a claim. That was a period when it would be too late to raise any question of marshalling. In the other case, too, it would appear that the attempt of the party who stood in the position of a puisne incumbrancer was, in the language of the Court, to "deprive" the prior incumbrancer "of his legal rights," and to affect the interests of third parties which had been created in the course of their enforcement. For there, too, the prior incumbrancer had sold the property to a stranger. And before the sale no question of marshalling had been raised at all.

It is well established in England, that the rule of marshalling will not be applied in favour of a subsequent incumbrancer when that will either really prejudice the rights of the prior incumbrancer or the rights

(1) 11 C. 258. (2) 3 B. 312. (3) 5 M. 385.

of third parties (1). And the cases now referred to were clearly well decided, according to that principle. Mr. Gokuldas, for the respondent, also relied on the case of **[166]** *Gaya Prasad* v. *Salik Prasad* (2), But it is difficult to say from the report what the real decision of the Court was on the point now under consideration. Pearson, J., was evidently in favour of marshalling so far as to direct that the plaintiff should first try to recover his amount by the sale of the property in the hands of the mortgagor, before he proceeded against the properties in the hands of the mortgagor's alienees, the second, third and fourth defendants—all of whom he placed on the same footing. It is not clear from the judgment of Oldfield, J., that he took the same view as regards the second defendant. But Straight, J. (p. 695,and seeagain p. 697) says that " the points upon which the difference of opinion has occurred between my two honourable colleagues relate to the claim of the plaintiffs as against defendants Nos. 3, 4" —who were prior mortgagees as well as subsequent purchasers, while the second defendant's only title was under a subsequent purchase. It is to be remarked, further, with reference to one of the points made in that case, and which would have a bearing on the case before us, that the property sold to the plaintiff was sold, as Sir C. Sargent points out in *Moro Raghunath* v. *Balaji* (3), by a private sale,—that is, as I understand, not by a sale for realizing the mortgage security; and, therefore, it was held, and if I may say so rightly held, that the defendants had no equity to compel the plaintiff to proceed to sell that property as if it was still liable to the mortgage. By the transaction of sale that property had become discharged from the mortgage lien before the second defendant had anything to do with any of the properties of the mortgagor, the first defendant.

If, then, the cases relied on are inapplicable, the question again arises, whether there is any such equity in favour of the subsequent mortgagee as is here claimed. In England, the doctrine is broadly laid down that such an equity exists. The cases go back ultimately to a decision of Lord Hardwicke, who laid it down that " if a person who has two real estates, mortgages both to one person, and afterwards only one estate to a second mortgagee, who had no notice of the first, the Court, in order to relieve the second mortgagee, has directed the first to take **[167]** his satisfaction out of that estate only which is not in mortgage to the second mortgagee, if that is sufficient to satisfy the first mortgage, in order to make room for the second mortgagee, even though the estates descended to two different persons" (4). And the note of Mr. Tudor points out that that statement of the doctrine is correct, except that the absence of notice is not an essential condition for its application. It is unnecessary to discuss, in detail, the authorities there referred to. They seem to bear out the view expressed, and in *Aldrich* v. *Cooper* (5), Lord Eldon nowhere refers to notice as in any way entering into the consideration of this equity. Further, it seems reasonable that this equity should be enforced, both in cases of notice and of no notice, because to refuse so to enforce it would have the effect not only of enabling the first mortgagee to disappoint a subsequent mortgagee—which is what the English cases say equity will seek to avoid—but also of frequently enabling the mortgagor to defraud such subsequent mortgagee.

---

(1) 2 W. and T. Leading Cases in Equity, pp. 111—8.
(2) 3 A. 682. (3) 13 B. 45.
(4) 2 White and Tudor (6th Ed.), p. 102. (5) 2 White and Tudor (6th Ed.), p. 82.

1893
FEB. 20.
APPELLATE CIVIL.
18 B. 160.

This result must generally follow, unless the help of another doctrine of equity is called in, and the subsequent mortgagee is allowed to stand as a creditor against the other property although not mortgaged to him, as. for instance, is done in those cases mentioned in the judgment in *Aldrich* v. *Cooper* and in the notes to that case, where the Crown taking mortgaged property under an extent, other property of the mortgagor not mortgaged, but against which the extent might have been enforced, is treated in equity as if it was subject to the mortgage (1).

It must be admitted, that under the Transfer of Property Act (IV of 1882) this equity is by s. 81 made subject to the puisne incumbrance being without notice. But as the Act is not applicable to this case, we are not at present bound to adopt that rule as there laid down, and we may, I think, properly follow the rule laid down in England, which is not in any way unfair to the substantial claims of the prior incumbrancer, and which [168] avoids an injustice and possible fraud upon the rights of the puisne incumbrancer.

It is true that in *Khetoosee Cherooria* v. *Bance Madhub Doss* (2) the High Court of Calcutta made some remarks expressive of a doubt as to whether the equitable doctrine of marshalling should be applied in this country. These remarks, however, were merely made *obiter*, and were not intended to be decisive on the point. On the other hand, I think the doctrine is one of justice, equity and good conscience, and I see no objection to its application within due limits. And it may be pointed out, that the doctrine has, in fact, been already applied by this Court, even in cases of partition of Hindu family property—cases which the Courts are bound to decide according to Hindu law pure and simple. A purchaser or mortgagee for value of the share of an individual co-parcener in joint family property, even with notice that he is buying such a share, has been held entitled to have the family property marshalled in his favour, so far as that can be done "without doing injustice to prior incumbrancers or co-parceners" (3). This decision can only rest, I think, on the equity administered by the English Courts, as above explained,, and must have been adopted to avoid the possible fraud to which I have adverted.

In the present case, there is no finding or proof or even allegation that any injury may be occasioned to the defendant by his having to sell, in the first instance, the property which is not mortgaged to the plaintiff. I am, therefore, of opinion that the Judge below was wrong in refusing to give the appellant the relief which he sought, except in so far as he claimed to redeem the respondent's mortgage. To that relief he was, no doubt, entitled. But he was also entitled, I think, to a decree declaring that, in the event of the appellant's failure to redeem as provided by the Subordinate Judge's decree, the plaintiff would be at liberty to sell the property mortgaged to him, but subject to the proviso that he must first sell the field No. 695 which is not mortgaged to the appellant, and only proceed against the other field in the [169] event of the proceeds of the first sale not being sufficient to satisfy the amount of his decree.

The Judges having differed in opinion, the case was referred to the then Acting Chief Justice (Bayley, J.) and was argued before him on the 13th December, 1892.

---

(1) Compare the hint thrown out on a similar point in the judgment in *Udaram* v. *Ranu*, 11 B. H. C. R. 76 (82).

(2) 12 W. R 114.

(3) *Wamnajiv. Atmaram*, P. J., 1883, p. 337 ; see Mayne's Hindu Law, pl. 329 *Venkatarama* v. *Meera Laoai*, 13 M. 275.

Rao Saheb *Vasudeo J. Kirtikar*, for appellant (defendant No. 2).—The question is whether, when the subsequent mortgagee has notice of a prior mortgage, he has any equity to require the prior mortgagee to proceed in the first instance against such of the mortgaged property only as is not comprised in the subsequent mortgage. We contend that although we had notice we have a right to call for a marshalling of the securities in our favour. The doctrine of marshalling applies in India. The following authorities were referred to:—*Moro Raghunath* v. *Balaji* (1); *Nawab Azimat Ali Khan* v. *Jowahir Singh* (2), *Nanee Tara Naikin* v. *Allarakhia Soomar* (3); Story's Equity Jurisprudence, 634 (*a*); Ghose on Mortgages, p. 299; 2 White and Tudor's Leading Cases (6th Ed.), p. 109; *Heyman* v. *Dubois* (4); *Hughes* v. *Williams* (5); *Liverpool Marine Credit Co.* v. *Wilson* (6); *Tidd* v. *Lister* (7); *Bishonath* v. *Kisto Mohun* (8); *Mussamat Nowa Koowar* v. *Sheik Abdul Ruheem* (9); *Nanabhat* v. *Lakshman* (10).

Goculdas K. Parekh, for respondent (plaintiff):—We contend that in India the doctrine of marshalling securities has not been adopted where the subsequent mortgagee has had notice of the prior mortgage. In this case there was notice—*Lala Dilawar Sahai* v. *Dewan Bolakiram* (11); *Tadigotha Timmappa* v. *Lakshmamma* (12); *Indukuri Rama* v. *Yerramilli* (13); Fisher on Mortgage (4th Ed.), p. 667; *Lanoy* v. *Duke of Athol* (14); *Rodh Mal* v. *Ram Harakh* (15).

[170] Rao Saheb *Vasudeo J. Kirtikar* in reply.—In the case of *Nanabhai* v. *Lakshman* (10) there was notice, yet marshalling was allowed—*Toolsee Ram* v. *Nunno Lall* (16).

Cur. adv. vult.

JUDGMENT.

20*th February*, 1893. BAYLEY, C. J. (Acting).—The question for decision in this appeal is, whether when two properties are mortgaged to one person, and one of them is subsequently mortgaged to another person with notice of the former mortgage, such second mortgagee has any equity to call for a marshalling of the securities in his favour so as to require the first mortgagee to proceed to realise his security in the first instance out of the property not mortgaged to the second mortgagee.

The first mortgage was dated the 15th November, 1876. By s. 8, of "The Transfer of Property Act, IV of 1882" this equity is made subject to the second mortgage having been made without notice of the former one, but that section has no application to this case, as the Act was not extended to the Bombay Presidency until the 1st January 1893, (Notification, dated the 27th October, 1892, by the Government of Bombay).

Although it is said in Macpherson on Mortgages, p. 491, (7th Ed.) that there does not appear to be any case in which the doctrine of marshalling has been applied to Mofussil mortgages, and although a doubt was expressed by the High Court at Calcutta in 1869 as to whether the doctrine of marshalling of securities ought to be introduced into India, and thereby (as the Court said) to interfere with the legal rights of parties—see *Khetoosee Cherooria* v. *Banee Madhub* (17)—I entertain no doubt that such doctrine has been so introduced.

---

(1) 13 B. 45. (2) 13 M.I.A, 404. (3) 4 B. 573 (note).
(4) L.R. 13 Eq. 158. (5) 3 Mac. and G. 683. (6) L.R. 7 Ch. 507.
(7) 3 De G. M. and G. 857. (8) 7 W. R. 483.
(9) W.R. (1864), 374. (10) P.J. 1877, p. 83. (11) 11 C. 258.
(12) 5 M. 385. (13) 5 M. 387. (14) 2 Atk. 446.
(15) 7 A. 711. (16) 1 W. R. 353. (17) 12 W. R. 114.

1893

FEB. 20.

APPELLATE CIVIL.

16 B. 160.

In two cases which came before Mr. Justice Couch and his colleagues in the High Court of Bombay in 1865, *viz.*, *Dada* v. *Babaji* (1) and *Webbe* v. *Lester* (2), it was held that although the English law is not obligatory upon the Courts in the Mofusssil, they ought, in the absence of special law and usage, in deciding a case according to "justice, equity and good conscience" (Regulation IV of 1827, s. 26), to be guided by the principles **[171]** of English law applicable to a similar state of circumstances. The Courts, however, will not, in such a case, apply rules of English law, which, though well-established and binding on English Courts, are yet so special in their nature and origin as to be inapplicable to the different circumstances of this country, and accordingly the Court of first instance (Ordinary Original Civil Jurisdiction), refused to apply the rule in *Shelley's case* to an agreement by the members of a Parsi family relating to an estate in the Island of Salsette, in the Mofussil of this Presidency—see *Mithibai* v. *Limji Nowroji Banaji and others* (3), a decision which was affirmed in the Court of appeal (I. L. R. 6 Bom. 151)—both Courts holding that such well-established rule was a law of property or tenure based on feudal considerations and was unsuited to the circumstances of India. It is unnecessary for me to point out, in detail, what Mr. Justice Telang has already done, and I venture to think correctly, in his judgment in this case, that the authorities relied on by Mr. Goculdas K. Parekh, the pleader for the respondent (original plaintiff in the Court below), are inapplicable and may be distinguished from the present case. I am of opinion that there is such an equity in favour of the subsequent mortgagee (the present appellant) as is claimed on his behalf. In the argument before me I did not understand it to be denied that the doctrine of marshalling had been applied in the Courts in India, but it was urged that it had not been carried further than that it is applicable where the second mortgagee had no notice of the first mortgage. No doubt in the case before Lord Hardwicke (*Lanoy* v. *The Duke of Athol* (4), reference is made to the second mortgagee having no notice of the first mortgage, but subsequent decisions pay no regard to the absence of such notice, and do not refer to notice as in any way entering into the consideration of this equity. In the note in Tudor's Leading Cases in Equity, Vol. 2, p. 109, (6th Ed. 1886) Mr. Tudor says that it seems to be immaterial whether the second mortgagee has notice of the first mortgage or not. In the leading case of *Aldrich* v. *Cooper* (5), decided by Lord Chancellor Eldon in 1803, he says (p. 388) 'If a party has two funds, a person **[172]** having an interest in one only has a right in equity to compel the former to resort to the other if that is necessary for the satisfaction of both.' See also at p. 394 the instances he gives of the rule that a person having a double fund shall not by his option disappoint another who has only one. In *Baldwin* v. *Belcher* (6) the Lord Chancellor of Ireland (Sir Edward Sugden, afterwards Lord St. Leonards) states the rule without any qualification. He says: 'The rule of law is perfectly settled. If there are two creditors who have taken securities for their respective debts, and the security of the first creditor ranges over two funds, while the security of the other is confined to one of those funds, the Court will arrange or marshal the assets, so as to throw the person who has two funds liable to his demand on that which is not liable to the debt of the second creditor.' In *Gibson* v. *Seagrim* (7), two properties X and Y were mortgaged

(1) 2 B. H. C. R. 36 (38). (2) 2 B. H C. R. 55. (3) 5 B. 506.
(4) 2 Atk. 446. (5) 8 Vesey, 381. (6) 3 Dru. and War. 173.
(7) 20 Beav. 614.

to A, and afterwards X was mortgaged to B. The Master of the Rolls held that B was entitled to have the securities marshalled so as to throw A's mortgage, in the first instance, on estate Y. See also *Re Mower's Trusts* (1) to the same effect.

The learned pleader for the appellant, Rao Saheb Vasudev Jagannath Kirtikar, cited two passages in Ghose's Tagore Lectures for 1875-76, p. 299, where it is stated that the doctrine of marshalling had been adopted by the Courts in India as a rule founded in equity and good conscience, and that although in some of the earlier cases it was laid down that marshalling could not be insisted on by an incumbrancer with notice of the prior mortgage (*Lanoy* v. *The Duke of Athol* (2)) the rule was considered too narrow, and that the distinction had since been abolished (*Gibson* v. *Seagrim* (3) ; *Tidd* v. *Lister* (4)). The appellant's pleader relied upon a decision of Melvill and Kemball, JJ., in *Nanabhat* v. *Lakshman* (5) as a case of marshalling with notice of the first incumbrance. As it is difficult to collect what are the facts of the case from that report, I have examined the record and the notes of the argument in Mr. Justice Melvill's note-book. From **[173]** these it appears that Lakshman (original defendant No. 1) on 3rd January, 1868, mortgaged certain trees on his land to Nanabhat (original plaintiff) to secure Rs. 150 then borrowed, payable in two years. The suit was brought on the 3rd January, 1876, to recover the above sum, and a like sum for interest, or to recover possession of the mortgaged trees. The mortgage bond had been registered in Book I relating to immoveable property. Nanabhat in suit No. 51 of 1870 sued Lakshman for Rs. 100, and on the 15th March, 1870, obtained a decree, attached the field and trees, besides other property. A prohibitory order of 23rd January, 1871, published on the 11th February, 1871, expressly mentioned the mortgage. On the 6th July, 1871, the property was purchased by Vishnu Gopal, who, on the 6th September, 1871, sold to Narayan, father of Vaman (original defendant No. 2). The Subordinate Judge found that the bond was proved, that the plaintiff had not possession of the mortgaged trees, and only decreed that plaintiff should recover Rs. 300 from Lakshman, and dismissed the claim against Vaman, laying his costs on plaintiff. The District Judge confirmed the decree with costs.

The plaintiff appealed to the High Court on, amongst others, the following grounds :—(1) that the lower Court had erroneously held that the mortgaged property (*viz.*, 9 mango and 20 babul trees) was moveable property ; (3) that the lower Court erroneously held that the appellant's lien upon the trees would not follow the trees into the hands of the purchaser at a Court sale, who had purchased the trees with full notice of the mortgage lien ; (4) that the judicial sale of the trees having been clearly made subject to the mortgage lien, the purchaser was bound to pay the mortgage amount on the trees.

For the appellant it was argued before Melvill and Kemball, JJ., that registration was sufficient notice, and that, at any rate, the auction-purchaser was bound even if the sale had not been made expressly subject to the mortgage. On the other side, it was contended that the land was not mortgaged, only the trees, and that by Act XX of 1866 standing timber is moveable property, and that plaintiff ought to recover his debt from the whole moveable property.

---

(1) L. R. 8 Eq. 110. (2) 2 Atk. 445. (3) 20 Beav. 614.
(4) 10 Hare 140 (157). (5) P. J. for 1877, 83.

1893
FEB. 20.
APPEL-
LATE
CIVIL.
18 B. 160.

[174] The Court delivered the following judgment:—

"If notice be necessary, in order to affect a purchaser at a Court-sale, the registration of the plaintiff's mortgage bond was sufficient notice. Vishnu Gopal purchased both land and trees at the auction-sale, and if he had searched the register, as he was bound to do, he would have ascertained the existence of the plaintiff's lien on the trees by virtue of his mortgage bond, which was registered in Book I relating to immoveable property. Under these circumstances, we consider that the plaintiff's lien upon the mortgaged property remains valid, though in execution he should be obliged to proceed, in the first instance, against any portion of the mortgaged property which may remain in the hands of the mortgagor before he proceeds against any of the property held by the defendant Vaman. If the defendant Vaman or his father has made away with any of the trees, he is liable for their value, which must be ascertained at the time of the execution. We amend the decrees of the Courts below and award the plaintiff's claim for Rs. 300, and direct that the same be recovered from the defendant Lakshman personally, or from the mortgaged property, and also from the defendant Vaman personally, to the extent of the value of any of the mortgaged trees which may have been cut down after the land came into the possession of his father Narayan. Costs on defendants throughout."

It will thus be seen that the High Court considered that the plaintiff's lien upon the mortgaged property remained valid, though in execution he should be obliged to proceed, in the first instance, against any portion of the mortgaged property which might remain in the hands of the mortgagor before he proceeded against any of the property held by the defendant Vaman,—that is, it compelled the plaintiff to proceed against his mortgagor and such mortgagor's property before he proceeded against Vaman, the son of Narayan, who had purchased from Vishnu Gopal the auction-purchaser. The Court in that manner arranged or marshalled the assets available for the satisfaction of the original mortgage lien of the 3rd January, 1868.

In the present case, as pointed out by Mr. Justice Telang, there is no finding, or even allegation, that any injury will be occasioned [175] to the prior incumbrancer by his having to sell, in the first instance, the field which is not mortgaged to the appellant.

For the above reasons, I am of opinion that the view taken by Mr. Justice Telang is the correct one, and I concur in the form of the decree which he proposes should be made. Appellant to have his costs throughout.

Decree varied.

18 B. 175 (F.B.).

1893
FEB. 23.

FULL BENCH.

18 B. 175 (F.B.).

APPELLATE CIVIL.—FULL BENCH.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Candy and Mr. Justice Fulton.

SHANTAPPA CHEDAMBARAYA (*Auction-purchaser*) *v.* SUBRAO RAMCHANDRA YELLAPUR (*Decree-holder*), RAYAPA SHIVAPA SHETI (*Judgment-debtor*).* [23rd February, 1893.]

Stamp—Stamp Act (I of 1879), sch. I, arts. 16-21—Decree—Execution—Sale of property subject to mortgage—Valuation of property sold—Computation of purchase-money—Certificate of sale—Proclamation of sale—Mortgages noted in proclamation of sale—Civil Procedure Code (Act XIV of 1882), ss. 282-287.

Mortgages noted in the proclamation of sale as claims upon the property sold, should not be entered in the certificate of sale, or be computed as part of the purchase-money, unless they have been admitted by the parties, or established by decree, or unless they have been declared, under s. 282 of the Civil Procedure Code (Act XIV of 1882), to be charges on the property, and the Court has seen fit to sell it subject to them, but they should be entered in the certificate and computed as part of the purchase-money if they have been thus admitted or established, or if they have been declared under s. 282 of the Civil Procedure Code (Act XIV of 1882), and the sale has been held subject to them.

Claims admitted by parties or established by the decree of a Court should be entered in the proclamation of sale as charges upon the property, though they have come to the knowledge of the Court in an enquiry under s. 287 only, and have not been made the subject of an order under s. 287 of the Civil Procedure Code (Act XIV of 1882).

[Rel., 15 Ind. Cas. 5 (8) = 15 O.C. 211.]

THIS was a reference made by Rao Saheb H. S. Phadnis, Subordinate Judge of Kumta in the Kanara District, under s. 49 of the Stamp Act (I of 1879) and s. 617 of the Civil Procedure Code (Act XIV of 1882).

[176] One Subrao Ramchandra Yellapur obtained a decree against Rayapa Shivapa Shetti and in execution attached and sold certain property subject to four different mortgages. The property was purchased at the Court sale by one Shantappa Chedambaraya, who was the holder of one of the four mortgages. He applied for a certificate of sale, and relying upon the decision in *In re Ramkrishna* (1) contended that his mortgage and one of the other three mortgages should not be inserted in the certificate of sale and computed as purchase-money, as they had not been admitted by the parties or established by the decree of a Court. The Subordinate Judge, being of opinion that the decision relied on was irreconcileable with the ruling in *Sha Nagindas* v. *Halalkore Nathwa* (2), referred the following questions:—

"I. Should not the mortgages specifically noted in the proclamation of sale as being charged upon the property sold, be so entered in a certificate of sale, and be computed as part of the purchase-money?

"II. Should claims admitted by the parties, or established by the decree of a Court, be entered in the proclamation of sale as charges upon the property to be sold, supposing they have come to the knowledge of the Court in an inquiry made under s. 287 only, but are not covered by an order under s. 282?"

The opinion of the Subordinate Judge on the first question was in the affirmative and on the second in the negative.

---

* Civil Reference No. 16 of 1892.

(1) 9 B. 47.

(2) 5 B. 470.

1893
FEB. 23.

FULL BENCH.

18 B. 175 (F.B.).

There was no appearance for the parties.

The reference was decided by a Full Bench consisting of SARGENT, C.J., and CANDY and FULTON, JJ.

JUDGMENT.

We think that the first question, put by the Subordinate Judge, should be answered by saying that mortgages, noted in the proclamation of sale as claims upon the property sold, should not necessarily be entered in the certificate of sale, or be computed as part of the purchase-money, unless they have been admitted by the parties, or established by decree, or unless they have been declared, under s. 282 of the Civil Procedure Code, to be charges on the property and the Court has seen [177] fit to sell it subject to them, but that they should be entered in the certificate, and computed as part of the purchase-money, if they have been thus admitted or established, or if they have been declared, under s. 282 of the Civil Procedure Code, and the sale has been held subject to them.

As regards the second question, we consider that claims admitted by the parties, or established by decree of a Court, should be entered in the proclamation of sale as charges upon the property, though they have come to the knowledge of the Court in an enquiry under s. 287 only, and have not been made the subject of an order under s. 282 of the Civil Procedure Code.

Order accordingly.

---

18 B. 177.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Bayley.

PARVATI AND ANOTHER, MINORS (*Original Plaintiffs*), *Appellants v.* GANPATRAO BALAL AND OTHERS (*Original Defendants*), *Respondents.** [27th February, 1893.]

Hindu law—Joint family—Manager—Gift by manager of part of family property—Illegitimate daughters—Maintenance—Gift—Alienation of family property—"Dasiputra" (son of a slave).

Ramchandra, the manager of an undivided Hindu family, gave certain shares in a spinning and weaving company, which had been purchased out of family funds, to Ganesh for and on behalf of the plaintiffs, who were Ramchandra's illegitimate daughters. After the death of Ramchandra and Ganesh, Ramchandra's illegitimate daughters sued the surviving members of the family for a declaration that the shares belonged to them, and that they had a right to have them transferred to their names in the company's books.

Held, without deciding whether illegitimate daughters are entitled to simple maintenance from the family property, in any case, Ramchandra, as manager, could not alienate the shares for that purpose, as there were no emergent circumstances requiring it.

[F., 4 Bom.L.R. 883 (890); R., 24 B. 563 (579); 29 B. 51 (54); 32 B. 562 (566)=10 Bom.L.R. 736.]

APPEAL from the decision of L. G. Fernandez, First Class Subordinate Judge of Poona.

The plaintiffs were the minor illegitimate daughters of one Ramchandra Ganesh, deceased. They sued the defendants, who were the

* Appeal No. 67 of 1890.

legitimate sons of Ramchandra, for a declaration that [178] certain shares in the Morarji Goculdas Spinning and Weaving Company belonged to them, and that they had a right to have these shares transferred to their names in the books of the company.

They alleged that the deceased Ramchandra in 1876 had given these shares to one Ganesh Bapuji for and on their behalf; that he had intended to transfer them into the name of one Ganesh Bapuji Marathe, who passed an agreement to the plaintiffs that he held the shares for them and on their behalf, and that the company declined to transfer the shares to the plaintiffs' names owing to the defendants' opposition. They prayed, therefore, for the above declaration and for an injunction restraining the defendants from interfering with the plaintiffs' rights and from drawing the dividend on the said shares.

The defendants Balvant, Sadashiv and Hari, sons and representatives of the deceased Ramchandra Ganesh, pleaded (*inter alia*) that the suit was time-barred, that Ramchandra was not competent to alienate the shares, which had been purchased out of the family funds, and that the gift being incomplete was invalid.

At the hearing it was proved that the family was joint, and that the shares had been purchased out of the family funds. Ganesh Bapuji had died in 1880. The Subordinate Judge disallowed the claim, holding that the gift to the plaintiffs was not proved, and that the donor Ramchandra had no authority to make the gift. In his judgment he said :—

"The facts which have been proved beyond all doubt are these :— That the defendants' family was joint; that the shares in dispute were purchased with the ancestral funds belonging to the joint family by Ramchandra ; that the said Ramchandra attempted to make a gift of these shares to Ganesh Bapuji ; that he wrote to the secretaries and treasurers of the Morarji Goculdas Spinning and Weaving Company to transfer these shares to Ganesh Bupuji's name, which they refused to do owing to the defendants' objections ; that Ganesh Bapuji brought a suit claiming those two shares as *his* ; that the costs of that suit were defrayed by Chimma, the plaintiffs' guardian ; that [179] Chimma herself claimed the shares from the company as hers. These facts undoubtedly disprove the assertion that the shares were given in gift to the minor plaintiffs as alleged by them. It is for them to prove their assertion that these shares were given to them as alleged, and that the gift was completed by the necessary formalities. These the plaintiffs have clearly failed to prove. Were it otherwise, the shares were purchased with joint ancestral funds by Ramchandra. Hence he cannot make a gift of those shares as against his co-owners, who not only did not give their consent, but actually repudiated the transaction.

* * * * * *."

The plaintiffs appealed.

Inverarity (with *Balaji Abaji Bhagavat*), for the appellants (plaintiffs). —The management of the family property was in the hands of Ramchandra, who purchased the shares in dispute in his own name in or about November, 1875. In the year 1876 he was ill and desired to go on a pilgrimage to Benares, where his father Ganpatrao was then living. The plaintiffs' mother Chimma had been Ramchandra's mistress for several years, and prior to his going to Benares he desired to make provision for the plaintiffs who are his illegitimate daughters. He had a separate account in the family books, and he debited to himself the price of fiveshares and credited it in the accounts of the family. In fact, he bought five shares from the

1893
FEB. 27.
APPELLATE CIVIL.
18 B. 177.

family estate. Out of them he gave two to Ganesh Bapuji orally upon a secret trust in favour of his daughters (the plaintiffs). In the year 1878, Ganesh passed an agreement in favour of the plaintiffs with respect to the shares. The Subordinate Judge has held that agreement to be proved. The question as to the gift has arisen in other judicial proceedings. The story as to the gift, therefore, is not a new one. The only question to be determined, then, is whether the gift was complete or not. The fact of the gift is not disputed. The contention is either that Ramchandra had no power to make the gift, or that the gift was incomplete. The lower Court wrongly held that there was no gift. The shares were given for the maintenance of the plaintiffs. The illegitimate children of a person belonging to the twice-born [180] class are entitled to maintenance; and the assignment in favour of the plaintiffs being complete, they are entitled to take the benefit of that assignment.

The delivery, by Ramchandra, of the share certificates to Genesh and the execution of the transfers with the oral direction to Ganesh to hold the shares for the benefit of the minor plaintiffs show that there was a perfectly created trust valid in law. It could not be rendered incomplete by the fact that the name of Ganesh was not entered in the shareholders' register. Ramchandra having done everything in his power to get Ganesh's name registered, the trust was complete—Lewin on Trusts, p. 66. The legal estate was divested from the settlor, and that was sufficient. When the owner creates a trust for the benefit of a third person by appointing a trustee, it is not necessary that the legal interest of the owner should be entirely divested from him if the trustee can acquire that legal estate without any further act on the part of the owner. When there is nothing further to be done by the donor, the gift is complete—*In re Richards*; *Shenstone* v. *Brock* (1). It is not necessary for the purpose of passing the interest in the shares that the transfer should be registered—Buckley on Companies (6th ed.), p. 93; *Roots* v. *Williamson* (2); *The Societe General de Paris and G. Colladon* v. *Jenet Walker* (3).

Assuming that the legal estate did not pass to Ganesh, still under the circumstances the plaintiffs might have compelled the company to transfer the shares to their names under the articles of association. That being so, they could have asserted their right against Ramchandra even if he had been alive.

The rules as to a gift under Hindu law are not applicable to this transaction. We contend that the transaction is not a gift, but a mere transfer effected for the purpose of a legal object, namely, the maintenance of the minor plaintiffs, who, though illegitimate, are entitled to maintenance under Hindu law.

Jardine (with *Mahadeo Chimnaji Apte*), for the respondents (defendants).— The shares were purchased by Ramchandra with [181] ancestral funds; they were, therefore, family property. At the time of the alleged transfer, Ramchandra, although the manager of the undivided family, had only a limited interest in the family estate which he could not give away even to the extent of his own share—*Ramanna* v. *Venkata* (4); *Ponnusami* v. *Thatha* (5); *Vasudev* v. *Venkatesh* (6); *Gangubai* v. *Ramanna* (7) *Lakshman Dada Naik* v. *Ramchandra Dada Naik* (8). Even assuming that there was legal or moral obligation for

(1) 36 Ch. D. 541. (2) 38 Ch. D. 485. (3) 11 Ap. Ca. 20.
(4) 11 M. 246. (5) 9 M. 273. (6) 10 B. H. C. R. 139.
(7) 3 B.H.C.R.A.C.J. 66. (8) 7 I. A. 181.

the gift, still the above authorities show that the gift was bad. But we contend that there was neither any legal nor moral obligation to support the plaintiffs, being illegitimate daughters. The Hindu texts lay down that it is only a *dasi-putra* (son of a slave) that is entitled to inherit—*Rahi* v. *Govind* (1). Illegitimate sons may be entitled to maintenance, but illegitimate daughters are not. The word in all the texts being *dasi-putra* (son of a slave), it excludes a daughter. No doubt in the reported cases the words used are "illegitimate children," but none of the texts uses the word "children," the word throughout being *putra* (a son)—Vyavahar Mayukha, Ch. IV, s. 14, pl. 29-32; Daya Bhaga, Ch. IX, pl. 28; Mitakshara, Ch. I, s. 12; *Kirpal Narain* v. *Sukurmoni* (2). Even if the transaction in dispute be considered to be a gift, it is invalid according to Hindu law. The gift was not complete. It was argued that the transfer might have been compelled, but the thing to be considered is what was actually done. There was no transfer made, and Ganesh acquiesced in the objection raised by the company to the transfer. Ramchandra might have intended to make a gift which was not completed before his death. Such a gift is invalid—*Hirbai* v. *Jan Mahomed* (3).

Inverarity, in reply:—In support of our contention that illegitimate daughters are entitled to maintenance, we rely upon *Salu* v. *Hari* (4); *Inderun Valungypooly Taver* v. *Ramasawmy Pandia* (5); *Sri Gajapathi Radhika Patta Maha Devi Garu* v. *Sri Gajapathi* [182] *Nilamani Patta Maha Devi Garu* (6); West and Bühler, pp. 263. 432. No doubt the word "son" occurs in the texts, but we contend that the word "son" should be held to include "daughter," as the word "brother" has been held to include "sister."

JUDGMENT.

SARGENT, C.J.—The plaintiffs in this suit, who are the illegitimate children of one Ramchandra Ganesh, ask for a declaration that certain shares in the Morarji Gokuldas Spinning and Weaving Company, which had been purchased by their father, belonged to them, on the ground that they had been given by him to one Ganesh Bapuji for and on their behalf. The Court below found that the gift to plaintiffs was not proved; that the shares were purchased with ancestral funds by Ramchandra, and that he could not make a gift of them without the consent of the defendants, who are his legitimate children; that the gift, if at all, was to Ganesh and not to the plaintiffs, and that the gift, in any case, was incomplete, and accordingly dismissed the suit.

The appellants (the plaintiffs) have not attempted to argue that the Court was not correct in its finding as to the family having been joint and the shares having been bought with ancestral funds. The first question, therefore, in this case is whether Ramchandra could give the shares to the plaintiffs, or rather to Ganesh in their behalf, supposing the gift to be one which the Court would otherwise give effect to.

Ramchandra, it is admitted, was acting as manager of the family whilst his father Ganpatrao Balal was at Benares, and it has been argued that the support of Ramchandra's illegitimate children by Chima was a legal obligation on the entire family, and that a gift by Ramchandra as manager for that purpose could not be impugned, but that, at any rate, it was good as an alienation of his own share for that purpose. There is, doubtless, express authority for holding that an illegitimate son of one of

(1) 1 B. 97. (2) 19 C. 91. (3) 7 B. 229.
(4) P. J. (1877), p. 34. (5) 13 M.I.A. 141 (159). (6) 13 M.I.A. 497.

1893
FEB. 27.
APPELLATE CIVIL.
18 B. 177.

the family is entitled amongst the regenerate classes to maintenance. See *Chuoturya Run Murdun Syn* v. *Sahub Purhulad* (1) and *Muttusawmy* v. *Vencataswara* (2), and indeed in the case of *Rahi* v. *Govind* (3), Westropp, C. J., states it to be the result of the authorities that [183] amongst the three regenerated classes illegitimate "children" are entitled to maintenance. It is to be remarked, however, that the real question in that case was as to the meaning of '*dasi*' in the text relating to the rights of illegitimate children, and that the authorities on which Westropp, C. J., relies in support of that statement, and which are mentioned in the note at p. 102, only deal with the case of a *dasi-putra*, *i. e.*, illegitimate son. In the Mitakshara, Ch. I, s. 12, cl. 3, Yajnavalkya is cited as saying that "the son begotten on a female slave does not obtain a share even by the father's choice, but if he be docile he receives a simple maintenance" and the same passage is referred to by the author of the Mayukha at Ch. IV, s. 4, and it is on these authorities that Sir T. Strange in his Hindu Law, Vol. I, p. 70, states the right of illegitimate "progeny" to maintenance. Unless, therefore, the expression "*dasi-putra*" can be held to include "daughter," there is no authority for a daughter having a claim to maintenance. It was said that a "son" is to be construed as including a daughter, as "brethren" was interpreted as including "sisters" by Nanda Pandita. But that mode of interpretation has been much controverted, as may be seen by the discussion of the authorities in the judgment in *Vinayak* v. *Lakshmibai* (4), which was decided upon the authority of the Mayukha. Moreover, the right of illegitimate children to be maintained by the family is clearly an exceptional one as shown by the language of the text; and as the right to maintenance is laid down, in terms, in favour only of illegitimate sons, the proper inference, from the absence of any express provision for daughters, is, we think, that they were not contemplated as having the same right.

But in any view of that question it is clear that the plaintiffs' claim to the shares is not sustainable. Even if the daughters were entitled to simple maintenance out of the family property it cannot be contended that it was within the power of Ramchandra, even as the *de facto* manager, to alienate the shares for that purpose, as there were no emergent circumstances requiring it. The case of *Gangubai* v. *Ramanna* (5) shows this could not be done even in the case of a legitimate daughter.

[184] Lastly, as to the suggestion that the gift might be supported as an alienation of Ramchandra's interest in the family property, even if it could be regarded as an "alienation for value" so as to satisfy the decision in *Vasudev* v. *Venkatesh* (6), it would be sufficient to say that such was not the plaintiffs' case. But independently of that objection it is plain, on the authorities, that a suit would not lie against the other members of the family to have the shares declared to belong to plaintiffs and transferred into their names.

For these reasons, and without discussing the question whether there was such a possession by Ganesh as to create a valid gift by Hindu law, or whether the evidence suffices to establish that the gift was to Ganesh as a trustee for the benefit of the plaintiffs, we must hold that the plaint was properly dismissed, and confirm the decree with costs.

Decree confirmed.

---

(1) 7 M.I.A. 18.
(2) 12 M.I.A. 203.
(3) 1 B. 97 (102).
(4) 1 B.H.C.R. 117 (123).
(5) 3 B.H.C.R.A. C.J. 66.
(6) 10 B.H.C.R. 139 (160).

18 B. 184.

1893
SEP. 8.

ORIGINAL CIVIL.

ORIGINAL CIVIL.

18 B. 184.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Starling.

MUNICIPAL COMMISSIONER FOR THE CITY OF BOMBAY, *Appellant v.* SYED ABDUL HUK KURMALKER, *Respondent.**

[8th September, 1893.]

Municipality—Municipal Act, III (Bom.) of 1888, *ss.* 298, 299 *and* 301—*Land acquisition—Compulsory acquisition—Set-back—Compensation paid to owner for land with buildings thereon taken—Basis of valuation of such land—*15 *per cent. addition to compensation not allowed—Act XII of* 1888, *s.* 3—*Practice—Appeal from decision of Judge of Small Cause Court granting compensation for land taken by municipality.*

Where, in case of set back, land with buildings thereon was taken up by the Municipal Commissioner from a private owner under Act III of 1888, ss. 298, 299 and 301,

Held, that the amount of compensation awarded to the owner should be calculated with regard to the price given within a few years previously for land of a similar character in the immediate neighbourhood of the land in question.

Held, also, that the addition of 15 per cent. could not be allowed.

The Municipal Commissioner v. *Patel Haji Mahomed* (1), followed.

[185] An appeal lies to the High Court from a decision of the Chief Judge of the Small Cause Court of Bombay granting compensation to the owner of land taken by the municipality in case of a set-back under the Municipal Act III of 1888, ss. 298, 299, 301.

[R., 10 Bom. L. R. 907 (912).]

APPEAL to the High Court against the decision of the Chief Judge of the Small Causes Court (see Act XII of 1888, s. 3).

The respondent had claimed compensation from the appellant in respect of certain lands, together with the buildings thereon, situate at the junction of Apollo Street and Byrne Lane and in Byrne Lane in the City of Bombay, which were taken up by the appellant on behalf of the municipality, and the Chief Judge had awarded to the respondent a sum of Rs. 25,665-8-3 as compensation and interest thereon, at the rate of 5 per cent. per annum, from the 8th February, 1882, until payment.

From this decision the Municipal Commissioner appealed to the High Court.

Inverarity and *Scott*, for the appellant.

Lang (Acting Advocate-General) and *Macpherson*, for the respondent.

Lang raised the point that no appeal lay. The only section giving an appeal to the High Court is s. 3 of Act XII of 1888, but the appeal there given was only in cases under ss. 503 and 504 of the Municipal Act (III of 1888). He referred to ss. 298, 299, 301, 345 and 346 of the Municipal Act (III of 1888).

Per Curiam:—We think an appeal lies.

The argument of the appeal then proceeded. The following authorities were referred to:—*In the matter of the Land Acquisition Act* (2); *The Municipal Commissioner for the City of Bombay* v. *Patel Haji Mahomed* (1); Statute 38 and 39 Vict., c. 36, s. 19, cl. 2.

Cur. adv. vult.

---

* Municipal Appeal No. $\frac{\text{M.}}{15}$ of 1892.

(1) 14 B. 292.

(2) 15 B. 279.

1893

SEP. 8.

ORIGINAL CIVIL.

18 B. 184.

JUDGMENT.

STARLING, J.—The question for determination in this appeal is the amount to which the respondent is entitled in compensation in respect of a piece of land on the south side of Bruce Lane, [186] and running from Apollo Street to Church Lane, taken up by the Municipal Commissioner as a set-back. That amount is to be the value of the land as acquired, and that would be the market value of the land at the time when possession was taken by the municipality. That value, in our opinion, is the price which a man, intending to use the land, of which the set-back was a portion, for the purposes for which it could be most profitably employed at that time, having regard to all its surrounding circumstances, would probably give for it.

The basis of valuation adopted by the surveyors, who were called on behalf of the respondent, seems to us to be faulty. In the first place, they calculate the value the land might have to the purchaser after he has built upon it and let out his building to tenants. They assume that the building will at once be fully let (allowing only for average casual vacancies), and theyassume that a person buying to build will be content, at the time of purchase, to look forward to a net return of only 4 or 5 per cent. on the total cost of land and buildings, assuming his speculation to be entirely successful. It seems to me that a man buying a piece of land as a speculation for building purposes would require a larger percentage than that, certainly in this country, and would not pay a price for the land alone which would only enable him to get that comparatively small percentage after he had erected his buildings and run the risk of their letting well or not. There are also other minor items, which seem to us to have been taken too favourably for the owner. Consequently we do not think that such a basis of valuation should be accepted in any case, certainly not when there is any more practical basis to work on.

In the present case there are materials of a much more practical character to hand, *viz.*, the price given within the last few years for land of a similar character in the immediate neighbourhood, the price given by the respondent for the large plot of land of which the portion taken by the municipality forms a part, and, lastly, the price which he offered to take for the very piece.

In Ex. No. 3 there are three plots marked which have changed hands comparatively recently. That coloured green [187] was purchased by Haji Allarakhia Nathu at the beginning of 1891 to build on at a price which showed the rate per square yard was about Rs. 46. It had no building on it at that time, so that the difficulty which arises in determining how much is to be allowedfor buildings does not arise; but it is not so well situated as Sirdar's Palace is, for Apollo Street is there only half the width; it is opposite the respondent's property. Of the blue piece, plot A is, however, in our opinion, in quite as good a position as the respondent's property, though it has not so large a frontage to Apollo Street. The whole of the blue plot was sold in 1885 at a price which worked out a rate of about Rs. 100 a square yard, including buildings, the value of which is disputed; but, taking all things into consideration, we are of opinion that the value of the land itself cannot be taken at more than Rs. 50 a square yard for the whole plot; and assuming that the value of part A, as facing the wide part of Apollo Street, was worth double that amount, that would only give Rs. 100 a square yard for that portion, which we consider a very full rate for that piece.

The property coloured red was purchased in 1886 for a price which worked out to under Rs. 60 a square yard including buildings, and, deducting the value of the buildings, would probably leave the value of the land at about Rs. 30 a square yard.

This last plot is not in anything like as good a position as the front portion of the respondent's premises, though it is somewhat better than that of those abutting on Church Lane.

In 1886 the respondent purchased the whole plot of land known as the Old Secretariat, of which the strip now in dispute is a portion, at a price which, after deducting the value of existing buildings, would give about Rs. 30 a square yard, and on the 21st July 1888, he offered to sell the strip to the Municipality at the rate of Rs. 50 a square yard.

Within the last few years there does not seem to have been any material change in the value of land in the Fort. Consequently, all the foregoing materials can be used in this case without making any allowance for possible change of value.

[188] In calculating the compensation payable to the respondent, the strip of land has been divided into three portions; one coming up to Apollo Street containing, as finally settled by the Chief Judge of the Small Causes Court, 74·72 square yards, another at the Church Lane end containing 17·60 square yards, and the third between those two containing 183·93 square yards. Now, taking into account all the facts we have just drawn attention to, we think the respondent will be amply compensated if he is allowed Rs. 80 a square yard for the first portion, Rs. 50 a square yard for the second, and as a high value has been put upon the two end pieces because of the open space between them, which space must be kept open or with only low buildings thereon, in order to justify the value we have put on them, we think that the third piece cannot be worth more than Rs. 20 a square yard. That will work out as follows :—

74·72 at 80 =	5,997·60
17·60 at 50 =	880·00
183·93 at 20 =	3,678·60
	10, 536·20

Of course these amounts are to a certain extent only approximate; but, in a matter of this kind, it is absolutely impossible to ascertain a mathematically exact value of any piece of land, and the utmost that can be done is to take into consideration all the surrounding circumstances and from them deduce, as a jury, the value which the owner ought to receive.

To the amount of Rs. 10,536-3-2 as calculated above must be added the sum of Rs. 181-12-3, the value of old erections allowed by the Chief Judge and not appealed against, which brings the total compensation up to Rs. 10,717-15-5.

The respondent by his objections has asked that he should be allowed 15 per cent. on the amount awarded him as on account of the compulsory nature of the acquisition. That point has already been decided against the respondent in the case of *The Municipal Commissioner for the City of Bombay* v. *Patel Haji Mahomed* (1), and we see no reason to differ from the decision in that case.

[189] The award of the Chief Judge of the Small Causes Court must, therefore, be varied by inserting the sum of Rs. 10,717-15-5 in the place

(1) 14 B. 292.

1893
SEP. 8.

ORIGINAL CIVIL.

18 B. 184.

of Rs. 25,665-8-3. The respondent will retain the costs awarded to him in the Court below, but must pay the costs of the appellant in this Court.

Attorneys for the appellant;—Messrs. *Crawford, Burder and Co.*

Attorneys for the respondent:—Messrs. *Brown and Moir.*

---

18 B. 189.

ORIGINAL CIVIL.

Before Mr. Justice Starling and, on appeal, before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Bayley.

JIJIBHOY MUNCHERJI JIJIBHOY AND OTHERS, (*Plaintiffs*), *v.* BYRAMJI JIJIBHOY AND OTHERS (*Defendants*).* [13th and 16th October. 1893.]

Costs—Taxation—Attorney and client—Trustees—Bills of costs paid by majority of trustees—Right of dissenting trustee to have bills taxed even after payment.

In a suit relating to a charitable trust the decree directed that the costs of all parties thereto, when taxed, should be paid out of the trust fund. Certain bills of costs were subsequently furnished to the trustees by the attorneys. Two of the trustees thought the bills reasonable and agreed that they should be paid. The third trustee objected to the amount of the bills as exorbitant, and desired that they should be taxed. Notwithstanding his protest, however, the other trustees paid the bills without taxation. He, thereupon, took out a summons calling upon his co-trustees and the attorneys to show cause why the bills should not be taxed and why they should not refund any sum which had been overpaid.

Held, that the dissenting trustee was entitled to have the bills taxed, although they had been paid, and that the High Court had jurisdiction to order taxation to be made.

BY the decree made in this suit on the 5th January, 1889, it was ordered that a scheme should be prepared for the management of certain charities called the Jijibhoy Dadabhoy Trusts. The scheme was subsequently settled in chambers,and an order was made directing *(inter alia)* that the costs of all parties to the suit when taxed as between attorney and client should be paid out of the Trust Fund.

[190] The trustees of the charities were the plaintiffs in the suit, and were three in number, *viz.*, Jijibhoy Muncherji Merwanji, Rustomji Nanabhoy Byramji and Dadabhoy Bomanji Jijibhoy. In the month of September, 1890, the trustees changed their solicitors, and the suit and matters connected with it were tansferred to Messrs. Ardesir Hormasji and Dinsha, who, on the 12th April, 1893, by request sent in their bills of costs for work done from September, 1890 to the end of March, 1893. There were two bills of costs sent in, one for Rs. 11,329-13-0 and the other for Rs. 842-2-0. These bills less (an abatement of Rs. 500) were paid by the two first mentioned trustees on the 21st June, 1893.

On the 21st August, 1893, the third trustee, Dadabhoy Bomanji Jijibhoy, took out a summons calling on his co-trustees and the solicitors (Messrs. Ardesir Hormasji and Dinsha) to show cause why the said bills of costs should not be taxed by the Taxing Master, and why such sums as might be taxed off should not be refunded to the charities by the solicitors.

The objecting trustee (Dadabhoy Bomanji Jijibhoy) in his affidavit stated that the bills sent in appeared to him to be exorbitant, and that he had called upon his co-trustees to get them taxed before settling them, but

---

* Suit No. 375 of 1886.

1893
OCT. 16.
ORIGINAL CIVIL.
18 B. 189.

that notwithstanding his repeated protests the bills had been paid on the 21st June. On the 13th July, 1893, he requested his co-trustees (through his solicitor) to get the bills taxed, and on the same day enquired of Messrs. Ardesir Hormasji and Dinsha if they were prepared to get them taxed; otherwise he would bring the matter before the Court. He set forth in his affidavit the items in the bills to which he objected.

The co-trustees also filed an affidavit, in which they stated that the bills of costs had been carefully examined and found to be reasonable; that the solicitors had rendered very valuable services to the charities, and that many charges which they might have made had been omitted by them from these bills. They said that these facts being brought to their knowledge they (*i. e.* the two co-trustees) had met and passed a resolution for payment of the bills. Their affidavit contained the following statements:—

[191] "5. We, Jijibhoy Mancherji Merwanji Jijibhoy and Rustomji Nanabhoy Byramji Jijibhoy, say that, having regard to the provisions of the trust-deed and the practice hitherto observed by the trustees, we were justified in passing the resolution aforesaid and paying the solicitors' costs without taxation.

"6. Several days after the aforesaid resolution we were informed that Mr. Dadabhoy objected to the bills being paid without taxation, but it is not true that he alleged the same to be exorbitant or improper. As it was competent to us to pay solicitors' costs without taxation, we made payment. A large portion of such costs had previously been paid pursuant to a resolution passed by the trustees, including the said Dadabhoy, on the 30th day of April, 1892.

"7. We say that we, the present trustees and our predecessors in office for four years past, have paid solicitors' bills without taxation, and that Mr. Dadabhoy is a party to payment of costs of other solicitors connected with this suit without taxation."

The solicitors (Messrs. Ardesir Hormasji and Dinsha) also filed an affidavit denying that their charges were exorbitant and alleging that they were reasonable and proper charges according to the scale in the Taxing Master's office. They stated that between the 12th April, 1893 (the day on which the bills were sent in) and the 21st June, 1893 (on which day they were paid) the objecting trustee had not communicated with them directly or indirectly, and that they had no intimation that he required the bills to be taxed, or that he considered them "heavy" until they received his letter of the 13th July. They stated that the trustees had full opportunity of examining the bills and getting them taxed if they so desired before payment, and they further alleged that they had caused enquiries to be made in the office of the Taxing Master and had ascertained that within the previous twenty-two years there was no precedent for a reference for taxation after payment, and they submitted that the Court had not the power to direct taxation after payment on a summary proceeding by summons.

The summons was argued on the 2nd September, 1893.

Lang (Acting Advocate General), for Dadabhoy Bomanji Jijibhoy in support of the summons.

Inverarity, for the two co-trustees, showed cause.

Macpherson, for Messrs. Ardesir Hormasji and Dinsha, also showed cause.

[192] 26*th March*, 1893. STARLING, J.—This matter arises out of a suit which was brought for the settlement of a proper scheme for the

1893
OCT. 16.

ORIGINAL CIVIL.

18 B. 189.

management of the Jijibhoy Dadabhoy Trust Charities, in which, by the decree directing a scheme to be prepared and by a subsequent order approving the scheme, the costs of all parties to the suit when taxed as between attorney and client were ordered to be paid out of the Trust Funds.

After September, 1890 Messrs. Ardesir, Hormasji and Dinsha acted as solicitors for the trustees of the Charity Funds, and a large amount of costs became due to them in respect of the preparation of the scheme and other matters connected with the carrying out of the decree of this Court. The solicitors had received, on account of their costs, a sum of Rs. 7,000. In April, 1893, they sent in their bills of costs to the trustees which, by the secretary to the Trust Funds, were circulated among the trustees for their orders. The balance then appearing to be due to the solicitors was Rs. 5,482-15-0. Two of the trustees minuted "should be paid off." The third trustee, Dadabhoy Bomanji, wrote a long minute in which he said the amount of the bills was exorbitant and that they should be taxed as ordered by the Court, and thereafter the proper balance should be paid to the solicitors. Subsequently, the two trustees got a deduction of Rs. 500 from the solicitors and paid the balance without taxation.

On the 21st August, 1893, the dissenting trustee obtained a summons calling upon the other two trustees and the solicitors to show cause why the bills should not be taxed and why they should not repay any sum which had been overpaid. I think the two trustees were rightly made parties to the summons under the circumstances of the case, but I do not think I could in this summary proceeding make them repay any portion of the Trust Funds which they may have improperly expended.

I treat the summons as one by a trustee who is dissatisfied with a payment of costs made by his co-trustees asking that the bills of the solicitors to whom the payment was made may be taxed, and joining his co-trustees as defendants, because they will not take any part in the matter.

[193] Now it was argued that the Court has no jurisdiction to order costs to be taxed after payment, on the ground that such jurisdiction is in England given by statute, and that there is no statute applicable here. It is true that various Acts have been passed in England regulating the admission, duties and liabilities of attorneys there, and that by them the Courts in England have to be guided in their decisions; it seems also that the first Act so passed was in 1729. Consequently none of these Acts are in force in this country. What the practice was before 1729, I am unable to say, and I know of no treatise from which the information could be obtained. It is also true that there are no such Acts in India, and the only rules we have are rules of the High Court regulating the admission of attorneys and their right to recover their costs in a summary manner, but that to my mind is no reason why the Court should not exercise a jurisdiction of this kind over its officers according to equity and good conscience guided by the general principles laid down by English cases. Consequently, I am of opinion that, upon a proper case being made out, the Court can in a proper manner call a solicitor to account in respect of the amount of his bill even after it has been paid.

It was then argued that, if the Court has such a power, it will not exercise it summarily, but only on a proper suit being filed. That may have been the case in former years, but in the latest case reported, where an alleged agreement between the attorney and client was in question—

1893
OCT. 16.
ORIGINAL CIVIL.
18 B. 189.

In re Frape (1)—Lindley, L.J., says: "Upon this appeal it was argued that if there is reason to suppose the agreement is unfair or unreasonable, yet you cannot impeach it on such a summons as this, but that some kind of formal proceeding—which, I suppose, according to the present practice, would be an action to set it aside—must be instituted. The language of the Act seems rather to favour that view. But when you consider it carefully, it appears to me there is really nothing in the argument; because so long as the solicitor has a proper opportunity of resisting taxation, it cannot matter whether the application to tax is by writ, or by a special petition to tax, or a summons to tax, as in this case. The [194] client may say. "I want an order to tax, notwithstanding the agreement." The agreement can be no answer to that, if he can show reasons why there ought to be a reference to the Taxing Master to enquire into that agreement." That was, in my opinion, a much stronger case for not going into the matter on a summons in chambers than the present one, and I shall follow the spirit of that ruling and hold that the present matter can be enquired into under the present summons.

Has, then, a case been made out for referring these bills to the Taxing Master? "The old rule that you must show either gross, fraud or pressure or overcharge, does not obtain as an absolute rule. A decision in the Court of appeal *In re Boycott* (2) intimates that it is not an absolute rule;" per Kay, L.J., *In re Frape*. Of course under ordinary circumstances I should not think of making an order to tax a bill, if it had been paid by a client who was *sui juris*, and dealing with his own money, after he had had an opportunity of examining it, and especially after he had discussed the matter with his solicitor and obtained from him a reduction in the amount. But that is not the case in the present instance. Messrs. Ardesir, Hormasji and Dinsha were solicitors for trustees, and they knew that the Court had ordered that certain costs taxed as between attorney and client were to be paid out of the Trust Funds, and they must have known that, if the trustees' accounts were called in question, no proof of the correctness of the payments to them would be accepted except the *allocatur* of the Taxing Master. Consequently, it was their duty to have so advised their clients, and it was their duty also to have had their bills taxed before they demanded payment of the balance. The fact that none of these things was done seems to me to be a very sufficient reason why the amount of the bills should be inquired into.

It was further argued that as two out of three trustees agreed to pay the bills without taxation, their action binds the third, and that he, consequently, cannot now ask to have the bills taxed. I don't think so, especially as the funds were Trust Funds and could only be dealt with in carrying out the trust or under an [195] order of this Court. It is quite clear that on the 12th June, 1893, the present applicant, whatever might have happened before, expressed his opinion that the costs ought to be taxed. In spite of this, the other two trustees on the 21st June, without obtaining the consent of their co-trustee or giving him any notice, paid the costs without taxation. On the 13th July, the applicant asked for an explanation from Messrs. Ardesir, Hormasji and Dinsha and again on the 7th August, but to neither of these letters did he get any reply, though as one of their clients, I think, he was by courtesy entitled to some explanation. Was he, then, to let the matter drop and run the risk at some future time of being called to an account for this payment at a time possibly when his

(1) L. R. (1893) 2 Ch. 295.

(2) 29 Ch. D. 571.

1893
OCT. 16.

ORIGINAL CIVIL.

18 B. 189.

means of proving it was proper payment even on taxation might be absent? In my opinion, he was not bound to do so, but was entitled to bring the matter before the Court and prevent himself being hereafter harassed by a suit.

I, therefore, hold that these bills of costs must be taxed, and I refer them to the Taxing Master for that purpose, and I direct Messrs. Ardesir, Hormasji and Dinsha within fourteen days from this day to lodge the bills in question with the Taxing Master for the purpose of taxation. The remainder of the summons, including the question as to who is to pay the costs of taxation and costs of and incidental to this summons up to this time, to stand over till the *allocatur* of the Taxing Master is produced.

The two consenting trustees and the solicitors appealed.

The appeal came on for hearing before Sargent, C. J., and Bayley, J., on the 13th October, 1893.

Macpherson, for the two trustees and *Scott*, for the solicitors (Messrs. Ardesir, Hormasji and Dinsha) in support of the appeal. They referred to Statute 2 Geo. II, c. 23, s. 23; 1 Chitty's Practice (14th Ed.), p. 139; Stat. 6 and 7 Vict., c. 73, s. 41; Daniell's Chancery Practice (6th Ed.), p. 1993 *et seq.*; *Ibid.*, p. 2023; *Farhall* v. *Farhall* (1); the Supreme Court Charter, **[196]** cl. X; the amended Letters Patent, 1865, cls. 19, 20, 21; High Court Rules No. 183 (p. 42); *Assur Purshotam* v. *Ruttonbai* (2); Supreme Court Rules No. 326; *In re Jackson &c.* (3); Lewin on Trusts, (9th Ed), p. 275; *Massie* v. *Drake* (4); *In re Cheesman* (5).

They contended that the solicitors' account was settled and could not be opened—*Blagrave* v. *Routh* (6); *Staniar* v. *Evans* (7); *Re Massey* (8); *Re Whalley* (9); *In re Whalters* (10); *In re Thompson* (11).

Lang (Acting Advocate General), *contra* referred (*inter alia*) to the Supreme Court Rule No. 151 (see Rules and Orders of High Court by Jamaitram Nanabhoy, p. 190) which is as follows:—

"The attornies, solicitors and proctors shall not in any instance receive or demand the amount of any bill or part thereof, except reasonable advances to be accounted for before the Master, till the same shall have been taxed by the Master, who shall after taxation register the same in books to be kept by him for that purpose in his office, and shall be allowed to charge for the registering of such bill half a rupee per folio."

JUDGMENT.

SARGENT, C. J.—We think that the order made by Mr. Justice Starling must be affirmed. The decree in the suit directed that the costs should be paid out of the funds of the charity when taxed. It is clear, then, that in paying bills which have not been taxed, the trustees have not observed the direction contained in the decree. The payment appears to have been made notwithstanding the protest of one of the trustees, who, in requiring taxation, was acting strictly within his right and his duty. Even if other bills have been paid without taxation to his knowledge, we do not think that he thereby lost his right to have these bills taxed. A trustee of a charity cannot in such a case waive his right to require the taxation of bills of costs connected with the charity. The solicitors in

---

(1) 7 Ch. Ap. 123 (126). (2) 16 B. 152. (3) 40 Ch. D. 495.
(4) 4 Beav. 433. (5) L. R. (1891), 2 Ch. 289. (6) 26 L J. (Ch.) 86.
(7) 34 Ch. D. 470 (476). (8) 34 Beav. 463. (9) 20 Beav. 576.
(10) 9 Beav. 299. (11) 30 Ch. D. 441 (450).

acting for the trustees in this case must be regarded as acting for the charity, and we think the Court has jurisdiction in the matter.

[197] We have also been referred to the rule by which it is ordered that all bills of costs are to be taxed. The existence of this rule no doubt adds force to the argument for the respondent; but, quite independently of that rule, the Court in a case like the present would, in our opinion, have power to enforce taxation.

We are asked to add words to this order to the effect that it is made without prejudice to the rights of the solicitors to claim in respect of certain items of charge which they have omitted from these bills of costs. I do not think we ought to add anything to this order. No case of error or omission has been argued before us, and the affidavits which have been filed do not deal with the subject. Under these circumstances we shall leave the order as it stands.

Order affirmed.

Attorneys for the appellants:—Messrs. *Ardesir, Hormasji and Dinsha.*
Attorneys for the respondent:—Messrs. *Chalk, Walker and Smetham.*

---

18 B. 197.

APPELLATE CIVIL.

Before Mr. Justice Candy and Mr. Justice Fulton.

KRISHNABAI (*Original Defendant*), *Appellant v.* KHANGOWDA (*Original Plaintiff*), *Respondent.** [27th February, 1893.]

Hindu law—Partition—Minor—Partition effected without taking into account a minor co-parcener—Such partition invalid—Limitation.

A partition effected without reserving any share for a minor member of the family, and without the consent of some one authorized to act on his behalf, is invalid as against the minor.

Three brothers S. L. and K. were members of a joint Hindu family. In 1862, S. and L. divided the whole of the family property between them without reserving any share for their brother K. who was then a minor. K. lived with L. as a member of his family. L. died in 1867 leaving a childless widow with whom K. continued to live till his death in 1876. K. left an infant son (the plaintiff), only a year old. Subsequently S. died in 1887, leaving two widows without issue. In 1889 the plaintiff, being still a minor, sued by his next friend to recover either [198] the whole or one-third of the family property in the possession of the widows of L. and S. The principal defences to this suit were (1) that it was time-barred, and (2) that the plaintiff was not entitled to claim more than one-third of the property in suit.

Held, that the partition made by S. and L. in 1862 was invalid, as it was made without reserving any share for their minor brother K. and without taking him into account. K's son was, therefore, entitled to recover the whole of the ancestral property as the sole surviving male member of the family.

Held, also, that the suit was not barred by limitation either under Act IX of 1871 or Act XV of 1877 in the absence of any evidence showing that K. ever demanded partition and was refused, or that he was excluded to his knowledge from all participation in the family property.

[**F.**, 22 B. 259 (261); **Appr.**, 31 C. 262 (**P.C.**) = 6 Bom.L.R. 1 = 8 C.W.N. 146 = 31 I.A. 10 = 14 M.L.J. 8 (12).]

APPEAL from the decision of Rao Bahadur Gopalrao Vinayek Bhanap, First Class Subordinate Judge of Belgaum, in suit No. 416 of 1889.

---

* Appeal No. 24 of 1891.

1893

FEB. 27.

APPELLATE CIVIL.

18 B. 197.

The property in dispute belonged to one Khangowda, who died about thirty years ago. Khangowda left behind him three sons, namely, Shidgowda, Linggowda and Kalgowda.

In 1862 Shidgowda and Linggowda divided the whole ancestral property between themselves without giving any share to Kalgowda, who was then a minor.

Kalgowda lived with Linggowda as a member of his family. On Linggowda's death without issue in 1867, he continued to live with Linggowda's widow Krishnabai (defendant No. 3). She got him married and he and his wife lived with her till his death in 1876.

At Kalgowda's death in 1876 his son (the plaintiff) was an infant, only one year old.

In 1887 Shidgowda died, leaving two childless widows (defendants Nos. 1 and 2).

In 1889 the plaintiff, who was still a minor, sued by his next friend to recover possession of the immoveable property in the defendant's possession, alleging that his father and uncles were members of a united family; that on the death of Shidgowda the whole of the ancestral property passed to him by right of survivorship, and that even if it were held that the family property was divided, he was at least entitled to one-third share of the property in dispute.

Defendants Nos. 1 and 2 did not contest the suit.

[199] Defendant No. 3 (the widow of Linggowda) pleaded that the plaintiff's father had been dedicated to a *math*, that after his dedication his brothers Linggowda and Shidgowda had, in 1862-63, divided the whole family property into two equal shares, and that since then they had been in separate possession and enjoyment of their respective portions as absolute owners, and that the suit was, therefore, time-barred.

The Subordinate Judge held that the alleged dedication of plaintiff's father was not proved; that the suit was not time-barred; that the partition made by Linggowda and Shidgowda was not binding on plaintiff's father, as he was not a party to it, and as, moreover, it was effected in fraud of his right; that there being no valid partition the family remained joint and, that the plaintiff as the sole surviving member of his family was entitled, to the whole of the family property. He, therefore, passed a decree awarding possession of the whole property to the plaintiff.

Against this decree the defendant No. 3 appealed to the High Court.

Inverarity (with him *Mahadev B. Chaubal*) for appellant (defendant No. 3):—We contend, in the first place, that the claim is barred by limitation. There was an actual division of the family property. It took place so far back as the year 1862. Ever since then both Linggowda and Shidgowda have dealt with the portions in their possession as their own absolute property. Their possession has been clearly adverse to the plaintiff and his father for more than twelve years. Plaintiff's father attained majority in 1876. He was then entitled to sue for partition. The present suit was not filed till 1889. The suit is, therefore, barred by limitation. Even if the claim be not time-barred, the plaintiff is not entitled to more than one-third of the property in suit.

Jardine (with him *Ganpat Sadashiv Rao*), for the respondent:—Where there are three brothers, two of them cannot divide the family property without consulting the third. In this case Linggowda and Shidgowda divided the ancestral property without reserving any share for their minor brother. The division is, therefore, invalid and cannot bind the minor. That being

the case, so far as the minor is concerned, he is entitled to regard the **[200]** family as still a united family. And as a matter of fact the minor Kalgowda lived with his brothers as a member of a joint family. He came of age in 1873, when the Limitation Act IX of 1871 was in force. Under that Act, and until there was a demand for partition and a refusal, limitation did not begin to run against a co-heir seeking partition. In this case there is no evidence to show that Kalgowda ever demanded partition and was refused. He died within three years after attaining majority, leaving behind him a minor son, the plaintiff in this case, who is still a minor. The suit is, therefore, not barred by limitation. Refers to *Kazi Ahmed* v. *Moro Keshav* (1); *Kane Bable* v. *Antaji Gangadhar* (2).

JUDGMENT.

CANDY, J.—In this case, in my opinion, the question as to the right of the plaintiff to claim one-third share or the whole of the ancestral property does not arise. For the plaintiff's right to obtain possession of the family property which was in the possession of the widows of Shidgowda is admitted. The only question is as to the property which has been for many years in the exclusive possession of Krishnabai, the widow of Linggowda. If limitation had not begun to run against plaintiff's father Kalgowda as regards this property, when he died in December, 1876, then there can be no bar; because, admitting Krishnabai's adverse possession since December, 1876, up to the present time, the present plaintiff was one year old only when Kalgowda died, and the present suit has been filed by his mother and guardian, he being still a minor. It is evident, on the facts established by the evidence, that limitation was not running against Kalgowda when he died as regards the property which was managed by Linggowda after the partition in 1862, till his death in 1867, and after his death by his widow Krishnabai. Whatever may have been the motives of Shidgowda and Linggowda in entirely ignoring their infant brother Kalgowda in the partition of 1862 (possibly they then thought that he would be dedicated to the service of the *math*), it is clear that Kalgowda when he came back from the *math* lived with Linggowda as a member of his family. After Linggowda's death in 1867 he continued to live with Krishnabai; she got him married in her house, and he and his wife were united in food and **[201]** residence with her till the day of his death in December, 1876. He allowed her to continue in management of the lands, but his existence as a member of the family and co-parcener in the property was recognized. On two mortgage bonds of 1871 his formal assent was taken. How far he was, and his son now is, bound by the acts of Krishnabai, who was allowed to exercise the rights of managership in respect of the property, need not now be considered. But it is evident, that Kalgowda could, at any time, have claimed possession of the property, and thus the present claim is, in no way, barred. Under this view of the facts, it is clear that the decree of the Subordinate Judge must be confirmed with costs.

FULTON, J.—The only points urged by the learned counsel for the appellant were:—(1) Whether on the facts found proved by the Subordinate Judge the plaintiff was entitled to recover more than one-third of the property in dispute? (2) Whether the suit was not time-barred? On both questions the answer must, in my opinion, be in favour of the respondent.

---

(1) P. J. (1878) 120.

(2) P.J. (1886) 315=11 B. 455.

1893
FEB. 27.
APPELLATE CIVIL.
18 B. 197.

There were three brothers, Shidgowda, Linggowda and Kalgowda, of whom the first two divided the property between themselves, in 1862, without reserving any share for their minor brother Kalgowda, or apparently taking him into any account. Possibly, the reason for this action was their belief that he had been dedicated to a *math*; but it has been found that there was, in fact, no such dedication, and the finding is not disputed. In these circumstances, it seems clear that, so far as Kalgowda was concerned, the partition was not binding on him. Whatever may be the right of the father of a Hindu family to effect partition among his sons without their consent by the exercise of his own will, and whether or not a fair partition among the adult male co-parceners with the reservation of a minor's proper share may be binding on the minor, there seems no authority for the proposition that a partition, such as was here effected which did not consider the minor at all, could have any effect whatever on his position or leave him otherwise than a member of (what so far as he was concerned remained) an undivided family. Hindu law recognizes the equal rights of brothers in ancestral property, and **[202]** its authority cannot be relied on to uphold a partition manifestly inconsistent with its provisions. Apart from Hindu law, it was not suggested that two joint owners could, without the consent of the third, or of some person legally authorized to consent on his behalf, alter his position as joint owner of the whole property.

The only question, then, remaining for consideration is whether the plaintiff's claim to recover the whole property is time-barred. Linggowda died about 1867; Kalgowda, the father of the plaintiff, in 1876; and Shidgowda in 1887. The exact date at which Kalgowda came of age is not quite certain, but probably he attained the age of majority under the Hindu law then in force about nine years before his death or in 1867 (*vide* Ex. 50). This is the view put forward by the appellant's counsel, and for the sake of argument I accept it as the one most favourable to his case. It is clear, however, that Kalgowda's rights in the property were not extinguished either by Act XIV of 1859 or by Act IX of 1871. The former Act did not remain in force for twelve years after the partition of 1862, and it is not alleged that there was ever any demand for partition by Kalgowda such as would render applicable art. 127 of Act IX of 1871. We have then to consider whether time had begun to run against him under art. 127 of the present Act. The burden of proving the fact of Kalgowda's exclusion to his knowledge rests on the defendant, and it does not seem to me that there is anything in the evidence to establish such exclusion. It was urged that he must have known of the third defendant's enjoyment of a part of the family property, but I do not think it is shown that he was aware of an intention to exclude him from his rights when he chose to assert them. He was a party to her mortgage (Ex. 50); but the fact that it was thought necessary to make him a party, indicates rather an acknowledgment than a denial of his rights. According to Krishnabai's evidence he lived principally with Shidgowda, but he died in the house of Krishnabai, with whom he was evidently on good terms (1). No attempt was ever made to allot him any separate share whatever, and it cannot be assumed that he ever assented to the partition made **[203]** during his minority; for it would require very strong evidence to show an assent to his own entire exclusion from his rights. Exhibit 50 shows that he was aware of the

(1) *Cf.* P.J. (1886), 315=11 B. 455.

partition deed of 1862, but the omission to allot him any share indicates that the matter was allowed to rest, and that no attempt was made to define his interest in the property. Under these circumstances, I do not consider that limitation ever began to run against him, nor has it ever begun to run under art. 127 against the present plaintiff, who is still a minor. Consequently, up to the death of Shidgowda in 1887, the plaintiff still retained his right to sue for partition, and the appellant's tenure of the property, in her possession, is not proved to have been adverse to him up to that period. On the death of Shidgowda, plaintiff's right to sue to enforce his right to share in the property probably ceased, and his right to sue for possession of the whole property commenced. To such a suit art. 144 would apply, but as less than twelve years have elapsed since Shidgowda's death, and as, moreover, the plaintiff is a minor, his right to sue is clearly not barred under this article.

The decree must accordingly be confirmed with costs.

Decree confirmed.

---

18 B. 203.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Telang.

SAKHALCHAND RIKHAWDAS AND ANOTHER (*Original Plaintiffs*), *Appellants v.* VELCHAND GUJAR AND OTHERS (*Original Defendants*), *Respondents.** [28th February, 1893.]

Decree—Execution—Limitation—Appeal—Appeal against part of decree—Decree affirmed in appeal—Decree to be executed is the appellate decree, and limitation runs from date of that decree.

In a suit for the value of goods and damages, the Court allowed the claim with respect only to a portion of the plaintiffs' claim, and rejected the rest. The plaintiffs appealed against the latter part of the decree. The decree was confirmed in appeal. The plaintiffs applied for execution of the decree after the expiration of three years from the date of the original decree, but within three years from the date of the appellate decree. The lower Court rejected the application as time-barred **[204]** being of opinion that the original decree still existed, there having been no appeal against that part of the decree which allowed the claim.

Held, discharging the order of rejection, that when the appellate Court confirms the decree of the Court below, the latter becomes incorporated in the decree of the appellate Court, which is thenceforth the only decree to be executed.

[F., 19 B. 258 (260) ; 22 B. 500 (503, 506) ; 23 C. 876 (883) ; 26 M. 91 (93) ; **Appl.**, 23 M. 60 (67) ; **Appr.**, 16 Bom. L.R. 778 ; **R.**, 18 B. 542 (545) ; 11 C.P.L.R. 115 (116).**]**

THIS was an appeal from an order passed by Rao Bahadur Chunilal Maneklal, First Class Subordinate Judge of Poona, in execution of a decree.

The plaintiffs sued the defendants to recover certain ornaments and clothes or their value, namely, Rs. 1,332-8-0. They also claimed Rs. 5,001 for damages. On the 24th July, 1889, the Subordinate Judge passed a decree for the plaintiffs with respect to some of the ornaments and clothes, or their value, Rs. 940-4-0. The rest of the plaintiffs' claim

* Appeal No. 164 of 1892.

1893
FEB. 28.
APPELLATE CIVIL.
18 B. 203.

was dismissed. The defendants did not appeal against the decree, but the plaintiffs appealed to the High Court (the amount of the original claim being more than Rs. 5,000) against the decree so far as it dismissed part of their claim. The High Court confirmed the decree of the Subordinate Judge on the 10th September, 1891.

On the 9th September, 1892, the plaintiffs presented an application (*darkhast*) for the execution of the decree. The Subordinate Judge rejected the application and passed the following order:—"This *darkhast* is beyond time and should be rejected. . . . The High Court confirmed the decree of the Court below. It seems to me that the award of Rs. 940-4-0 was not the subject-matter of the appeal, and limitation begins to run from the date of the original decree, which is the only decree which awards that sum to the plaintiffs. That decree was passed on 24th July, 1889, and the present *darkhast* was presented on 9th September, 1892."

Against this order the plaintiffs preferred the present appeal.

Ganesh Krishna Deshmukh, for the appellants (plaintiffs).—The High Court confirmed the Subordinate Judge's decree as a whole, and the decree to be executed is the appellate decree. The period of limitation must, therefore, begin to run from the date of that decree. Our *darkhast* is, therefore, within time.

The respondents did not appear.

ORDER.

[205] SARGENT, C.J.—The First Class Subordinate Judge is wrong in supposing that the original decree existed for the purpose of execution after the High Court confirmed it. The decisions in *Muhammad Sulaiman* v. *Muhammad Yar Khan*(1) and *Bhanushankar* v. *Raghunathram* (2) show that when the High Court confirms the decree of the Court below, the latter becomes incorporated in the decree of the High Court, which is thenceforth the only decree to be executed. We must, therefore, discharge the order of the Court below and send back the case for the First Class Subordinate Judge to dispose of the *darkhast* on the merits.

Order discharged and case sent back.

---

18 B. 205.

CRIMINAL REVISION.

Before Mr. Justice Candy and Mr. Justice Fulton.

QUEEN-EMPRESS *v.* SADASHIV ATMARAM.* [1st March, 1893.]

Indian Penal Code (Act XLV of 1860), ss. 499, 500—Defamation—Sending a notice containing defamatory matter to the complainant—Publication.

The mere sending a notice to a person, albeit containing matter of a defamatory nature, cannot be held to be equivalent to making or publishing an imputation "intending to harm or knowing or having reason to believe that it will harm the reputation of the person to whom it is addressed."

When the accused sent by post a notice to the complainant, containing certain false imputations, and the complainant thereupon prosecuted the accused on a charge of defamation under s. 500 of the Indian Penal Code.

Held, that the accused was not guilty of defamation.

[R., 11 Cr. L.J. 281=5 Ind. Cas. 892=10 P.R. 1910 (Cr.)=6 P.W.R. 1910 (Cr).]

---

* Criminal Revision No. 37 of 1893.

(1) 11 A. 267.

(2) 2 B.H.C.R. (A. C. J.) 101.

1893
MARCH 1.
CRIMINAL REVISION.
18 B. 205.

THIS was an application for revision under s. 435 of the Code of Criminal Procedure (Act X of 1882).

The accused was charged, under s. 500 of the Indian Penal Code, with defaming the complainant by writing to him a notice containing certain false imputations to the following effect:—"(1) You (the complainant) have been for the last several days behaving inimically towards me without any reason, and I have good grounds to think that you have caused false actions to be filed against me by others. (2) You have been, on **[206]** the strength of your official position, intimidating me from time to time without any reason. (3) On Monday the 31st October, 1892, at about 7 A.M., you came to my shop and in the presence of others uttered all shorts of abuses and criminally intimidated me, and since then you have been sending me messages full of criminal intimidation. You have ventured to do so purely on the strength of your official position as a jamadar."

The accused was also charged, under s. 506 of the Indian Penal Code, with committing criminal intimidation by threatening the complainant with injury to his reputation.

The accused was tried before Mr. Webb, the Third Presidency Magistrate, who convicted him on both charges and sentenced him to pay a fine of Rs. 100, or, in default, to suffer two months' rigorous imprisonment.

Thereupon the accused made the present application to the High Court under its revisional jurisdiction.

Vasudev Gopal Bhandarkar, for the accused.

There was no appearance for the complainant.

JUDGMENT.

FULTON, J.—We see no reason to interfere with the conviction for criminal intimidation, but are of opinion that the charge of defamation has not been proved. The accused was charged with defaming the complainant by writing him a notice containing certain false imputations; but the mere sending of a notice to a person, albeit containing matter of a defamatory nature, cannot be held to be equivalent to making or publishing an imputation intending to harm or knowing or having reason to believe that it will harm the reputation of the person to whom it is addressed. The Magistrate appears to have perceived the difficulty of convicting of defamation as stated in the charge, and in his finding said that the publication was proved by Sadashiv Narayan and Eshvant Supraji; but this was quite a different act of publication from that alleged, either in the complaint or the charge, and having regard to the provisions of s. 198, Criminal Procedure Code, could not, we think, form the basis of a conviction of defamation. We reverse the conviction of defamation, and direct that out of the fine the sum of Rs. 50 be **[207]** refunded to the accused, and that the remaining Rs. 50 be retained as the fine imposed for criminal intimidation. As the Magistrate convicted under two distinct sections, he should have imposed separate punishments under each.

As the complaint was made by the complainant as a private individual, and not in the capacity of a public servant, it ought to have been stamped.

Conviction for defamation reversed.

1893
MARCH 6.

APPEL-
LATE
CIVIL.

18 B. 207.

18 B. 207.

APPELLATE CIVIL.

Before Mr. Justice Candy and Mr. Justice Fulton.

BAI VARUNDA LAKSHMI (*Original Plaintiff*), *Appellant v.* BAI MANEGAVRI (*Original Defendant*), *Respondent.** [6th March, 1893.]

Stamp—Suits Valuation Act (VII of 1887), s. 8—*Court Fees Act (VII of* 1870)—*Valuation of suits—Appellate Courts—Jurisdiction—Valuation for purposes of jurisdiction—Appeal.*

The provisions of s. 8 of Act VII of 1887 apply to appellate Courts as well as to Courts of first instance, and the value of the subject-matter of suits for the purposes of jurisdiction must be determined by the provisions of that section.

In a suit of the description mentioned in s. 8 of Act VII of 1887 the plaintiff valued his claim at Rs. 664 for the computation of Court-fees, and at Rs. 14,000 for purposes of jurisdiction.

Held, that the appeal from the decree of the Court of first instance lay to the District Court, and not to the High Court.

[**F.**, 6 C.L.J. 427=11 C.W.N. 705; 50 P.R. 1896; **Appl.**, 63 P.R. 1902; 6 P. R. 1904; **Appr.**, 32 C. 734 (739)=9 C.W.N. 690; **R.**, 20 B. 265 (267); 6 O.C. 255 (258).]

APPEAL from an order rejecting a plaint passed by Khan Bahadur M. N. Nanavati, First Class Subordinate Judge of Surat.

In this case the plaintiff prayed for the following reliefs :—

(A) An injunction restraining the defendant from applying Government promissory notes of the value of Rs. 14,000, in contravention of the terms of an agreement dated 10th January, 1890, made between the plaintiff and the defendant.

(B) An injunction restraining the defendant from leaving undone certain acts which the defendant had to perform in accordance with the terms of the said agreement, as mentioned in paragraph 10 of the plaint.

[208] (C) An order directing the defendant to make over to certain trustees four per cent. Government promissory notes of the value of Rs. 7,500.

(D) An order directing the defendant to pay Rs. 604 on account of costs which the plaintiff had incurred in certain legal proceedings.

For the computation of Court fees the plaintiff valued reliefs A, B and C at Rs. 20 each, and relief D at Rs. 604. The whole claim was assessed at the aggregate sum of Rs. 664, and a stamp of Rs. 50-4 was affixed to the plaint.

For purposes of jurisdiction the claim was valued at Rs. 14,000. The suit was filed in the Court of the First Class Subordinate Judge at Surat.

The Subordinate Judge, being of opinion that the reliefs sought were undervalued, ordered that the claim should be properly valued and stamped. The plaintiff having failed to do so, the Subordinate Judge rejected the plaint.

From this order the plaintiff appealed to the High Court.

Gokuldas K. Parekh, for appellant.

Govardhan M. Tripati, for respondent.

Govardhan M. Tripati.—There is a preliminary objection to this appeal. The appeal lies, not to this Court, but to the District Court. Under s. 8 of Act VII of 1887, in a case like the present the valuation for purposes of jurisdiction is the same as the valuation for purposes of Court

* Appeal No. 28 of 1892.

fees. The plaintiff has valued his claim under the Court Fees Act (VII of 1870) at less than Rs. 5,000. The same valuation should, therefore, be taken for purposes of jurisdiction. The appeal, therefore, lies to the District Court.

Gokuldas K. Parekh.—The provisions of s. 8 of Act VII of 1887 apply to suits only. It would be straining the language of the section to extend its provisions to appeals. The section is, therefore, applicable to Courts of first instance and not to appellate Courts. In this case the plaint expressly states that the property in dispute is worth about Rs. 14,000. This should [209] be taken to be the valuation for purposes of jurisdiction. The appeal, therefore, lies to this Court.

The following judgment was delivered by the Court (CANDY and FULTON, JJ.):—

JUDGMENT.

PER CURIAM:—A preliminary objection has been taken that the appeal in this case lies to the District Court and not to the High Court: Mr. Gokuldas seeks to avoid the provisions of s. 8 of Act VII of 1887 by contending that it applies to Courts of first instance and not to appellate Courts. But we are unable to allow the contention. This is a suit decided by the Subordinate Judge, First Class, of which the value of the subject-matter was for the computation of Court fees less than Rs. 5,000 and s. 8 of Act VII of 1887 provides that in such a suit the value as determinable for the computation of Court fees and the value for the purposes of jurisdiction shall be the same. But it is only in suits in which the value of the subject-matter (which must be determined according to the provisions of (s. 8 of Act VII of 1887), exceeds Rs. 5,000 that the appeal lies to the High Court (s. 26 of Act XIV of 1869). In all other cases the appeal from an original decree of a Subordinate Judge lies to the District Court. We must, therefore, return the memorandum of appeal to be presented in the District Court. All costs in this Court on appellant.

---

18 B. 209.

APPELLATE CIVIL.

Before Mr. Justice Candy and Mr. Justice Fulton.

BALVANT GANESH AND OTHERS (*Original Defendants*), *Appellants v.* NANA CHINTAMON AND OTHERS (*Original Plaintiffs*), *Respondents.**

[6th March, 1893.]

Stamp—Court-fees—Valuation of suit—Suit for partition.

The stamp on a suit for partition and possession of the plaintiff's share of joint family property must be an *ad valorem* one on the value of the share.

[F., 28 A. 340 (342)=3 A.L.J. 181=26 A.W.N. 38; 16 Ind. Cas. 771=6 S.L.R. 72; 8 Ind. Cas. 512=21 M L.J. 21=9 M.L.T. 3; 4 L.B.R. 279 (281); **Appl.**, 22 B. 315 (316); **R.**, 6 C.L J. 651=12 C.W.N. 37 (41); 15 C.P.L.R. 120 (122); **Cons.**, 28 P.R. 1903=65 P.L.R. 1903.**]**

THIS was an appeal from the decree of Rao Bahadur Chunilal Maneklal, First Class Subordinate Judge of Poona, in suit No. 104 of 1891.

---

* Appeal No. 80 of 1892.

1893
MARCH 6.
APPELLATE CIVIL.
18 B. 209.

[210] The plaintiffs sued for a partition of joint family property by metes and bounds, and for an injunction restraining the defendants from obstructing the plaintiffs in receiving their share of certain cash allowances directly from the Revenue authorities.

The market value of plaintiffs' share of the property in dispute was more than Rs. 5,000.

The plaintiffs valued the reliefs sought at Rs. 140 for purposes of Court-fees.

The defendants pleaded (*inter alia*) that the suit was under-valued.

This contention was not pressed by the defendants' pleader, and the Court passed a decree on the merits in plaintiffs' favour.

Against this decree the defendants appealed to the High Court.

Mahadev Chimnaji Apte and *Daji Abaji Khare*, for appellants.

Phirozsha M. Mehta (with *Purshotam Parashram Khare*), for respondents.

JUDGMENT.

CANDY, J.—As regards the immoveable property (lands, houses, sites, &c.), the subject-matter of the present appeal, the suit was brought for demarcation by metes and bounds, according to the shares received by the plaintiff co-sharers in the profits of the said property. An objection has been taken, in appeal, that the claim was simply for a declaration of the plaintiffs' right to the share claimed, and that, therefore, the lower Court was not justified in making a division of the property. The language of the prayer of the plaint is somewhat ambiguous, the words used being "*taraun dyava.*" But the parties and the Subordinate Judge evidently considered this to be a prayer for actual division. Defendants Nos. 2 to 4 took an objection in their written statement that the claim had not been duly valued and the plaint not duly stamped; but the Subordinate Judge remarked in his judgment that "the question as to the under-valuation of the claim has not been urged by the pleader for the defendants." The reason why the Subordinate Judge did not of his own motion correct the valuation (which was Rs. 130, the supposed value on which a stamp of Rs. 10 was paid, to which was added Rs. 10 for the injunction prayed for), is to be found in *Mahadeva Balwant* v. [211] *Laxuman Balwant* (1). It appears to have been the practice in the First Class Subordinate Judge's Court at Poona to value such suits as the present one at Rs. 130. But the ruling of the Chief Justice in the above quoted case shows that "as the suit asks for partition and possession of the plaintiffs' share, the stamp must be an *ad valorem* one on the value of the share." The stamp on the present appeal has been levied in accordance with that ruling, and counsel for the respondent-plaintiffs admits that his clients must, if so ordered, pay the stamp which was leviable on their plaint according to the same principle. Even had the plaintiffs in the present case simply sued to establish their title to the share which they claim in the property, they would still have had to pay an *ad valorem* stamp fee upon the value of that share. (See the dictum of Garth, C. J., in *Kirty Churn Mitter* v. *Aunath Nath Deb* (2), which has been approved of by the Chief Justice in this Court). As they claimed partition and possession of a definite share in certain lands, houses, &c., which they could not say it was impossible to estimate at a money value, there can be no doubt that the valuation of the plaint as allowed by the Subordinate Judge was to the detriment of the revenue.

(1) P. J. (1892) 13.

(2) 8 C. 757 (758).

1893
MARCH 6.
APPELLATE CIVIL.
18 B. 209.

Passing to the merits, it must be noticed, that the representative of the Sirdar Ramchandra Lakshman, who was alive when the suit was filed, and who could be sued in the Agent's Court only, has now been placed on the record. We are of opinion, therefore, that the question of non-joinder of parties need not now be considered. With reference to the property in the Ratnagiri District, it is not contended that the plaintiffs are in possession of the same. There is no equity, therefore, which compels them to include it in their present claim. They exclude it at their own risk, and we offer no opinion as to whether they can, in a subsequent suit, claim actual partition of those lands. The other points urged by appellants' pleader need no remark. The property, the subject-matter of the present appeal, is shown to be liable to actual partition. The fact that some of it was *saranjam*, which has recently been resumed by Government, that is, made *khalsa*, would not render it less so. Cash allowances cannot, of course, be demarcated. The pleader for appellants admitted [212] that he could not satisfy the Court that his clients had not divided the profits of all the properties in the plaint among the co-sharers, including the plaintiffs. We must, therefore, with reference to the above remarks regarding the Court fee, direct that if the plaintiffs do within one month pay the Court fee due on Rs. 5,406-6-10½ in place of the Court fee paid by them on Rs. 130 on their plaint, the decree of the lower Court shall stand confirmed with costs on appellants; in default of such payment the decree of the lower Court will be reversed with all costs on plaintiffs.

Decree confirmed.

---

18 B. 212.

CRIMINAL REFERENCE.

Before Mr. Justice Candy and Mr. Justice Fulton.

QUEEN-EMPRESS *v.* SITA.* [9th March, 1893.]

Indian Penal Code (Act XLV of 1860), s. 403—Criminal misappropriation of moveable property—Property found on an open plain.

The accused, finding a gold *mohur* on an open plain, sold it the next day to a shroff for the full value, and appropriated the sale-proceeds.

Held that, in the absence of any information as to the circumstances under which the coin was lost, and as it was not improbable that the property in the coin had been abandoned by the original owner, the accused could not be convicted of criminal misappropriation under s. 403 of the Indian Penal Code.

[D., 8 Cr. L. J. 249=11 P. R. 1908 (Cr.)=27 P.W.R. 1908 (Cr).]

THIS was a reference by the District Magistrate of Ahmednagar under s. 438 of the Code of Criminal Procedure (Act X of 1882).

The reference was in the following terms:—

"The accused has been convicted under s. 403, Indian Penal Code, of the dishonest misappropriation of a gold *mohur* coin which according to her statement (and it is not disproved) she had picked up in an open plain in a village near Ahmednagar and which she forthwith sold to a shroff for Rs. 22-12-0.

"The accused has been sentenced by Rao Bahadur M. C. Joshi, First Class Magistrate, to pay a fine of Rs. 30, or, in default, to suffer simple imprisonment for one month.

---

* Criminal Reference No. 24 of 1893.

1893
MARCH 9.

CRIMINAL REFERENCE.

18 B. 212.

[213] "I believe that the conviction of the accused was not justified.

"The Magistrate has apparently acted on illustration (*f*) to s. 403, Indian Penal Code, where it is shown that under similar circumstances the finder of a valuable ring may be guilty of an offence under that section. A not uncommon coin, however, like a gold *mohur* is not on a par with a 'valuable ring,' and the finder thereof being in the position of a miserable woman like the accused, who is a Mang by caste, cannot, in my opinion, be held to be guilty of any offence for parting with it for current silver, without advertising her discovery.

"It is to be noted that there is no complaint, and that the Magistrate has taken cognizance of the case on a police report."

The reference was heard by a Division Bench consisting of Candy and Fulton, JJ.

There was no appearance either for the Crown or for the accused.

ORDER.

CANDY, J.—The First Class Magistrate, Ahmednagar, on 12th December, 1892, convicted one Sita, a Mang woman, of having committed criminal misappropriation of property on 15th October, 1892, in respect of a gold *mohur* which she said she had found in an open plain, and sold the next day to a shroff for Rs. 22-12-0. The First Class Magistrate remarked :—

"I can, however, hardly believe her story. It appears more probable that the *mohur* was found by her somewhere in this city, or that it is part and parcel of some stolen property. The accused is a Mang woman, and her possession of the gold *mohur* can no way be presumed as honest."

The Magistrate was not justified in making these remarks. The only evidence was in support of the story that the *mohur* had been found on the open plain, and the only question for consideration was, whether the act of the accused in selling on the next day the coin so found amounted to criminal misappropriation of property. We are of opinion that this question must be answered in the negative. It cannot fairly be said that when accused sold the *mohur* she knew, or had the means of discovering the owner, or that she omitted to use reasonable means to discover [214] and give notice to the owner, and did not keep the property a reasonable time to enable the owner to claim it. It might have been different had the *mohur* been found on a thoroughfare, in which case the finder would naturally believe that the property had been recently lost and that the owner would be discoverable. But in this case the *mohur* may have been lying undiscovered on the plain for weeks. It is a fair inference that the owner had given up all hope of recovering it, and had abandoned his right of ownership. This inference is strengthened by the fact that in December the Magistrate was apparently unable to discover any trace of the owner of the article which had been found in October. No doubt for a conviction under s. 403 it is sufficient if the accused did not in good faith believe that the real owner could not be found (explanation 2, para. 3). But in this case the Mang woman might in good faith have believed that the owner of the *mohur* could not be found. Therefore the conviction and sentence are reversed, and the fine, if paid, should be refunded.

FULTON, J.—The accused has been convicted of dishonestly misappropriating a gold *mohur* which she found lying on the ground and sold immediately without making any attempt to discover the owner. No one has come forward to claim it, and no evidence has been offered to prove that any one lost such a coin about the time or place at which it was found.

1893
MARCH 9.
CRIMINAL REFERENCE.
18 B. 212.

The offence consists in the dishonest misappropriation or conversion of moveable property, and before a conviction can be recorded it must be proved that the article forming the object of the charge was moveable property. The law relating to appropriation of things found on the road or in some other open place was explained in the case of the *Queen* v. *Glyde* (1) by Cockburn, C.J., who told the jury that where property had been cast away or abandoned, any one finding it and taking it acquired a right to it which would be good even as against the former owner, if the latter should be minded to resume it ; but that, when a thing had been accidentally lost, the property was not divested, but remained in the owner who lost it. The correctness of this statement will, I [215] believe, hardly be disputed. It has been recognized in India in the case of sacred bulls which had been abandoned by their owners, and were held not to be capable of being the subjects of dishonest misappropriation in the *Queen-Empress* v. *Bandhu* (2), the *Queen-Empress* v. *Nihal* (3) and *Romesh Chunder Sannyal* v. *Hiru Mondal* (4).

The question then arises, whether the evidence proves that at the time when the accused found the gold *mohur*, it remained the property of the person who had lost it ; for, if not, it follows that it could not be the subject of dishonest misappropriation, and became on being found the property of the finder. That it had once belonged to some person need not be disputed ; but, in the absence of all information as to the circumstances under which it was lost, it seems impossible to say, with any approach to certainty, that it had not been finally abandoned before it was picked up. It may have been dropped on the ground but a few hours previously, or it may have been lost years before, and by mere accident have been moved out of some place where it had been lying concealed, and cast upon the surface of the ground. The original owner may still be in quest of it, or he may long ago have left the locality and abandoned it for ever. That the latter is not an impossible, or even a very improbable, contingency may be inferred from the period which has elapsed without the appearance of any claimant. There was no undue haste about the proceedings. The gold *mohur* was found on the 16th October. The Magistrate considered his decision and disposed of the case on the 12th December. Whether under any circumstances it would be right to convict an accused person of dishonest misappropriation of an article, the real owner of which could not be discovered, need not be discussed ; but it seems clear that in the present case the conviction is unsafe, for the circumstances are not sufficiently elucidated to make it reasonably certain that the coin when found was the property of any one, and, unless it could correctly be described as property, neither explanation 2 nor any other part of s. 403 would apply to it. I would, therefore, reverse the conviction and direct that the fine be refunded.

[216] The case, it will be observed, does not fall within the scope of the Treasure Trove Act, inasmuch as the coin when found was not hidden in the soil or in anything affixed thereto (s. 3 of Act VI of 1878).

Conviction and sentence quashed.

(1) L. R. 1 C. C. 139. (2) 8 A. 51. (3) 9 A. 348. (4) 17 C. 852.

1893
MARCH 13.

APPEL-
LATE
CIVIL.

18 B. 216.

18 B. 216.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Bayley.

MUKTA AND ANOTHER (*Original Defendants*), *Appellants v.* DADA VALAD SUPADU (*Original Plaintiff*), *Respondent.** [13th March, 1893.]

Adverse possession—Limitation Act (XV of 1877), sch. II, art. 141—Reversioner.

Nathu, a Hindu, died in 1863, leaving two widows (Tulsa and Gama) and a daughter Mukta him surviving. In 1874 the widows divided the property left by Nathu between them, and one of them (Tulsa), in 1876, sold her share to one Ganpatrav, who again sold it to the plaintiff. Gama died in 1887, Tulsa having died previously. After the death of the two widows, Mukta, the daughter of Nathu, was heir to the property, but the plaintiff in this suit alleged a title by adverse possession.

Held, that the plaintiff had no title as against the defendant Mukta. Under art. 141 of the Limitation Act (XV of 1877) the possession of Tulsa's vendee and of the plaintiff was not adverse to the defendant Mukta who took as Nathu's heir, until the death of Gama the surviving widow of Nathu. Gama did not die until 1887.

Srinath Kur v. *Prosunno Kumar Ghose* (1) and *Cursandas Govindji* v. *Vundravandas Purshotam* (2) followed.

[F., 20 M. 493 (494); 2 Bom.L.R. 106 (107); **Cons.**, 19 A. 357 (372); **R.**, 21 B. 646 (660).**]**

THIS was a second appeal from the decision of Rao Bahadur N. N. Nanavati, First Class Subordinate Judge of Dhulia with Appellate Powers.

One Nathu Shet, who was the owner of two adjoining houses, died, leaving two widows Gama Bai and Tulsa Bai, and Mukta, a daughter by Gama Bai. The two widows divided Nathu's property on the 21st November, 1874, and each took a house. Tulsa Bai lived for some time in the house which she thus acquired, and on the 12th February, 1876, sold it to one Ganpatrav Shamrav. The house subsequently fell down, and on 7th January, **[217]** 1887, Ganpatrav sold the site to the plaintiff Dada valad Supadu. The plaintiff then re-built the house on the southern part of the site.

On the northern part of the site there was a door which was in the house that had fallen to Gama Bai's share. Tulsa Bai died childless, and subsequently in 1887, Gama Bai died leaving her daughter Mukta surviving her. In 1889 the plaintiff brought the present suit against Mukta and her husband for an injunction restraining them from preventing his passing across the northern portion of the site and from preventing him from shutting up the door in the defendant's house.

The defendants Mukta and her husband Ramshet denied the plaintiff's right and contended that they had been using the door and enjoying light and air through it for more than twenty years, and that the suit was, therefore, time-barred.

The Subordinate Judge dismissed the suit on the ground that the plaintiff's claim to close the door was barred by limitation, the defendants having acquired a right by prescription to have it kept open, and that the plaintiff's right to pass across the land was not proved.

On appeal by the plaintiff, the Court reversed the decree, holding that the claim with regard to the door in dispute was within time; that the

---

* Second Appeal No. 849 of 1891.

(1) 9 C. 934 (937).

(2) 14 B. 482 (488).

door belonged to the houses of both the parties, and that defendants had no right to pass through it; and that the plaintiff was entitled to the relief as prayed for in the plaint. The Court in its judgment observed:—

"Tulsa Bai died within a year or so after the date of the sale-deed passed by her to Ganpatrav. The alienation made by her in favour of Ganpatrav was never set aside, nor was any suit brought after her death by Gama, or the defendant No. 1, to set aside this alienation, and recover the property left by her. It thus appears that the plaintiff's right to his house is now unimpeachable (arts. 125 and 141 of sch. II of Act XV of 1877).

"The door is an old one. It has been in existence for the last more than forty years. The Subordinate Judge, therefore, held that the plaintiff's claim, as regards this door, was time-barred (s. 26 of Act XV of 1877). The two houses had belonged to [218] Nathu till his death. They appear from the defendant's written statement to be more than seventy-five years old. These houses descended after Nathu's death to his two widows Gama and Tulsa. The two co-widows effected a partition and became separate in 1874, *i.e.*, fourteen-years before the date of this suit. The owner, therefore, of the two houses till 1874 was the same. While unity of ownership or of possession lasts, no question of easement can arise (1). Unity of possession at any time within the twenty years is fatal to a claim to a right of easement (2). Unity of ownership of the dominant and servient tenements prevents the acquisition of a prescriptive right to the access of light and air (Addison on Torts, 4th Ed., pp.127, 138, 139, 140 and 141, and s. 46 of the Easements Act No. V of 1882). The period prescribed, in the Limitation Act, of twenty years must, therefore, be calculated from 1874, when Tulsa and Gama became separate, and as the defendants have thus had this door for fifteen years only, the plaintiff's claim in respect thereof is within time. In the *farkhat* (Ex. 19) no mention is made at all of this door, nor are there words showing that any such easement was meant to be created or was transferred in favour of the defendant's house."

The defendants filed a second appeal.

Ghanasham N. Nadkarni, for the appellants (plaintiffs):—The lower Court awarded the plaintiff's claim on the ground that no steps were taken to set saide the sale by Tulsa within twelve years from its date, *viz.*, 1876. But the defendant Mukta claims as her father's reversionary heir on her mother Gama's death. After Tulsa's death, her interest, whatever it was, passed to her co-widow Gama, and after Gama's death Mukta as her father's heir became entitled to the property. There could be no adverse possession as against Mukta so long as Gama was alive—*Cursandas Govindji* v. *Vundravandas Purshotam* (3).

Tulsa had only a life interest which she sold to Ganpatrav, and Ganpatrav sold to the plaintiff. But that interest terminated at her death. If there was any adverse possession, it only began at her death, and the lower Courts have not ascertained this date.

[219] *Narayan Vishnu Gokhale*, for the respondent.

JUDGMENT.

SARGENT, C.J.—The plaintiff in this case asks for an injunction to restrain the defendants from preventing his passing through the land marked "pa", "fa", "ba", on the map (Ex. 3) and from preventing his

(1) 6 C. L. R. 282 and 284. (2) 15 B.L.R. 361. (3) 14 B. 482 (468).

1893
MARCH 13.
APPELLATE CIVIL.
18 B. 216.

shutting up the gate marked "ksha" in the same map. Both the properties in the occupation of the parties belonged to Nathu Shet, who died leaving two widows Tulsa and Gama, who effected a partition of the property in November, 1874. Tulsa sold the house and land allotted to her to Ganpatrav Shamrav in February, 1876, who sold the site (the house having fallen down) to the plaintiff in January, 1877. Gama survived Tulsa and died, leaving a daughter the first defendant. The Subordinate Judge, without determining to whom the door belonged, found that in any case defendants had acquired a right by prescription to have the door kept open; and as to the land over which the plaintiff claimed a right of passage, he held that, whatever Tulsa's enjoyment might have been, it was personal to her; that he had no jurisdiction in this suit to determine as to the validity of the sale by Tulsa; that plaintiff could not go beyond the terms of his sale-deed, and as no right of passage over the land was, in his opinion, given him by the deed, dismissed the plaint. The lower appeal Court held that plaintiff had acquired an unimpeachable right by adverse possession to the property which was allowed to Tulsa; that the door was in the common wall of the two properties which fell to the shares of Gama and Tulsa, and that defendants had not acquired a prescriptive right to have light and air pass through it; and, lastly, that plaintiff and those through whose hands the property had passed were entitled, both upon the construction of the deed of partition and actual user, to a right of passage as claimed as a way of necessity to the lane to the north. It accordingly reversed the decree of the Subordinate Judge, and awarded the plaintiff's claim.

The principal ground on which the case has been argued before us on special appeal is that time would not run against the first defendant Mukta, who was the heir of Nathu, until after Gama's death; but that even if time ran from Tulsa's death, as the lower appeal Court held, that Court has never distinctly determined when Tulsa did die so as to justify the conclusion that plaintiff had [220] acquired an unimpeachable title, by adverse possession, and that it would be necessary to send back the case for a finding. As to this, it is to be remarked that the sale by Tulsa to Ganpatrav would not be binding on the surviving widow unless made under emergent circumstances. Assuming for the moment that it was not made under such circumstances, the possession by Ganpatrav and plaintiff would become adverse to Gama on Tulsa's death, but according to the ruling in *Srinath Kur* v. *Prosunno Kumar Ghose* (1), which we think is the correct view of art. 141 of the Limitation Act (XV of 1877) and was followed in *Cursandas Govindji* v. *Vundravandas Purshotam* (2), the Act would not begin to run against the first defendant Mukta, who takes as heir of Nathu, until after Gama's death: in other words, the possession during Gama's life-time was not adverse to the defendant. The result of the above considerations is that the plaintiff has not established an ownership in the premises occupied by him by adverse possession as found by the lower appeal Court, and cannot ask the Court for an injunction to restrain the defendants from interfering with him in closing up the door, because the defendant may have failed to prove that she had acquired a prescriptive right to the free passage of light and air through these doors.

Hitherto, we have considered the rights of the parties on the assumption that the alienation to Ganpatrav was not binding on the

(1) 9 C. 934 (937).

(2) 14 B. 482 (488).

family, but that question has not been distinctly raised owing to the manner in which the case has been tried, and we must, therefore, send down the following issue for that purpose :—

Has the plaintiff acquired the property allotted to Tulsa on the partition between her and Gama under such circumstances as to be binding on the first defendant ?

Both parties to have power to give fresh evidence. Finding to be transmitted to this Court within a month.

1893 MARCH 13. APPELLATE CIVIL. 18 B. 216.

Issue sent down.

---

18 B. 221.

[221] APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Telang.

LAKSHMAN (*Original Plaintiff*), *Appellant v.* VITHU AND OTHERS (*Original Defendants, Nos.* 3 *to* 8), *Respondents.** [15h March, 1893.]

Landlord and tenant—Commencement and origin of tenancy—Tenancy forty years old—Section 83 *of the Land Revenue Code* (*Bombay Act V of* 1879) *applicability of.*

Section 83 † of the Land Revenue Code (Bombay Act V of 1879) does not apply to a tenancy which commenced about forty years ago, but it applies to a tenancy with respect to which there is no satisfactory evidence to show the commencement as well as the terms of a tenancy.

[F., 11 Ind. Cas. 693=7 N.L.R. 100 ; **Cons.,** 18 B. 433.**]**

SECOND appeal from the decision of T. W. Walker, Assistant Judge of Satara.

The plaintiff sued to recover possession of a piece of land with mesne profits from the date of the institution of the suit. He alleged that the land originally belonged to one Pandurang Narayan Pendharkar, who was the inamdar and mirasdar, and **[222]** that at a Court-sale held on the 17th April, 1874, he (the plaintiff) purchased the right,

---

* Second Appeal No. 664 of 1891.

† Section 83 of the Land Revenue Code (Bombay Act V of 1879) :—A person placed, as tenant, in possession of land by another, or, in that capacity, holding, taking or retaining possession of land permissively from or by sufferance of another, shall be regarded as holding the same at the rent, or for the services, agreed upon between them, or in the absence of satisfactory evidence of such agreement, at the rent payable or services renderable by the usage of the locality, or if there be no such agreement or usage, shall be presumed to hold at such rent as, having regard to all the circumstances of the case, shall be just and reasonable.

And where by reason of the antiquity of a tenancy, no satisfactory evidence of its commencement is forthcoming, and there is not any such evidence of the period of its intended duration, if any, agreed upon between the landlord and tenant, or those under whom they respectively claim title, or any usage of the locality as to duration of such tenancy, it shall, as against the immediate landlord of the tenant, be presumed to be co-extensive with the duration of the tenure of such landlord and of those who derive title under him.

And where there is no satisfactory evidence of the capacity in which a person in possession of land in respect of which he renders service or pays rent to the landlord, receives, holds or retains possession of the same, it shall be presumed that he is in possession as tenant.

Nothing contained in this section shall affect the right of the landlord (if he have the same either by virtue of agreement, usage or otherwise) to enhance the rent payable, or services renderable, by the tenant, or to evict the tenant for non-payment of the rent or non-rendition of the services, either respectively originally fixed or duly enhanced as aforesaid.

1893

MARCH 15.

APPELLATE CIVIL.

18 B. 221.

title and interest of the said Pandurang Narayan Pendharkar in the land. He now sought to eject defendants Nos. 1 and 2, who had been the tenants of Pandurang Narayan, and defendants Nos. 3 to 8, who occupied the land under Nos. 1 and 2.

Defendants Nos. 1 and 2 resisted the claim, on the ground that they were the owners of the *miras* rights over the land, and that defendants Nos. 3 to 8 were in possession as their mortgagees.

Defendants Nos. 3 to 8 denied the mortgage set up by Nos. 1 and 2 and pleaded that they occupied the land as owners for sixty years on payment of the assessment to the inamdar, that the plaintiff was not entitled to evict them, and that the suit was time-barred.

The Joint Subordinate Judge (Rao Saheb B. Y. Gupte) found that the defendants did not own *miras* rights over the land in dispute, that the plaintiff was entitled to eject them, and that the suit was not time-barred. He, therefore, allowed the claim.

On appeal by defendants Nos. 3 to 8, the Assistant Judge reversed the decree. The following is an extract from his judgment :—

" * * * I am of opinion that the plaintiff has proved his title to the land, but with what rights I cannot determine.

" As to the defendants, they have been cultivating the land for a period which the witnesses variously put at twenty or forty years and the Subordinate Judge takes as fifty. During that time they have paid the Government assessment and nothing besides. What the origin of their tenancy is, there is nothing to show, the reason being its antiquity. Following the view of s. 83, Bombay Land Revenue Code, laid down in the High Court Printed Judgments for 1889, p. 363, I presume the defendant's tenure co-extensive with that of the plaintiff. The title of defendants is, in my opinion, as good as the plaintiff's, and there is quite as much reason, perhaps more, for considering them mirasdars as for so considering the plaintiff."

The plaintiff preferred a second appeal.

[223] *Jardine* (with *Mahadeo Chimnaji Apte*), for the appellant (plaintiff) :—The Assistant Judge, it seems, accepted the finding of the Subordinate Judge that the respondents have been tenants for fifty years and yet he held that the origin of their tenancy could not be ascertained owing to its antiquity. Even in their written statement the respondents say that they have been on the land for sixty years. Therefore, their title cannot be co-extensive in duration with that of our vendor, who was both the inamdar and mirasdar. Under these circumstances the respondents cannot assert their *mirasi* rights. Section 83 of the Land Revenue Code is not applicable—*Kalidas* v. *Bhaiji* (1).

Macpherson (with *Daji Abaji Khare*), for the respondents (defendants Nos. 3 to 8) :—The Assistant Judge has clearly found that the origin of our title is lost in antiquity. This is a finding of fact, and cannot be interfered with in second appeal. There is no evidence in the case with respect to the origin of our tenancy. The Judge has not accepted the finding of the Subordinate Judge with respect to the origin. If he had done so, he would not have reversed the decree.

JUDGMENT.

SARGENT, C. J.—It is not clear from the language of the judgment of the lower Court whether the Assistant Judge intended to decide that

(1) 16 B. 646.

the tenancy commenced between twenty-five and forty years ago, but not more than forty. If he did, s. 83 of Act V of 1879 would not apply, as ruled in *Kalidas* v. *Bhaiji* (1). If, on the contrary, he did not so intend, and by saying that there was no evidence to show the "origin of the tenancy" he meant that there was no satisfactory evidence to show the commencement of it as well as the terms of it, the section would apply. Having regard to this ambiguity in the judgment, we think it safer to reverse the decree of the Court below and send back the case for a fresh decision, having regard to the above remarks. Costs to abide the result.

Decree reversed and case sent back.

1893 MARCH 15 — APPELLATE CIVIL. — 18 B. 221.

---

18 B. 224.

[224] APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Telang.

HIRACHAND HARJIVANDAS AND ANOTHER (*Original Applicants*), *Applicants v.* KASTURCHAND KASIDAS (*Original Opponent*), *Opponent.**

[23rd March, 1893.]

Practice—Procedure—Decree—Appeal—Execution—Death of judgment-debtor after appellate decree—Representatives of judgment-debtor—Civil Procedure Code (Act XIV of 1882), *ss.* 234, 248, 361 *to* 372, 583.

The Civil Procedure Code (Act XIV of 1882) does not contemplate the representatives of the judgment-debtor being placed on the record after the appellate decree has been passed. There is no express provision for it in the sections relating to execution. Sections 361 to 372 relate to changes during suit, and speak only of plaintiffs and defendants—terms which seem to show that they were only intended to apply to proceedings up to final determination by the appellate decree and not to proceedings in execution between the judgment-creditor and judgment-debtor.

A Court of appeal having confirmed the decree of a Second Class Subordinate Judge, the decree was transferred for execution to the First Class Subordinate Judge. After the transfer the judgment-debtor died. The judgment-creditor then applied to the First Class Subordinate Judge to substitute on the record the name of the representative of the deceased. The First Class Subordinate Judge rejected the application and referred the judgment creditor to the Second Class Subordinate Judge, who also rejected the application on the ground that the decree which was being executed was the appellate decree in which his decree was merged, and, therefore, he had no jurisdiction to entertain the application.

Held, that the course open to the judgment-creditor was by way of application to execute the decree against the legal representative of the deceased as provided by s. 234 of the Civil Procedure Code (Act XIV of 1882), in which case the application to execute the decree, having regard to s. 583, would be to the Second Class Subordinate Judge, although by s. 248 the notice to the party against whom execution was applied for, would be issued by the First Class Subordinate Judge to whom the decree was transferred for execution.

[**F.**, 21 B. 314 (317); **Appr.**, 28 M. 466 (471)=15 M.L.J. 116; **Expl.**, 34 B. 142=11 Bom.L.R. 1358 (1366)=4 Ind. Cas. 839; **R.**, 17 A. 243 (245); 10 C.L.J. 396 (399)=14 C.W.N. 752=3 Ind. Cas. 324.]

APPLICATION under the extraordinary jurisdiction (s. 622 of the Civil Procedure Code, Act XIV of 1882) against the decision of Rao Saheb M. B. Hora, Second Class Subordinate Judge of Surat.

One Kasidas Harjivandas filed a suit against Hirachand Harjivandas and another in the Court of the Second Class Subordinate Judge of Surat,

---

* Application No. 200 of 1892 under Extraordinary Jurisdiction.

(1) 16 B. 646.

1893
MARCH 23.
APPELLATE CIVIL.
18 B. 224.

who dismissed the suit and ordered each party to bear his own costs. Kasidas appealed to the District Judge of Surat, who confirmed the Subordinate Judge's decree and ordered Kasidas to pay the respondents' costs of the appeal. In [225] order to recover these costs the respondents, now judgment-creditors, applied for the execution of the decree to the Second Class Subordinate Judge, and prayed that the execution proceedings should be transferred to the First Class Subordinate Judge within whose local jurisdiction the judgment-debtor Kasidas was living. The application was granted, and the execution was transferred as prayed for. Some time after the transfer, the judgment-debtor died. The judgment-creditors, therefore, applied to the First Class Subordinate Judge to put the name of the son and heir (Kastur) of the deceased on the record. This application was rejected and the judgment-creditors were directed to apply to the Second Class Subordinate Judge and to produce from him a certificate with respect to the substitution of the name.

The judgment-creditors thereupon presented an application to the Second Class Subordinate Judge, who dismissed it on the ground that he had no jurisdiction to entertain it, because the decree that was being executed was the decree of the appellate Court in which the Subordinate Judge's decree had become merged.

The judgment-creditor then applied to the High Court under its extraordinary jurisdiction and obtained a *rule nisi* calling on the opponent Kastur to show cause why the order of the Second Class Subordinate Judge should not be reversed.

Motilal Mugutlal Munshi, in support of the rule.—Either the First Class Subordinate Judge had jurisdiction to entertain our application to substitute the name of the heir of the deceased judgment-debtor on the record, or the Second Class Subordinate Judge had it. We presented applications to both the Courts, and both of them held that they had no jurisdiction to entertain the application. Against those two orders we have presented two applications under the extraordinary jurisdiction of the High Court including the present application, which relates to the order made by the Second Class Subordinate Judge. Some Court must put the heir of the deceased on the record under ss. 361 to 372 of the Civil Procedure Code (Act XIV of 1882). One of our applications should, therefore, be granted.

Govardhanram M. Tripati, for the opponent, showed cause:—

No *rule nisi* has yet been granted on the application against the order of the First Class Subordinate Judge. We are, therefore, [226] not now concerned with that application. The present application cannot be granted. The explanation to s. 248 of the Civil Procedure Code (Act XIV of 1882) shows that the Court empowered to act under that section is the Court which actually executes the decree, and not the Court which passed it. The Second Class Subordinate Judge had, therefore, no jurisdiction to act under s. 248, and his order is, therefore, correct. It is for the applicant to find out what course is open to him. It is difficult to see under what section the application, whether to the First Class Subordinate Judge or the Second Class Subordinate Judge, can be made, as ss. 361 to 372 of the Civil Procedure Code apply to "plaintiffs" and "defendants," and these words have been under s. 582 extended to "appellants" and "respondents," while there is no provision extending them to "judgment-creditors" and "judgment-debtors."

Motilal Mugutlal Munshi, in reply:—We have a right to proceed before the Second Class Subordinate Judge under s. 234.

JUDGMENT.

1893
MARCH 23

APPEL-
LATE
CIVIL.

18 B. 224.

SARGENT, C.J.—The Civil Procedure Code does not, we think, contemplate the representatives of the judgment-debtor being placed on the record after the appellate decree has been passed. There is no express provision for it in the sections relating to execution. The ss. 361 to 372, which relate to changes during suit, speak only of plaintiffs and defendants—terms which seem to show that they were only intended to apply to proceedings up to final determination by the appellate decree, and not to proceedings in execution between the judgment-creditor and judgment-debtor. The course for the judgment-creditor to adopt is that provided by s. 234, in which case the application to execute the decree, having regard to s. 583, would be to the Second Class Subordinate Judge, although by s. 248, the notice to the party against whom execution is applied for would be issued by the First Class Subordinate Judge, to whom the decree had been transferred for execution.

There is, therefore, under the circumstances, no reason for our interfering with the decision of the Second Class Subordinate Judge, and we must discharge the rule with costs.

Rule discharged.

---

18 B. 227.

[227] ORIGINAL CIVIL.

Before Mr. Justice Starling.

DAWOOD DURVESH (*Plaintiff*) *v.* VULLUBHDAS PURSHOTAM (*Defendant*).* [22nd August, 1893.]

Hindu law—Damdupat—*Rule of* damdupat *when applicable—Interest—Amount of interest recoverable by a Hindu—Mortgage—Hindu creditor claiming interest from a debtor not a Hindu—Redemption suit—Supreme Court Charter, cl.* 29.

In a redemption suit brought by a Mahomedan against a Hindu, it was found on taking the accounts that a sum of Rs. 17,519 were due by the plaintiff (mortgagor) to the defendant (mortgagee). Of this sum Rs. 6,500 were the principal and the remainder (Rs. 11,019) was for interest. The plaintiff contended that the defendant being a Hindu was bound by the rule of *damdupat*, and could not claim as interest more than the amount of the principal.

Held, that the rule of *damdupat* did not apply; and that the plaintiff was liable to the defendant for the whole amount. The rule of *damdupat* only applies when the debtor is a Hindu.

[R., 21 B. 39 (40).]

ON Commissioner's report. The plaintiff in this suit was a Mahomedan and the defendant a Hindu. On the 1st December, 1865, the plaintiff mortgaged his house in Bombay to one Purshotam Bhimji (since deceased) to secure the principal sum of Rs. 6,500, with interest at 9 per cent. per annum. In 1867 the mortgagee was put into possession, and he received the rents and profits of the house until his death in 1873, when his son, the defendant, took possession.

In 1890 the plaintiff brought this suit for redemption, and on 24th February, 1891, it was referred to the Commissioner to take an account of the principal and interest due upon the mortgage and also of the rents

---

* Suit No. 309 of 1890.

1893
AUG. 22.

ORIGINAL CIVIL.

18 B. 227.

and profits of the house received by the original mortgagee and the defendant.

The Commissioner, by his report dated 18th October, 1892, certified that there was on the 22nd August, 1892, a sum of Rs. 17,519-6-6 due by the plaintiff (mortgagor) to the defendant (mortgagee) in respect of principal and interest. This sum was ascertained as follows :—

	Rs.	a.	p.
Principal sum advanced	6,500	0	0
Interest due to 22nd August 1892	15,635	4	1
	22,135	4	1
Less rents received ...	4,615	13	7
Balance due ...	17,519	6	6

[228] The plaintiff filed exceptions to this report. He contended (*inter alia*) that the rule of *damdupat* was applicable, and that under this rule the defendant could not claim from him, as interest, a sum larger than the principal.

Vicaji, for the plaintiff, in support of the exceptions :—The defendant is a Hindu and is bound by Hindu law. Under the rule of *damdupat* he cannot claim from his debtor an amount of interest greater than the principal sum due to him—*Narayan* v. *Satvaji* (1); *Ganpat* v. *Adarji* (2). See Supreme Court Charter, cl. 29(3), and Letters Patent of High Court, 1865, cl. 19, which provide that the law of the defendant is to apply. The plaintiff must be presumed to have contracted with reference to this provision of law, and he is, therefore, entitled to the benefit it gives him. In using the word "defendant" the Legislature must have meant defendant, and it is difficult to believe that it was not aware that in a redemption suit it may be that the debtor (mortgagor) is suing the creditor (mortgagee). The Supreme Court Charter (1823) says that matters of contract are to be determined by "the laws and usages of the defendant." These words are quite clear and unambiguous, and the Court will be assuming legislative power if it qualifies or limits their plain and obvious meaning. The fact of a Hindu being a *defendant* seems to be the single point on which the decisions turn. In *Nanchand* v. *Bapusaheb Rustambhai* (4), the rule of *damdupat* was said not to operate "when the defendant is other than a Hindu." In *Ganpat* v. *Adarji* (2), the rule is expressly said to be applicable, because the defendant was a Hindu. There is nowhere any suggestion that, in order to make the rule applicable, the Hindu must not only be the defendant, but also the debtor. *Shri Ganesh Dharnidhar Maharaj Dev* v. *Keshavrav Govind* (5) was also cited.

Macpherson, for the defendant.—Here a Mahomedan debtor is claiming the benefit of a rule of Hindu law in order to escape **[229]** his liability to a Hindu creditor. The rule of *damdupat* does not apply to such a case. It applies only where both parties are Hindus—*Dhondu* v. *Narayan* (6). See also the judgment of Peacock, C. J., in *Ramlal Mookerjee* v. *Haranchandra* (7).

---

(1) 9 B. H. C. R. 83.
(2) 3 B. 312 (332).
(3) The following is the clause of the Charter referred to :—

All matters of contract and dealing between party and party shall be determined .....where one of the parties shall be a Mahomedan or Gentoo, by the law and usages of the defendant.

(4) 3 B. 131.
(5) 15 B. 625.
(6) 1 B.H.C.R. 47.
(7) 3 B.L.R.O. C.J. 130 (134).

1893
AUG. 22.
ORIGINAL CIVIL.
18 B. 227.

JUDGMENT.

STARLING, J.—The plaintiff in this case is a Mahomedan mortgagor who is suing his mortgagee, a Hindu, for redemption of the mortgaged premises. The suit in due course was referred to the Commissioner to ascertain how much was due by the plaintiff to the defendant. During that investigation the plaintiff asked to have the rule of *damdupat* applied, on the ground that the defendant is a Hindu. This the Commissioner refused to do, and reported accordingly. The plaintiff has excepted to the report, on the ground (*inter alia*) that the Commissioner was wrong in not applying that rule.

On the argument of the exception, Mr. Vicaji, for the plaintiff, cited cl. 29 of the Supreme Court Charter, which provides that "all matters of contract and dealing between party and party shall be determined. . . . where one of the parties shall be a Mahomedan or a Gentoo, by the laws and usages of the defendant;" and he argued that, as the rule of *damdupat* was a rule of Hindu law, and the defendant was a Hindu, that rule applied in this case. He was, however, obliged to admit that, if the Hindu had been suing the Mahomedan for sale or foreclosure, the rule would not apply, and it seems strange that the same account should be treated in different ways, according to whether the mortgagor or the mortgagee happens to be the plaintiff.

What, then, is the rule of *damdupat*? If I had been reading for the first time, without the aid of decisions, the Hindu texts cited in *Dhondu* v. *Narayan* (1), I should have formulated from them one of two propositions:—Either that no Hindu creditor receiving principal and interest at the same time from a Hindu debtor is entitled to receive an amount of interest larger than the principal; or else that a Hindu creditor is not entitled to receive from *any* debtor more interest than principal. The first proposition is good law. The second proposition would, I think, have **[230]** been accepted as good law by Couch, C. J., and Westropp, J., in *Hakma Manji* v. *Ayab Haji* (2), for there they remitted a case to the Small Cause Court for a new trial "to determine whether the rate of interest claimed does not exceed what the plaintiff is allowed to take by Hindu law." The defendant there was a Mahomedan, though a Memon, but the point was not argued on either side. This case has, however, I think, been overruled by that of *Nanchand* v. *Bapusaheb Rustambhai* (3), though it was not cited to the Court in the argument. In this case the Court held that the rule of *damdupat* was not applicable where the defendant was a Mahomedan.

The judgment on the point was very short, and it is, therefore, important to trace the case through its various stages. The District Judge held that the Hindu law forbad a creditor receiving more interest than principal, and that the plaintiff was not at liberty to abrogate the express provisions of the law, even when dealing with a Mahomedan. In the High Court it was argued, for the defendant, that the Hindu law puts an obligation on a Hindu creditor not to receive more interest than principal, but it was held that as "in this case the defendant is a Mahomedan, the Courts below were wrong in applying the Hindu rule of *damdupat*, which can only operate when the defendant is a Hindu," *i.e.*, as I understand the whole case, when the *debtor* is a Hindu.

(1) 1 B.H.C.R. 47. (2) 7 B.H.C.R (O.C.J.) 19. (3) 3 B. 131.

1893
AUG. 22.
ORIGINAL CIVIL.
18 B 227.

Consequently, after looking at other cases in which the rule of *damdupat* is discussed, I hold that the rule of *damdupat* only applies to cases where the debtor is a Hindu.

In the present case, the debtor is a Mahomedan, and as, in my opinion, the rule of *damdupat*, as interpreted by the Courts, does not apply to any case where the debtor is not a Hindu, there is no law applicable to the defendant in this case which renders it necessary to interfere with the report of the Commissioner as to the amount of interest legally claimable by the defendant.

Attorney for the plaintiff :—Mr. *K. D. Shroff*.

Attorneys for the defendant :—Messrs. *Little, Smith, Frere and Nicholson*.

---

18 B. 231.

[231] ORIGINAL CIVIL.

Before Mr. Justice Parsons.

BOMBAY, BARODA AND CENTRAL INDIA RAILWAY COMPANY (*Plaintiffs*) *v.* JACOB ELLAS SASSOON AND OTHERS (*Defendants.*)*

[12th September, 1893.]

Interpleader—Civil Procedure Code (XIV of 1882), ss. 470-473—Costs of plaintiffs—Claims by plaintiffs against goods in respect of which suit brought.

In May, 1893, one Sadanand Ramsarmall (defendant No. 4), a resident at Hissar in the Punjab, consigned 600 bags of rapeseed to one Khimji Kanji of Bombay and delivered them to the plaintiffs for carriage to Bombay. While the goods were in transit to Bombay, Sadanand the consignor ordered the plaintiffs to deliver them to his agent Ramgopal Fulchand, instead of to the consignee, and on the 18th May, Ramgopal requested delivery from the plaintiffs. Before the goods could be delivered, however, the firm of E. D. Sassoon & Co. (defendants Nos. 1, 2 and 3) claimed them, alleging that they had been assigned to them by Khimji Kanji for valuable consideration. The plaintiffs thereupon filed this suit praying that the defendants should be required to interplead, and that they should be restrained from suing them (the plaintiffs) in respect of the said goods. The plaintiffs claimed to charge the goods with payment of freight, wharfage and demurrage and their costs of suit.

Held :—

(1) that the suit was properly instituted by the plaintiffs as an interpleader suit so as to entitle them to their costs ;

(2) that the fourth defendant was entitled to the goods, subject to the plaintiffs' charge for freight and costs ;

(3) that the plaintiffs' charge for wharfage and demurrage could not be allowed. The goods remained in the plaintiffs' possession not by reason of any neglect or default of the owner to take delivery of them, but by the act of the plaintiffs themselves, who kept and refused to deliver them for their own protection and benefit. All that they could presumably be entitled to, was a reasonable warehouse rent, which, however, they had not claimed.

INTERPLEADER suit. The plaint prayed for an injunction restraining the defendants and each of them from taking proceedings against the plaintiffs in respect of certain goods which had been delivered to them for carriage, and that the defendants should be directed to interplead together concerning their respective claims to the said goods, &c.

The first three defendants were partners in the firm of E. D. Sassoon & Co., which carried on business in Bombay. The fourth defendant

---

* Suit No. 260 of 1893.

was one Sadanand Ramsarmall, who resided **[232]** at Hissar in the Punjab and carried on business in Bombay by his *munim*.

The plaint stated that in May, 1893, the fourth defendant (Sadanand) at Hissar, in the Punjab, consigned 600 bags of rapeseed to one Khimji Kanji at Bombay in three lots, and delivered the same to the plaintiffs for carriage to Bombay. The plaintiffs passed three railway receipts, in the usual form, to the consignor (Sadanand), dated, respectively, the 9th, 11th, and 12th May, 1893.

While the goods were in transit to Bombay the consignor (defendant No. 4, ordered the plaintiffs to deliver them to one Ramgopal Fulchand instead of to the consignee Khimji Kanji. The order was conveyed to the plaintiffs' traffic manager at Bombay by a telegraphic message dated the 15th May. On the 18th May, Ramgopal Fulchand requested delivery of the goods from the plaintiffs.

Before the goods could be delivered, the firm of E. D. Sassoon & Co. (defendants Nos. 1, 2 and 3) claimed them, alleging that they had been assigned to them by Khimji Kanji for valuable consideration, and shortly afterwards the fourth defendant, the consignor (Sadanand), claimed them, alleging that Ramgopal Fulchand was his agent to receive them.

The following are the concluding paragraphs of the plaint:—

"6. The plaintiffs have given the usual directions for detaining the said rapeseed (whereon they will rely) and the same is now in the keeping of the plaintiffs, and demurrage and other charges are daily being incurred in respect thereof. The plaintiffs fear that a suit will be filed against them in respect of the said rapeseed.

"7. The plaintiff company is ignorant of the respective rights of the parties claiming the said goods.

"8. The plaintiff company has no interest in the goods so claimed as aforesaid otherwise than their due and proper charges for freight, demurrage, &c., and subject thereto is ready and willing to deliver the same to such person or persons as this Honourable Court shall direct.

"9. This suit is not brought by collusion with the defendants or any of them."

The plaint prayed (*a*) for an injunction restraining the defendants from suing the plaintiffs; (*b*) that the defendants should be required to interplead; (*c*) that upon delivering the **[233]** said goods to such person or persons as the Court should direct, subject to the plaintiffs' claim thereon for freight, demurrage and charges and the costs incurred by the plaintiffs in this suit, the plaintiffs should be discharged from all liability to the defendants, or any of them, in respect of the same; (*d*) that the said rapeseed should be directed to be sold by the plaintiffs, and the net proceeds thereof, less freight, demurrage, charges and costs, as afore said, be paid into Court to await the decision of this suit.

The fourth defendant (Sadanand Ramsarmall) was the only one who filed a written statement. He stated that he sold the said 600 bags of rapeseed (with other goods) to Khimji Kanji, but that Khimji having dishonoured the *hundis* drawn against the said goods while the said goods were in transit, he (Sadanand) had given notice to the plaintiffs not to deliver the goods to Khimji Kanji, but to deliver them to his (Sadanand's) agent, *viz.*, Ramgopal Fulchand. He claimed the goods and denied that the firm of E. D. Sassoon & Co. had any title to them, and prayed for his costs either against the plaintiffs or the other defendants.

Before the trial came on, the goods had been sold, and the proceeds were lodged in Court subject to the decision of this suit.

1893
SEP. 12.
ORIGINAL CIVIL.
18 B. 231.

The following issues were raised at the hearing :—

1. Whether the suit was properly instituted as an interpleader suit so as to entitle the plaintiffs to their costs ?

2. Whether the fourth defendant (Sadanand) was entitled to the proceeds of the sale of the 600 bags of rapeseed free of any charges on the part of the plaintiffs ?

3. Whether the fourth defendant was entitled to his costs from the plaintiffs or the other defendants, or both of them ?

4. Whether plaintiffs were entitled to recover any and what charges in respect of the said goods, and if so, whether from the first three defendants or the fourth defendant ?

Macpherson and *Scott*, for plaintiffs, argued that they were entitled to their costs and charges in respect of the carriage of the said goods. They referred to s. 470 of the Civil **[234]** Procedure Code (XIV of 1882); *Martinius* v. *Heimuth* (1); *Mason* v. *Hamilton* (2); *Cotter* v. *Bank of England* (3); *Attenborough* v. *St. Katharine's Dock Company* (4); *Dadoba* v. *Krishna* (5); *Martin* v. *Lawrence* (6). They claimed Rs. 1,672-5 for freight, and alleged a lien on the proceeds to that extent. They referred to the Indian Contract Act (IX of 1872), s. 170, and s. 55 of Act IX of 1890. They also claimed wharfage and demurrage amounting to Rs. 6,698 4.

Lang (Acting Advocate General), for defendants Nos. 1, 2 and 3 (E. D. Sassoon & Co.).—The cases cited for the plaintiffs do not apply. The Court is bound by the Code of Civil Procedure (XIV of 1882). Under ss. 470-473 a person filing an interpleader suit must be a mere stakeholder and must hand the property over unreservedly. See also the form 104 in sch. IV. The plaintiffs have kept the goods, and now make enormous charges against them, which amount to more than the value of the goods. The suit should be dismissed with costs.

Inverarity and *Russell*, for the fourth defendant.—This is not a proper interpleader suit. See paragraphs 6 and 8 of the plaint. Paragraph (*a*) of the plaint asks for personal relief—*Mitchell* v. *Hayne* (7); *Bignold* v. *Audland* (8). The plaintiffs have not complied with s. 472 of the Civil Procedure Code, and are, therefore, not entitled to any order. We asked for the goods and offered an indemnity. The value of the goods is Rs. 5,800. The plaintiffs' charges now amount to Rs. 7,770-9. The plaintiffs are entitled to charge for freight, but are not entitled to demurrage or wharfage, and we should be allowed to set off our costs against their charge for freight.

JUDGMENT.

PARSONS, J.—I think that, on the authorities, cited by the learned counsel for the plaintiffs, this is a properly constituted interpleader suit. In *Mason* v. *Hamilton* (2) the bill filed stated that the plaintiff had no interest in the goods except his lien for wharfage and warehouse rent, and Sir L. Shadwell, the Vice-Chancellor, said that the bill stated a plain case of interpleader. **[235]** The case of *Mitchell* v. *Hayne* (7) is discussed in *Bignold* v. *Audland* (8), and the result is said to be this: "Where a plaintiff represents not merely that he has a lien with respect to which two other persons have adverse rights, but that there is a further

(1) Cooper's Rep. 245. (2) 5 Sim. 19. (3) 3 Moore and Scott 180.
(4) 3 C. P. D. 466. (5) 7 B. 34 (36). (6) 4 C. 655.
(7) 5 Sim. and St. 63. (8) 11 Sim. 23.

1893
SEP. 12.
ORIGINAL CIVIL.
18 B. 231.

question to be litigated adversely between himself and one of them, that is not a case of interpleader." In *Cotter* v. *Bank of England* (1) it was held that the bank, who retained a lien on certain bullion in respect of freight and charges, had no interest in the subject-matter of the suit within the meaning of those words in Statute 1 and 2 William IV, c. 58. In *Attenborough* v. *St. Katherine's Dock Co.* (2) the defendants claimed no interest in the wines, the subject-matter of the suit, other than the usual dock rents and charges; Bramwell, L.J., said: "Defendants do not claim any interest in the subject-matter of the suit, for their alleged right of lien is not an interest in the wine," and it was held that the case fell within the Interpleader Act, and the defendants' costs and charges were made a first charge on the fund. The language of ss. 470 and 471 of the Code of Civil Procedure (XIV of 1882) is almost identical with that of Statute 1 and 2 William IV, c. 58, and the above rulings clearly apply. The personal relief asked for is nothing more than an injunction restraining the defendants from suing the plaintiffs, and that is contained in the form of plaint in an interpleader suit given in the form No. 104 of the 4th schedule to the Civil Procedure Code. I find the first issue in the affirmative.

Strictly speaking, in my opinion, so much of the second and fourth issues as relates to the amount of the charges has been improperly raised in this suit, in which the title only to the thing claimed has to be adjudicated. No doubt a lien can be declared for charges, but the amount of those charges, if disputed, ought, I think, to form the subject of a separate proceeding between the adjudicated owner and the person who seeks to make the goods liable. As, however, here the parties interested have gone to trial on those issues without an objection on the part of any of them, I will proceed to determine them.

The charge for freight comes to Rs. 1,072-5, and this is admitted to be correct and due. The plaintiffs, however, seek, further, to **[236]** charge the goods with the sum of Rs. 6,698-4 for wharfage and demurrage, and this charge is disputed. The rules of the said company allow of such a charge being made when goods are not taken delivery of by their owners within a certain time after notice of arrival; the rates charged being exceedingly high that they may act as a kind of penalty so as to ensure the speedy removal of goods. The present is not a case of that kind. The goods remained on the plaintiffs' premises, not by reason of any neglect or default of their owner to take delivery of them, but by the act of the plaintiffs themselves, who kept and refused to deliver them for their own protection and benefit. They did not even place them in the custody of the Court, as they could have done under the provisions of s. 472. All that they could possibly be entitled to, would be a reasonable warehouse rent for the time the goods remained with them, and I might have been able to have awarded them that had they claimed it, and given evidence in proof of the amount. They do not, however, do this, and, I think, the claim they have made is inadmissible and unproved.

I find on the second and fourth issues that the fourth defendant is entitled to the proceeds of the sale of the 600 bags, and that the plaintiffs are entitled to recover the freight claimed only from him.

I find on the third issue that the fourth defendant is entitled to his costs from the defendants Nos. 1 to 3, since it is their action that has caused the whole litigation.

---

(1) 3 Moo. and Se. 180.

(2) 3 C.P.D. 450.

1893
SEP. 12.
ORIGINAL CIVIL.
18 B. 231.

I decree as asked for in paragraph (*a*) of the prayer of the plaint, and declare that the fourth defendant is entitled to the fund in Court, and that he be paid the same after deducting therefrom the plaintiffs' charge for freight, *viz.*, Rs. 1,072-5, and their costs, which are made a first charge on the fund and are to be paid to them out of it, and I order that the defendants Nos. 1 to 3 pay the defendant No. 4 his costs, and reimburse him the costs of the plaintiffs that he may have to pay.

Attorneys for the plaintiffs :—Messrs. *Crawford, Burder and Co.*

Attorneys for the defendants :—Messrs. *Pestanji, Rustim and Kola*, and Messrs. *Payne, Gilbert and Sayani.*

---

18 B. 237.

[237] TESTAMENTARY AND INTESTATE JURISDICTION.

Before Mr. Justice Starling.

IN THE MATTER OF THE WILL OF DAWUBAI
HAJI KHAN HUBIB KHAN, *Petitioner.** [9th October, 1893.]

Will—Executor—Probate—Application by executor for probate in forma pauperis—Civil Procedure Code (XIV *of* 1882), *ch.* 26, *s.* 647—*Practice—Procedure.*

Where an executor is not in possession of the property of his testator and cannot get possession of it, and where he has not himself the means of paying the necessary fees, he may be allowed to petition for, and, if entitled thereto, to obtain probate in *forma pauperis.*

[R., 36 B. 279=13 Bom. L.R. 577=11 Ind. Cas 724; 12 C.L.J. 185 (188)=14 C.W.N. 924=7 Ind. Cas. 126; 19 C.W.N. 205]

APPLICATION in *forma pauperis* for probate.

One Dawubai, of the Nakva caste and a Christian by faith, died on the 10th June, 1892. By her will, dated 6th June, 1892, she appointed the petitioner sole executor.

At the time of her death, Dawubai was plaintiff in a suit (No. 407 of 1891) which she had filed in *forma pauperis* against certain persons to recover from them a sum of money, ornaments and two houses situate at Dharavi. In her will she directed her executor to prosecute this suit and recover this property, which she bequeathed upon certain trusts set forth in her will.

On the 23rd August the petitioner applied *in forma pauperis* to the High Court for probate of the said will. He stated the value of the assets to which the testatrix was entitled, but which, as above stated, were in dispute in suit No. 407 of 1891 to be under the value Rs. 9,075. He did not pay the usual stamp or probate duty, and prayed to obtain probate in *forma pauperis.*

Vicaji, in support of the petition :—The Court Fees Act (VII of 1870) contains no clause which forbids such an application. See s. 4 (1), cl. 11,

---

* Application No. 1 of 1893.

(1) Section 4, Court Fees Act (VII of 1870) :—

No document of any of the kinds specified in the first or second schedule to this Act annexed, as chargeable with fees, shall be filed, exhibited or recorded in, or shall be received or furnished by, any of the said High Courts in any case coming before such Court in the exercise of its extraordinary original civil jurisdiction ;

or in the exercise of its extraordinary original criminal jurisdiction ;

[238] or in the exercise of its jurisdiction as regards appeals from the judgment of two or more judges of the said Court, or of a Division Court ;

sch. I. We are willing to give a **[238]** bond for the payment of the proper fees if we are successful in suit No. 407 of 1891, and recover the property which we claim.

Lang (Acting Advocate General), for Government, contended that the Court had no power to direct its officers to issue probate without payment of fees.

1893
OCT. 9.

TESTAMENTARY AND INTESTATE JURISDICTION.

18 B. 237.

JUDGMENT.

STARLING, J.—This is an application by one Haji Khan Hubib Khan, the executor appointed by the will of Dawubai, a native Christian, for leave to prosecute a petition for and to obtain probate of the said will in *forma pauperis*. I had on a previous occasion refused to accept such a petition, as no precedent was in existence for such a course being pursued, but in the present instance the matter was pressed upon me as being one of great hardship, as the deceased had during her life-time filed a suit to recover the property in question, and as she was a Christian that suit must now be dismissed unless the applicant could obtain probate of her will. I, therefore, allowed the petition to be interpreted and affirmed *gratis*, so that the matter might be set down as a pauper petition and the point at issue be fully discussed.

The first question is whether a petition for grant of probate falls under chap. XXVI of the Civil Procedure Code. It is not a suit in the ordinary acceptation of the term, though, if a caveat were entered, it would be changed into a suit; but I am of opinion that s. 647, which provides that the procedure for suits prescribed by the Civil Procedure Code "shall be followed, so far as it can be made applicable, in all proceedings in any Court of civil jurisdiction other than suits and appeals," makes the provisions of the Code applicable to all miscellaneous civil proceedings. Further, by ss. 238 and 261 of the Indian Succession Act (X of 1865) the procedure in granting probate is to be **[239]** regulated, except as is otherwise provided, by the Civil Procedure Code so far as the circumstances of the case will admit. Consequently, I see no reason why chap. XXVI should not be applicable to petitions for probate, if a proper case be made out, and if no other enactments than those before referred to stand in the way. Of course no proper case could be made out except where the executor was not in, and could not get, possession of the property of his testator so as to be able to pay the necessary fees; nor yet, I should think, where he himself had money wherewith he could take the necessary steps.

It was then argued by the Acting Advocate General that whatever the Court could do with regard to those fees which might be regarded strictly as fees payable to the Court, it could not make any order relieving the executor from payment of the duty which was payable to Government, and that the only thing to be done would be for the petitioner to petition Government to lend him the stamp necessary to be affixed to the probate, and he relied upon the terms of the Court Fees Act, 1870. The first remark to be made is that all the fees imposed under that Act are called "Court Fees." Among those fees are what are called institution fees, as well as fees leviable on the issue of probates. Section 410

---

or in the exercise of its jurisdiction as regards appeals from the Courts subject to its superintendence;

or in the exercise of its jurisdiction as a Court of reference or revision;

unless in respect of such document there be paid a fee of an amount not less than that indicated by either of the said schedules as the proper fee for such document.

1893
OCT. 9.
TESTAMENTARY AND INTESTATE JURISDICTION.
18 B. 237.

of the Civil Procedure Code provides that when an application to sue in *forma pauperis* is granted, the plaintiff shall not be liable to any Court-fee (except process fees) in any proceeding connected with the suit. Under this section a pauper plaintiff is exempted from institution fees; consequently, it seems to me to be difficult to say that he cannot be also exempted (unless exemption be otherwise prohibited) from all the fees payable under the schedules to that Act. Looking at the sections of the Act applicable to the matter in hand, we find that s. 3 provides (*inter alia*) that, in the High Court, fees chargeable under No. 11 of the first schedule to the Act (relating to probates and letters of administration) shall be collected in manner hereinafter appearing, and s 25 provides that such fees shall be collected by stamps; therefore, as regards the High Court in its original civil jurisdiction, there is nothing to prohibit the exemption from stamp of probate to a pauper. Section 28, however, provides that no document which ought to bear a stamp shall be [240] of any validity unless and until it is properly stamped; and the question is whether, if a pauper executor got probate without its being stamped, it would be of any use to him. Turning to s. 6, there is a prohibition to certain Courts against receiving documents chargeable under the Act until they are stamped; among those documents are plaints; yet a plaint presented by a pauper can be received and filed without an institution fee stamp. Consequently, it is evident that the provisions of s. 410 of the Civil Procedure Code, so far set aside and control the provisions of the Court Fees Act, and I can see no reason why, if a probate were granted without payment of fees under s. 410, that section should not exempt it from being a "document which ought to bear a stamp," the fact of its having been so issued, of course, appearing on its face, and thus prevent the previous act of the Court in granting it without payment of stamp duty being rendered nugatory by s. 28 of the Court Fees Act. The Acting Advocate-General wanted to know how Government could recover the amount of the stamps due to them if probate was issued in *forma pauperis*. Section 411 provides that Court-fees in a pauper suit shall be a first charge upon the subject-matter of the suit, and that has been acted upon in *Ganpat* v. *Collector of Kanara* (1), *Collector of Muradabad* v. *Muhammad* (2) and *Janki* v. *Collector of Allahabad* (3). I have already held in *Yeshwant Bhagwant* v. *Shankar Ramchandra* (4) that in a testamentary proceeding the "subject-matter of the suit" is the property of which the executor is the legal owner under the will of the testator, and of which the probate by declaring him to be executor recognises him before the Court as legal owner. Consequently, I am of opinion that all the Court-fees due to Government for grant of a probate in *forma pauperis* will be a first charge upon the property covered by the probate, and in the case of immoveable property, which could not be transferred without the use of that document, such charge would undoubtedly continue in the hands of a purchaser who would have notice, from the probate itself, of the manner in which it was granted.

[241] Under these circumstances, being satisfied that the petitioner is a pauper, and that there is none of his testatrix's estate available to enable him to take out probate, I grant him leave to petition for and, if entitled thereto, to obtain probate in *forma pauperis*.

---

(1) 1 B. 7. (2) 2 A. 196. (3) 9 A. 64. (4) 17 B. 388 (391).

18 B. 241.

1893
MARCH 13.

APPELLATE CIVIL.

APPELLATE CIVIL.

18 B. 241.

Before Sir Charles Sargent Kt., Chief Justice, and Mr. Justice Telang.

GOPAL PURSHOTAM (*Original Plaintiff*), *Appellant v.* BAIDIVALI (*Original Defendant*), *Respondent.** [13th March, 1893.]

Civil Procedure Code (XIV of 1882), ss. 278 and 283—Decree—Execution—Attachment—Application by third party for removal of attachment—Order refusing to remove attachment—Omission by third party to bring subsequent suit to establish right to attached property—Subsequent withdrawal of attachment by attaching party—Effect of such withdrawal—Subsequent claim to property by the party who had failed to remove attachment.

The plaintiff was the assignee of a mortgage decree dated the 2nd May, 1885. In 1888 he attached the mortgaged property in execution of the decree, whereupon the defendant intervened and applied to have the attachment removed, on the ground that prior to the attachment she had purchased the land under a registered deed of sale dated the 23rd June, 1888. Her application was rejected on the 27th September, 1888. Subsequently the judgment-debtors applied and obtained the Court's permission to sell the land by private contract, and on the 1st November, 1888, the plaintiff purchased it and withdrew his application for execution on the 20th November, 1888. In 1889 the plaintiff brought this suit against the defendant to obtain the removal of certain portions of a culvert erected by her on the land. The defendant pleaded that she was the owner of the property, having purchased it on the 23rd June, 1888.

The Subordinate Judge passed a decree for the plaintiff, on the ground that though the plaintiff's sale-deed was not entitled to preference over the defendant's, still as she had taken no steps to establish her right to the property in a regular suit after her application for the removal of the plaintiff's attachment had been rejected, effect could not be given to her purchase. On appeal by the defendant the decree was reversed, and the plaintiff preferred a second appeal.

Held, confirming the appellate decree, that when the plaintiff withdrew his attachment on the 20th November, 1888, the parties were restored to the *status quo ante*. The object of the claim which was preferred by the defendant was, as contemplated by s. 278 of the Civil Procedure Code (Act XIV of 1882), to obtain the removal of the attachment, and when that attachment was removed by the judgment-creditor's own act, there was no longer an attachment or any [242] proceeding in execution on which the order could operate to the prejudice of the claimant, and, therefore, there was no necessity for her to bring a suit to set aside the order.

The defendant's title to the property having been acquired on the 23rd June, 1888, was superior to the plaintiff's, which was not acquired before November, 1888.

[Diss., 1 C.L.J. 296 (300); F., 31 C. 228 (231); R., 26 M.L.J. 499; D., 29 M. 225 (229) = 16 M.L.J. 136.]

SECOND appeal from the decision of G. McCorkell, District Judge of Ahmedabad.

Two brothers named Jhalam Ratna and Maina Ratna were the owners of the land in dispute (Survey No. 61). They mortgaged it to one Lallu Gopal, who filed a suit against them on the mortgage and obtained a decree on the 2nd May, 1885. On the 4th May, 1885, this decree was assigned by Lallu Gopal to the plaintiff Gopal Purshotam, who in 1888 attached the mortgaged property in execution. The defendant Bai Divali intervened and applied for the removal of the attachment, alleging that on the 23rd June, 1888, before the property was attached, she had purchased it under a registered deed of sale. On the 27th September, 1888, defendant's application was rejected.

* Second Appeal No. 1034 of 1891.

1893

MARCH 13.

APPELLATE CIVIL.

18 B. 241.

Subsequently the judgment-debtors Jhalam and Maina applied to the Court for permission to sell the land by private contract, and their application being granted, the plaintiff on the 1st November, 1888, privately purchased the land and on the 20th November, 1888, withdrew his application for execution.

In 1889 the plaintiff brought the present suit against the defendant for an injunction requiring the defendant to remove certain portions of a culvert erected by her on the land in question and for damages.

The defendant pleaded (*inter alia*) that the suit was time-barred and that she was the owner of the property.

The Subordinate Judge allowed the claim for the removal of the culvert, holding that though the plaintiff purchased the property with full knowledge of the defendant's prior registered purchase, nevertheless the defendant was not protected by her purchase, as she had not established her right to the property by a regular suit after the rejection of her application in the attachment proceeding. The rest of the plaintiff's claim was disallowed.

[243] Both the parties appealed to the District Judge, who reversed the decree and rejected the plaintiff's claim on the following grounds :—

"It has been contended that because Bai Divali brought no suit within one year to set aside the order of the Subordinate Judge, she is now barred from setting up a claim to the land. I am of opinion that this is erroneous ; when the plaintiff withdrew his application on 20th November, 1888, he practically cancelled all the proceedings which had taken place in consequence of his application, and the parties returned to the *status quo ante*. If plaintiff had allowed his application to remain on the file for a year and then withdrawn it, the defendant meanwhile having done nothing, the plaintiff's plea would be good. But another point appears in favour of the defendant; the summary proceedings do not appear to extinguish the defendant's title, but only her right to possession (cf. *Parashram* v. *Rakhma*, I. L. R., 15 Bom., 299). If, then, my opinion on this point be not erroneous, it follows that the defendant's sale-deed must have priority over the plaintiff's, and the present suit must fail."

The plaintiff preferred a second appeal.

Goverdhanram M. Tripathi, for the appellant (plaintiff).

Chimanlal H. Setalvad, for the respondent (defendant).

JUDGMENT.

SARGENT, C. J.—We agree with the lower appeal Court that, when the plaintiff withdrew his attachment, the parties were restored to the *status quo ante*. The object of the claim which was preferred by the defendant was, as contemplated by s. 278, Civil Procedure Code, to obtain the removal of the attachment, and when that attachment was removed by the judgment-creditor's own act on 20th November, 1888, there was no longer an attachment or any other proceedings in execution on which the order could operate to the prejudice of the claimant and, therefore, no necessity for bringing a suit to set aside the order. This is apparently the broad view on which the Court proceeded in *Ibrahimbhai* v. *Kabulabhai* (1).

Under these circumstances, as s. 283 of the Civil Procedure Code does not operate as a bar to the present suit, and the **[244]** defendant's

(1) 13 B. 72.

title to the property, which was acquired on 3rd June, 1888, is superior to the plaintiff's, which was not acquired before November, 1888, the plaintiff has failed to establish his right to an injunction, and his claim was, therefore, properly rejected.

Decree must be confirmed with costs.

Decree confirmed.

1893
MARCH 13.
APPELLATE CIVIL.
18 B. 241.

---

18 B. 244.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Telang.

FAKI GULAM MOHIDIN AND OTHERS (*Original Plaintiffs*), *Appellants* *v.* SAJNAK BIN PANDNAK AND OTHERS (*Original Defendants*), *Respondents.** [22nd March, 1893].

Khoti Settlement Act (*Bombay Act I of* 1880), *ss* 17,† 20,† 21,† 22† *and* 37†—*Settlement Officer's decision*—Dhara *lands*—*Suit for a declaration that lands were* khoti *lands* —*Decree of a Civil Court*—*Adverse possession*—*Art.* 14, *sch. II of the Limitation Act* (*XV of* 1877)—*Six years' limitation.*

A survey settlement officer decided in the year 1882 that certain lands situate at the *khoti* village of Tadil, in the Ratnagiri District, were *dhara* lands of S. and [245] another, but the entry in the survey register that they were *dhara* lands was not made till 1889.

In the meanwhile, F. and others, who were the *khots* of the village, made an application to the special survey officer to revise the decision of the settlement officer of the year 1882, and the special settlement officer having rejected this application in 1885, they brought the present suit in 1887 against S. and others for a declaration that the lands were their *khoti*.

The Judge dismissed the suit on the ground that the settlement officer's decision being final under ss. 20 and 21 of the Khoti Settlement Act (Bombay Act I of 1880), and it having not been set aside within one year from its date, the suit was time-barred under art. 14, sch. II of the Limitation Act (XV of 1877).

---

* Second Appeal, No. 595 of 1891.

† Sections 17, 20, 21, 22 and 37 of the Khoti Settlement Act (Bom. Act I of 1880):—

17. The other records prepared under the said section (that is, s 16) shall specify the nature and amount of rent payable to the khot by each privileged occupant according to the provisions of s. 33 of this Act, and any entry in any record duly made under this section shall be conclusive, and final evidence of the liability thereby established.

20. If it shall appear to the survey officer who frames the said register or other record that there exists any dispute as to any matter which he is bound to record, he may, either on the application of any of the disputant parties or of his own motion, investigate and determine such dispute and frame the said register or other record accordingly.

21. In any such matter the decision of the said survey officer, when not final, shall be binding upon all the parties affected thereby until reversed or modified by a final decree of a competent Court.

22. No suit shall lie against the said survey officer, or against Government, to set aside any such decision of a survey officer; but the record shall from time to time be amended by the said survey officer, or when the survey settlement is concluded, by the Collector, in accordance with any such decree as aforesaid which the parties may obtain *inter se* on an application accompanied by a certified copy of such decree, being duly made to the said survey officer, or to the Collector, for that purpose.

37. Existing survey settlements of the land revenue of any village to which this Act extends, made, approved and confirmed under the authority of the Governor in Council, shall be deemed to have been lawfully made, and, except as is hereinafter otherwise provided, shall continue in force for the terms for which they have been respectively guaranteed, subject to all the provisions of law which would be applicable thereto if this Act had not been passed, and anything in this Act which is inconsistent with any of the said provisions shall be deemed not to apply to such settlements.

1893
MARCH 22.

APPEL-
LATE
CIVIL.

18 B. 244.

Held, reversing the decree, that the claim was not time-barred. Under ss. 20 and 21 of the Khoti Settlement Act, it is the "decision" on the rival claims of the parties which is open to reversal by the Civil Court and not the consequences of that decision, which as provided by s. 22 are left to the Collector himself to undo or modify in accordance with the decision of the Civil Court.

Held, further, that s. 21 does not contemplate any "order" being made by the survey officer between the parties, and even if framing the register be regarded as an "act" of the survey officer, s. 22 provides for its being amended by the Collector himself, in accordance with the decision of the Civil Court.

Held, further, that although the defendants might have paid only the assessment before 1878-79, their adverse possession of the lands as *dhara* did not begin to run against the plaintiffs until 1878-79, when such a claim was actively advanced by the defendants. The plaintiffs' cause of action arose in 1882, when the survey officer determined that the lands were *dhara*, and the present suit, which was brought within six years to reverse that decision, was, therefore, in time.

[F., 3 Bom. L.R. 420 (421); R., 32 C. 1107 (1126)=2 C.L.J. 107.]

THIS was a second appeal from the decision of R. S. Tipnis, Acting Assistant Judge of Ratnagiri.

Suit for a declaration that the lands in dispute were plaintiffs' *khoti* lands.

The lands in dispute were situate in the village of Tadil, in the Dapoli Taluka in the Ratnagiri District, and were held by the ancestors of defendants Nos. 1 and 2 on *khoti* tenure prior to the revenue survey of 1867-68. The plaintiffs were the *khots* of the village. At the time of the revenue survey settlement of 1867-68 some of the lands in dispute were entered in the revenue register as the plaintiffs' *khoti* and the rest as *dhara* of defendants Nos. 1 and 2. Complaints were lodged against the settlement of 1867-68 as being in many cases erroneous, and in 1874 the Government appointed a commission to settle the disputes [246] that had arisen among the *khots*. On the report of this commission in 1876, Government passed a resolution directing that the survey settlement should be revised. In the year 1878-79 a revised settlement was introduced in the village of Tadil, and in this revised survey all the lands in dispute were entered as *dhara* of defendants Nos. 1 and 2. Thereupon the plaintiffs in 1880 complained to the survey authorities that the lands should have been entered as their *khoti*, and applied that the records should be altered. The Special Assistant Collector inquired into the matter, and on the 19th June, 1882, reported to the settlement officer and Collector that the lands in dispute were the *dhara* of the defendants Nos. 1 and 2, and the settlement officer sanctioned their being entered as such in the register on the 23rd June, 1882, but the actual correction was not made till the year 1889. In the meanwhile, a special settlement officer was appointed for the settlement work, and to him one of the plaintiffs applied for a review of the order of the 23rd June, 1882, and on the 30th June, 1885, the special settlement officer decided that he saw no reason to interfere with that order.

On the 19th September, 1887, the plaintiffs brought the present suit praying for a declaration that the lands in dispute were their *khoti* lands. The date of the plaintiffs' cause of action was stated to be the 30th June, 1885, *viz.*, the date of the order of the special settlement officer.

The defendants Sajnak and Ramnak (defendants Nos. 1 and 2) contended that all the fields in dispute were their ancestral *dhara* lands and alleged that they had sold two of them to defendants Nos. 12 and 13.

Defendants Nos. 3, 6 and 8, who were co-sharers of the plaintiffs, admitted the claim, and stated that they were willing to be joined as co-plaintiffs.

Defendants Nos. 12 and 13, Faki Hasan and Faki Abdul Gafur, set up their purchase of two fields from defendants Nos. 1 and 2.

The Subordinate Judge made the declaration sought for by the plaintiffs with respect only to four out of the eighteen survey [247] numbers in dispute, and rejected the claim with respect to the remaining fields as time-barred.

Against the decree of the Subordinate Judge defendants Nos. 1 and 2 appealed, and the plaintiffs presented cross-objections under s. 561 of the Civil Procedure Code (Act XIV of 1882). The Acting Assistant Judge rejected the claim *in toto*, on the ground that as the suit was not brought within one year after the final settlement of 1882, it was barred under art. 14, sch. II of the Limitation Act (XV of 1877). He was, however, of opinion that art. 144, sch. II of the Limitation Act was not applicable, and that the decision of 1882 was liable to be rectified by a competent Civil Court.

The plaintiffs preferred a second appeal.

Ganesh Krishna Deshmukh, for the appellants (plaintiffs).—The Judge was wrong in holding our claim barred under art. 14, sch. II of the Limitation Act. The article is not applicable to the present case, because it relates to an "act" or "order" of a Government officer, and not to a "decision" passed by him, as in the present case.

When the revised settlement was introduced in the year 1878-79, the Khoti Settlement Act had not been passed; therefore the Act cannot be held to apply to that settlement; consequently s. 21 of the Act has no application. Assuming that ss. 20 and 21 do apply to the decision of 1882, these sections contemplate judicial inquiry, but the officer who passed that decision made no such inquiry; therefore the decision can have no binding effect. The survey settlement proceedings were not finally closed till the year 1889, when the alteration with respect to the lands in dispute was made in the survey register. The proceedings under the revised survey commenced in 1878-79 and lasted till 1889. Our present suit was filed in 1887, that is, before the proceedings were finally closed. Therefore there had been no complete settlement made under the Khoti Act before the filing of the suit. Section 21 of the Khoti Act cannot apply to the present case, because the conditions precedent to the operation of the section were not satisfied.

[248] Under s. 20 of the Act the Settlement Officer had no authority to rectify the Survey register which had been prepared, prior to the passing of the Act, in the year 1878-79 under a Government resolution of the year 1876.

The Judge was wrong in rejecting our claim *in toto*. The Subordinate Judge had awarded our claim with respect to four fields, which included the field purchased by defendants Nos. 12 and 13. They had not appealed to the Judge against the Subordinate Judge's decree; therefore the decree could not be reversed as against them.

Gangaram B. Rele, for respondents Nos. 1 and 2 (Mahar defendants).

Vasudev G. Bhandarkar, for respondents Nos. 3 and 4 (defendants Nos. 12 and 13).—The appeal in the lower Court covered all the fields mentioned in the plaint. Therefore the Judge was right in passing a decree as to all of them.

1893

MARCH 22.

APPELLATE CIVIL.

18 B. 244.

With respect to the point of limitation, we contend that the present suit is governed by art. 14, sch. II of the Limitation Act XV of 1877. It is true that the article does not contain the term "decision;" but the word "act" or "order" includes the term "decision." A decision of a Government officer is an act on his part. We further support the decree of the lower Court on the point of adverse possession. The Subordinate Judge distinctly found that the relationship between the parties was that of landlord and tenant, and that we ceased to pay rent since 1868,—that is, more than twelve years prior to the institution of the suit. The claim is, therefore, clearly barred by our adverse possession of those fields at least, for which no declaration was made by the Subordinate Judge in appellants' favour.

The appellants seek a mere declaration in the present suit without claiming consequential relief. Such a suit cannot be maintained—s. 42 of the Specific Relief Act (I of 1877).

Ganesh Krishna Deshmukh, in reply.—The Judge has found that the possession of the respondents could not be adverse to us. In connection with the contention that a suit for a mere **[249]** declaration will not lie, see *Magantal Purushottam* v. *Govindlal Nagindas* (1).

JUDGMENT.

SARGENT, C. J.—The District Court has decided against the plaintiffs' claim to have the lands in question declared to be *khoti*, on the ground that the Settlement Officer's decision in 1882, that they were *dhara*, was final under ss. 20 and 21 of the Khoti Act I of 1880 (Bombay), not having been set aside within a year from the date of the survey officer's decision as required by art. 14 of the Statute of Limitation. An objection has been taken by the appellants that the Settlement Officer had no power, under s. 20 of Act I of 1880 (Bombay), to rectify the register as previously made in 1879 after the settlement was introduced into the village of Tadil in pursuance of the resolution of Government in 1876. We think, however, that the lower appeal Court was right in holding that there had not been such a complete settlement before the passing of Act I of 1880 as must be deemed to have been confirmed by s. 37 of the Act. There is no evidence to show that the register as framed in 1878-79 was treated by the Government as a final settlement, whilst it is plain, from the applications subsequently made to the Collector by the parties themselves, that neither of them considered the question as to their rights as finally settled by the Revenue authorities.

Passing, then, to the consideration of ss. 20 and 21 of the Khoti Act I of 1880 (Bombay), s. 20 states the course to be pursued by the survey officer "in investigating and determining disputes" arising in framing the register. Section 21 further provides that the "decision" of the survey officer when not final (apparently referring to the finality mentioned in s. 17 with regard to entries made under that section) shall "be binding on all the parties affected thereby until reversed or modified by a final decree of a Civil Court." It is, therefore, the "decision" on the rival claims of the parties which is open to reversal by the Civil Court, and not the consequences of that decision, which, as provided by s 22, are left to the Collector himself to undo or modify in accordance with the decision **[250]** of the Civil Court. It is further to be remarked that the section does not contemplate any "order" being

(1) 15 B. 697.

made by the survey officer between the parties; and even if "the framing the register" be regarded as an "act" of the survey officer, the section provides, as before mentioned, for its being amended by the Collector himself, in accordance with the decision of the Civil Court. Lastly, in the present case it is to be observed that the "act" was not done until 1889 nearly two years after the filing of the suit. For these reasons, we are of opinion that the claim is not affected by the art. 14 of the Statute of Limitation.

As to the contention that the defendant had acquired a title by adverse possession to hold the lands as *dhara*, we agree with the lower Court that although the defendant may, as a fact, have paid only the assessment before 1878-79, adverse possession would not begin to run against the plaintiff until 1878-79 when such a claim was actively advanced by the defendant, and no title by adverse possession was, therefore, acquired by the defendant when the present suit was instituted in 1887. A cause of action, however, arose in 1882 when the survey officer determined that the lands were *dhara*, and the present suit, which is brought within six years to reverse that decision, is, therefore, in our opinion, in time. We must, therefore, reverse the decree of the Court below and send back the case for a decision on the merits. Costs to abide the result.

Decree reversed and case sent back.

---

18 B. 250.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Telang.

RAMBHAT (*Original Plaintiff*), *Appellant v.* BABABHAT AND OTHERS (*Original Defendants*), *Respondents.** [22nd March, 1893.]

Landlord and tenant—Non-payment of rent by tenant to landlord—Acquiescence of landlord—Effect of acquiescence—Subsequent suit by landlord for possession—Practice—Finding of fact not accepted in second appeal—Inam land—Sub-alienee—Wrongful surrender by the village inamdar to Government—Khalsat.

The plaintiff, a sub-alienee from an inamdar of certain inam, leased it to D, prior to the year 1858. In 1860 the land was wrongfully surrendered by the inamdars **[251]** of the village to Government as lapsed old service inam and was made *khalsat*. In 1863, the plaintiff protested against this being done, and the Collector referred him to a civil suit against the inamdars. From the year 1863 the plaintiff received no rent from D., or after D's death from his heirs, who paid the assessment to Government. In 1889, the plaintiff brought the present suit against the representatives of D, and the village inamdars to recover possession. The District Judge dismissed the suit, on the ground that the plaintiff must be held to have acquiesced in the loss of the land, and by his conduct since 1863 must be taken to have designedly abandoned all his interest in the land, and that his suit was barred.

Held, that the plaintiff did not acquiesce in the surrender by the inamdar in 1860, to Government, as he distinctly protested against it in 1863, and that as to his conduct since 1863 nothing had taken place to deprive him of such legal rights as he possessed against the tenant D, in 1863, if they were not barred by the Statute of Limitation;

and as to limitation, *held* that as the District Judge had decided the point under the influence of the view taken by him as to the plaintiff's conduct, the case should be remanded for a fresh finding on that point.

---

* Second Appeal No. 627 of 1891.

1893
MARCH 22.

APPELLATE CIVIL.

18 B. 250.

Held, further, that the mere circumstance that D., after the land was treated as *khalsat*, paid assessment to Government, and had not paid rent to plaintiff, could not affect the relationship of landlord and tenant which admittedly existed between them in 1863.

[R., 15 C.P.L.R. 9 (10).]

THIS was a second appeal from the decision of Dr. A. D. Pollen, District Judge of Belgaum.

Suit to recover certain land situate in the village of Kalol which was held in inam by defendant No. 6 and his kinsmen.

The plaintiff alleged that the land in question was originally given in inam by the Maharaja of Kolhapur to one Baburao Katre, and that Baburao had granted it as sub-inam to his (plaintiff's) father early in the present century. The plaintiff stated that in 1858 he had mortgaged it to Dadambhat, the father of defendants Nos. 1 and 3 and grandfather of defendant No. 2, who had previously been his tenant, but that the mortgage-debt was now satisfied out of the profits of the land.

Defendants Nos. 1 to 4 denied the plaintiff's statement. They denied that he was the owner of the land, and they denied the tenancy and mortgage alleged by him. They alleged that defendant No. 6 was the village *khatedar* of the land as well as one of the inamdars of the village, and that they held the land as his tenants. They further pleaded that the land was made *khalsa* in 1863 by [252] the British Government, and that Dadambhat had subsequently got a permanent lease from defendant No. 6 under two *kowls* dated September and December, 1864. They further pleaded that the suit was barred by limitation, alleging that there had been a dispute in 1863 about the lands between the inamdar and the plaintiff, and that in that year the plaintiff was referred to a Civil Court by the Collector.

Defendant No. 5 admitted the claim.

Defendant No. 6 answered that land was never held as sub-inam by the plaintiff's family and was never in their possession; that he was the owner, and that he had made it over to Baburao Katre for a time as a remuneration for services rendered by him; that the tenancy and mortgage alleged by the plaintiff were false, and that the claim was time-barred.

The Subordinate Judge (Rao Saheb R. G. Bhadbhade) held that the claim was not time-barred; that the plaintiff was the owner of the land; that the mortgage to, and the tenancy of Dadambhat alleged by, the plaintiff were proved, and that nothing was due by the plaintiff to defendants Nos. 1, 2 and 3 under the mortgage. He, therefore, awarded possession to the plaintiff.

On appeal by the defendants the District Judge found that the land had been given in inam by the Kolhapur State to Katre from whom the plaintiff acquired it as sub-alienee; that the plaintiff had leased it to Dadambhat in or about the year 1859; that in the year 1860 there was a dispute between the inamdars and Government with respect to lands usurped by the inamdars, and that the land in question was wrongly surrendered by them to Government as lapsed old service inam and was made *khalsat*; that the plaintiff in the year 1863 protested against the action of the inamdars and Government, and was referred by the Collector to a civil suit against the inamdars; that he made no attempt to recover his inam rights or his occupancy of the land, which was burdened with a heavy assessment; that from the year 1863 the plaintiff had ceased to receive rent from Dadambhat, whose family had continued

to hold the land as occupancy tenants on payment of assessment under Government and not under plaintiff. The District Judge held that "under these [253] circumstances he (plaintiff) must be held to have acquiesced in the loss of the land and to have relinquished his rights" and found the last issue—which was, "is his (plaintiff's) claim to recover the land now in time?"—in the negative, for the reasons stated as follows in his judgment :—

"At the same time I do not think that the plaintiff is entitled to succeed. I think that by his conduct from and after 1863 he abandoned all his interest in, and connection with, the land as completely and effectually as if he had relinquished it by a formal document. In 1861, or thereabout, the village inamdars transferred the land to Government, and it was changed from inam into ordinary rayatawar land against his will. The *khata* was entered in the village inamdar's name. An assessment was imposed on it payable to Government in excess of the amount which he formerly received as rent. It is true that his former tenants remained in possession of the land; but they did so by virtue of their paying the assessment to Government and not by virtue of their continuing to be his tenants. He made no attempt to recover his inam rights, or to recover the occupancy burdened as it was then by a heavy assessment. He received no rent and no acknowledgment of his title from the occupancy tenants. All this can have no other meaning than that he designedly relinquished the land after his unsuccessful petition to the Collector in 1863. He did not sue within twelve years and thus he lost his rights. Dadambhat's family became the real survey occupants, though defendant No. 6 became the nominal khatedar. Such is the view which I feel constrained to take of the real facts."

The Judge, therefore, reversed the Subordinate Judge's decree and rejected the plaintiff's claim.

The plaintiff preferred a second appeal.

Vasudeo Gopal Bhandarkar (with *N. G. Chandavarkar*), for the appellant (plaintiff).—The Judge found that the representatives of Dadambhat—respondents Nos. 1 to 3—were the occupancy tenants under Government since 1863, and not under the plaintiff. But this was not their allegation. What they said was that they were the tenants of defendant No. 6, who is the inamdar of the [254] village. The Judge, therefore, made a case for the defendants which they themselves never set up.

[SARGENT, C.J.—But the Judge finds that the plaintiff's claim was barred, because he relinquished his right as landlord and ceased to recover rent from 1863.]

The point of relinquishment was never urged before the Court, nor was any issue framed on it. The question to be considered is, whether mere silence for twenty-six years amounts, in law, to a relinquishment, and we submit that it does not. Further, what was surrendered to Government was the inam and not the occupancy right. The surrender by the inamdar of his inam right cannot operate to the plaintiff's prejudice —*Gangabai* v. *Kalapa* (1). Defendants Nos. 1 to 3 instead of paying rent to us paid assessment to Government the amount of which is greater than that of the rent. The mere levy of full assessment by Government, or the

(1) 9 B. 419.

1893
MARCH 22.

APPELLATE CIVIL.

18 B. 250.

mutation of names in the revenue records, cannot alter the relation between us and the respondents.

Macpherson (with *Manekshah J. Taleyarkhan*), for respondents Nos. 1 to 3 (defendants Nos. 1 to 3).—The plaintiff's case was that the Government called upon the inamdars to give up the lands usurped by them, and that the inamdars surrendered to Government certain lands including the one in dispute. Defendant No. 6 is the registered occupant of the land, and we attorned to him in the year 1863. The fact that we have been in possession for more than twelve years as the tenants of either the Government or the registered occupant with the appellant's knowledge, is a sufficient answer to his claim.

Mahadeo Chimnaji Apte, for defendant No. 6 (the inamdar).—The lands were registered in our name in 1863 when our right as holder was recognised by Government. The plaintiff had knowledge of the recognition of our right by Government, and yet he took no steps to get his title established within the statutory period. Defendants Nos. 1 to 3 are permanent tenants under us. We repudiated the plaintiff's ownership in 1863, and since then our possession was adverse to him.

[255] *Vasudeo Gopal Bhandarkar* in reply.—The utmost that can be said against the plaintiff is that he remained quiescent and did nothing to establish his right from the year 1863 until the institution of the present suit. But by merely doing nothing, one does not surrender anything.

JUDGMENT.

SARGENT, C.J.—The District Judge has found that the land in question had been originally obtained by Katre in inam from the Kolhapur State, and that plaintiff had acquired it as a sub-alienee from Katre and leased it to Dadambhat in 1859; that in 1860 the land was wrongly surrendered by the inamdars of the village to the Government as lapsed old service inam and made *khalsat*; that in 1863 the plaintiff protested against this being done; an order was made by the Collector referring him to a civil suit against the village inamdars; that the plaintiff ceased from 1863 to receive his rent from Dadambhat, whose family has ever since paid the assessment, which was more than the rent to Government. The District Judge has held that under these circumstances the plaintiff must be held to have "acquiesced in the loss of the land and relinquished his rights;" that by his conduct from and after 1863 he must be taken to have designedly abandoned all his interest in it "as effectually as if he had relinquished it by a formal document."

We are unable to agree in this view of the case, which, indeed, would appear to have been adopted by the District Judge with reluctance. There are no circumstances in the case which point to acquiescence by the plaintiff in the surrender by defendant No. 6 in 1860, to the Government, as he distinctly protested against it in 1863, and as to his conduct since 1863 nothing has taken place to deprive him of such legal rights as he possessed against Dadambhat in 1863, if they are not barred by the statute.

As the Judge of the lower appeal Court has clearly decided the third issue, which raises this question, under the influence of the view taken by him of the plaintiff's conduct, we must send back the case for a fresh finding on that issue, and we think it right to observe, for the guidance of the Court, that the mere circumstance of Dadambhat and his family having, after the land was treated as *khalsat*, paid the assessment to

Government, [256] and not having paid any rent to the plaintiff, cannot affect the relationship of landlord and tenant which admittedly existed between them in 1863.

The finding to be transmitted to this Court within two months. The parties to be allowed to give fresh evidence.

Case sent back.

18 B. 256.

APPELLATE CIVIL.

Before Mr. Justice Telang and Mr. Justice Fulton.

KRISHNAJI RAMCHANDRA (*Original Defendant No.* 1), *Appellant v.* ANTAJI PANDURANG (*Original Plaintiff*), *Respondent.**

[24th March, 1893.]

Landlord and tenant—Possession—Adverse possession—Lease—Expiry of lease—Continued possession after expiration of lease—Permissive possession—Tenant's heirs continuing in possession after the expiry of tenancy—Limitation.

In 1840 the land in dispute was leased to R. for life. R. died in or about 1871, and after R.'s death, his heirs (the defendants) continued in possession without obtaining a fresh lease or paying any rent to the landlord. In 1888 the landlord sued to eject the defendants. The defence was that the suit was barred by limitation.

Held, that the suit was not barred. After R.'s death the defendants, though not in possession as tenants, were not trespassers. Their possession was permissive, and not adverse until they expressly set up a title of ownership in the property.

[Overruled, 22 B. 893 ; **F.**, 24 B. 504 (507) ; **R.**, 20 B. 759 (763); U.B.R. (1892—1896), Civil, 363 (364) ; **D.**, 31 M. 163 (167) = 18 M.L.J. 26 = 3 M.L.T. 256.**]**

SECOND appeal from the decision of J. FitzMaurice, Acting District Judge of Ratnagiri, in appeal No. 298 of 1889.

The plaintiff sued to eject the defendants from the land in dispute.

It appeared that in 1840 one Jankibai, who was then in management of the plaintiff's ancestral property, leased the land to Ramchandra, the adoptive father of defendant No. 1, for life at a yearly rent of Rs. 5. Ramchandra held the property till his death, which occurred in 1871 or thereabouts. On Ramchandra's death, his widow Ramabai and her adopted son defendant No. 1 continued in possession. But they did not obtain a fresh lease, nor pay any rent after Ramchandra's death.

In 1888 the present action of ejectment was brought.

[257] The defendant No. 1 pleaded (*inter alia*) that since Ramchandra's death his possession had been adverse to the plaintiff, and that the suit was, therefore, time-barred. The other defendants did not contest the suit.

The Subordinate Judge was of opinion that defendant's father having come in as a tenant, the tenancy must be presumed to have continued even after his death, and that the mere non-payment of rent did not destroy the tenancy. He, therefore, held that the suit was not barred by limitation, and decreed the plaintiff's claim.

On appeal, the District Judge held that the possession of defendant No. 1 must, on the authority of *Tatia* v. *Sadashiv* (1) and *Rango Lall* v. *Abdool Guffoor* (2), be deemed to have been that of a tenant and not

* Second Appeal No. 483 of 1891.

(1) 7 B. 40.

(2) 4 C. 314.

1893
MARCH 24.
APPEL-
LATE
CIVIL.
18 B. 256.

adverse to plaintiff, and that as there was no reliable evidence as to the character of defendant No. 1's tenancy, it must be presumed that it was a tenancy from year to year. He, therefore, awarded possession of the land in suit.

Defendant No. 1 preferred a second appeal to the High Court.

Ganesh Krishna Deshmukh, for appellant (defendant).—The suit is barred. The lease granted to Ramchandra expired on his death. His heirs remained in possession, but never attorned to the plaintiff, nor paid any rent to him. Under these circumstances art. 139 of the Limitation Act (XV of 1877) applies. According to that article, the plaintiff ought to have sued within twelve years from the determination of the lease, that is, within twelve years after Ramchandra's death. Ramchandra died more than twenty years before suit. The cases relied on by the lower Court do not apply. They are cases of tenants holding over after the determination of the tenancy. The present is not such a case. Moreover, if the lower Court's finding be correct, that the defendant is a yearly tenant, then he is entitled to a legal notice to quit. No notice has been given, and the suit must fail.

Manekshah Jehangirshah, for respondent.—The point as to the necessity of a notice to quit was not raised in either of the [258] Courts below, and cannot be raised for the first time here. The defendant's case from the commencement was that he was the owner, and not merely a tenant, of the land in dispute. That is a clear repudiation of the landlord's title. The defendant is not, therefore, entitled to a notice to quit. Defendant's father was our tenant. After his death his family continued in possession on the same terms as before, namely as tenants. Their possession was, therefore, not adverse. Mere non-payment of rent does not make the tenants' possession adverse—*Tatia* v. *Sadashiv* (1).

JUDGMENT.

TELANG, J.—The original tenant in this case was Ramchandra, and, according to the finding of the District Judge, his tenancy expired with his death "some nineteen or twenty years ago." This finding has not been impeached in argument before us. The District Judge also appears to hold that the defendants were living in the demised premises with the deceased Ramchandra during his lifetime and have continued to live in those premises after Ramchandra's death. And the question is, what is the character of the defendant's possession after the expiry of Ramchandra's tenancy? The District Judge holds that he was not in adverse possession, and relies on the case of *Rungo Lall* v. *Abdool Guffoor* (2). That case is not, however, conclusive on the question which arises here. It was there held, no doubt, that the relation of landlord and tenant once created between certain parties continues as between them and their "representatives in title until it is proved to have ceased," and that the defendant was bound to show that it has ceased by some affirmative proof. But here such proof is given, and the District Judge himself has found that the tenancy ceased on Ramchandra's death. The case of *Tatia* v. *Sadashiv* (1), which the Judge also relies on, is distinguishable, as it was merely the ordinary case of a tenant holding over after the expiry of his tenancy. That always has been treated as not a case of adverse possession, but it has no bearing on the nature of the possession of one who never was a tenant at all.

(1) 7 B. 40.

(2) 4 C. 314.

Although, however, the authorities relied on by the District Judge do not really support the proposition laid down by him, we [259] think that proposition to be correct. In *Hellier* v. *Sillcox*(1) the tenant for life was in possession of certain premises, and the defendant lived with her in those premises until the death of the tenant for life, and continued to do so after her death without coming to any arrangement with the reversionary heir, the plaintiff. The plaintiff having subsequently brought an action for use and occupation, it was argued that the action should have been in ejectment and not for use and occupation. Lord Campbell, however, with the concurrence of the rest of the Court of Queen's Bench, said, after time taken to consider, that the action for use and occupation would lie, "as the defendant occupied the cottage *by the plaintiff's permission*. The plaintiff was the reversioner, and the defendant, who had married the daughter of the tenant for life, lived in the cottage with her and remained in possession of it after her death. *Therefore he was not a trespasser*, and he set up no adverse title to the premises." We think we should follow that decision and hold that in this case the District Judge's finding is correct in so far as it decides that after the death of Ramchandra the possession of defendant was not adverse, but permissive only until she expressly set up a title of ownership in the property.

It has, however, been argued for the defendant, that the plaintiff is not entitled to succeed in this case, on the ground of want of legal notice to quit. No doubt it has been held that this point may be taken in second appeal though not raised before—*Dodhu* v. *Madhavrao* (2). But in this case there is no tenancy, and no question of notice to quit, therefore, arises. Besides, there has been here a distinct repudiation of the plaintiff's title by the defendant (see Ex. 13), and under such circumstances the latter is not entitled to any notice to quit even if the relation between him and the plaintiff was taken to be that of landlord and tenant. We must, therefore, confirm the decree of the District Court with costs.

Decree confirmed.

---

18 B. 260.

[260] APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice and Mr. Justice Telang.

HARISHANKAR JEBHAI (*Original Plaintiff*), *Appellant v.* NARAN KARSAN AND ANOTHER (*Original Defendants*), *Respondents.**

[28th March, 1893.]

Decree—Execution of decree—Attachment—Order for removal of attachment—Suit for a declaration that the property was liable to attachment and sale—Suit to set aside an order removing attachment—Defendant's adverse possession—Section 246 *of the Civil Procedure Code* (*Act VIII of* 1859)—*S.* 283 *of the Civil Procedure Code* (*Act XIV of* 1882)—*Article* 15, *sch.* II *of the Limitation Act* (*IX of* 1871)—*Article* 11, *sch. II of the Limitation Act* (*XV of* 1877).

The plaintiff obtained a decree against one Ishvar, and in execution attached the property in dispute. The defendants intervened, and obtained an order for the removal of the attachment on the 11th August, 1888. On the 13th August, 1889, the plaintiff instituted this suit for a declaration that the property belonged to his judgment-debtor (Ishvar) and as such was liable to attachment and sale. The defendants pleaded that they had been in possession of the property for more than twelve years, prior to the institution of the suit, and that the suit was, therefore, barred. The Judge rejected the plaintiff's claim.

---

* Second Appeal No. 927 of 1891.

(1) 19 L.J.Q.B. (N.S.) 295. (2) 18 B. 110.

1893
MARCH 28.

APPELLATE CIVIL.

18 B. 260.

Held, reversing the decree, that the suit being brought under s. 283 of the Civil Procedure Code (Act XIV of 1882) it was a suit to set aside the order of 11th August, 1888, directing the removal of the attachment, and should be determined by ascertaining the rights of the parties at the date of that order. As the defendants had not at that date acquired a title to the property by adverse possession for twelve years, the plaintiff was entitled to a decree.

A suit brought under s. 283 of the Civil Procedure Code (Act XIV of 1882) is a suit to set aside an order within the meaning of art. 11 of sch. II of the Limitation Act (XV of 1877).

[F., 35 B. 79=12 Bom.L.R. 956 (968)=8 Ind. Cas. 639; Appr., 25 Ind. Cas. 11=26 M L.J. 449.]

SECOND appeal from the decision of M. P. Khareghat, Assistant Judge, Full Power, at Broach.

Suit for a declaration that certain property was liable to be attached and sold in execution of a decree.

The plaintiff obtained a decree against one Ishvar Jeykrishna, and in execution attached the property in question. On the 11th August, 1888, on the application of the defendants the attachment was ordered to be set aside.

On the 13th August, 1889, the plaintiff filed this suit praying for a declaration that the property in question belonged to his [261] judgment-debtor Ishvar, and as such was liable to attachment and sale in execution of his decree.

The defendants pleaded that the property had been in their possession for more than twelve years before suit, and that the plaintiff's claim was, therefore, barred.

The Subordinate Judge held that the suit was not barred, and made the declaration sought for.

On appeal by the defendants the Assistant Judge reversed the decree. He held that the defendants had been in possession since June, 1877, and that as this suit was not filed until August, 1889, the plaintiff's claim was barred.

The plaintiff filed a second appeal.

Gokuldas Kahandas Parekh, for the appellant (plaintiff) :—Unless the defendants had acquired a title by adverse possession for twelve years at the time the plaintiff attached the property, his claim in this suit is not barred. The object of this suit is to show that he was then entitled to attach the property ; therefore, the date of the attachment is the date at which the defendants' title is important. If the plaintiff proves that the defendants had then no title, he must succeed. If the gets a decree, his attachment is restored. For the purpose of limitation the possession of the defendants cannot be adverse to the plaintiff subsequently to the application for attachment. The present suit must be determined by taking into consideration the rights of the parties at the time of the attachment. According to the finding of the lower Court, the defendants had not, as against the plaintiff, acquired title by adverse possession at that time. Our suit is, therefore, not barred by limitation.

Manekshah J. Taleyarkhan, for the respondents (defendants):—As found by the Judge, our adverse possession began in or about the month of June 1877. The present suit was filed in August, 1889. We have, therefore, acquired a complete title by twelve years' adverse possession.

JUDGMENT.

SARGENT, C.J.—In this case the plaintiff seeks to have it declared that the property in dispute which he had attached belonged to his

judgment-debtor Ishvar Jeykrishna, and was [262] liable to the attachment. The attachment had been removed by order of the Court on defendants' application on 11th August, 1888, and the present suit was filed on 13th August, 1889.

The Court below held that the property belonged to Ishvar, but that the suit was time-barred, as it found that defendants' father came into possession during the rainy season of 1877, and that plaintiff had not shown that Ishvar had been in possession later than June, 1877, and, therefore, not within twelve years before the date of this suit.

Mr. Gokuldas has contended before us that the object of the present suit, which was brought under s. 283 of the Civil Procedure Code (XIV of 1882), is to determine the rights of the parties at the time of the attachment and not when the suit was instituted, and that the real question was whether the defendants had been in possession within twelve years preceding the date of the order of 11th August, 1888.

The object and effect of a suit to establish the right as contemplated by the corresponding s. 246 of the Civil Procedure Code of 1859 has undergone considerable discussion by the several High Courts. The result of the decisions is to show that the suit has uniformly been regarded by the High Courts of this Presidency and of Madras and Allahabad as a suit to "set aside" the order made with respect to the claim to attached property, and on this ground cl. 15 of the Limitation Act IX of 1871 was held to apply in the case of orders made under the Civil Procedure Code of 1859—*Settiappan* v. *Sarat Singh* (1), *Krishnaji Vithal* v. *Bhaskar Rangnath* (2) and *Badri Prasad* v. *Muhammad Yusuf* (3). The soundness of those decisions was indeed disputed in *Luchmi Narain Singh* v. *Assrup Koer* (4) and *Bessessur Bhugut* v. *Murli Sahu* (5), but apparently only on the ground that cl. 15 of Act IX of 1871 and art. 11 of the Limitation Act XV of 1877 did not apply to orders made under art. 246 of the Civil Procedure Code of 1859. However, in *Gend Lall Tewari* v. *Denonath Ram Tewari* (6) it was expressly held by Sir R. Garth, C. J, [263] and Beverley, J., that a suit to establish his right under s. 246 was not necessarily a suit to set aside an order which must be brought within a year from the date of the order; and indeed Sir R. Garth, C. J., expressed an opinion that it would not be so even under the corresponding ss. 278 to 282 of the Civil Procedure Code of 1882. Notwithstanding this opinion of the late learned Chief Justice of Bengal we see no sufficient reason for doubting the soundness of the above rulings of the other High Courts which have been regarded as settled law for so many years, and must, therefore, as their necessary consequence, hold that Mr. Gokuldas was right in his contention that as the suit is one to set aside the order of August, 1888, it must be determined by the rights of the parties at that time. As the defendants had not, according to the finding of the Court below, at the date of the order, acquired a title by adverse possession for twelve years, we must reverse the decree of the Court below and declare that the property in question was the property of Ishvar Jeykrishna and was liable to the plaintiff's attachment in execution of the plaintiff's decree. Plaintiff to have his costs throughout.

Decree reversed.

(1) 3 M. H. C. R 220.
(2) 4 B. 611.
(3) 1 A. 381.
(4) 9 C. 43.
(5) 9 C. 163.
(6) 11 C. 673.

1893
APRIL 4.

CRIMINAL REFERENCE.

18 B. 263.

18 B. 263.

CRIMINAL REFERENCE.

Before Mr. Justice Candy and Mr. Justice Fulton.

FRAMJI BHICAJI *v.* MOHANSING DHANSING.* [4th April, 1893.]

Attorney and client—Professional communication—Privilege—Extent of the privilege—Solicitor bound to give the name of the client on whose behalf the privilege is claimed, but not the nature of his employment—Evidence Act (I of 1872), s. 126(1)—Evidence,

The law relating to professional communications between a solicitor and a client is the same in India as in England.

[264] It is not every communication made by a client to an attorney that is privileged from disclosure. The privilege extends only to communications made to him confidentially, and with a view to obtaining professional advice.

Where a solicitor claims privilege under s. 126 of the Indian Evidence Act (I of 1872), he is bound to disclose the name of his client, on whose behalf he claims the privilege. The mere fact that the client's name had been communicated to him in the course and for the purpose of his employment as solicitor by another client, affords no excuse, unless it was communicated to him confidentially, on the express understanding that it was not to be disclosed.

But a solicitor is not at liberty, without his client's express consent, to disclose the nature of his professional employment. Section 126 of the Indian Evidence Act protects from publicity not merely the details of the business, but also its general purport, unless it be known *aliunde* that such business falls within proviso I or II to the section.

At an interview between a solicitor and a client, the solicitor took down a certain statement made by a person named A. B. who was in his client's company, and whose name was communicated to him in the course and for the purpose of his professional employment. A. B. was afterwards tried for defamation. At the trial, the solicitor was called as a witness for the prosecution, and was asked (*a*) the name of his client, (*b*) the name of the person who accompanied the client and made a statement to him, and (*c*) the matter in which his client employed him. The solicitor declined to answer all the three questions on the ground of privilege.

Held, that (*a*) the solicitor was bound to disclose the name of the client.

(*b*) He was bound to disclose the name of the person who accompanied the client and made a statement to him.

(*c*) He was *not bound* to disclose the matter in which the client employed him

[R., 8 Ind. Cas. 897=4 S.L.R. 88.**]**

THIS was a reference by C. P. Cooper, Esquire, Chief Presidency Magistrate, under s. 432 of the Code of Criminal Procedure (Act X of 1882).

---

* Criminal Reference, No. 36 of 1893.

(1) Section 126, Indian Evidence Act, I of 1872 :—

"No barrister, attorney, or pleader or vakil shall at any time be permitted, unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such barrister, pleader, attorney or vakil, by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for **[264]** the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment.

"Provided that nothing in this section shall protect from disclosure.

(1) any such communication made in the furtherance of any illegal purpose ;

(2) any fact observed by any barrister, pleader, attorney or vakil, in the course of his employment as such, showing that any crime or fraud has been committed since the commencement of his employment.

"It is immaterial whether the attention of such barrister, pleader, attorney or vakil was or was not directed to such fact by or on behalf of his client.

"*Explanation* :—The obligation stated in this section continues after the employment has ceased."

1893
APRIL 4.
CRIMINAL REFERENCE.
18 B. 263.

One Mohansing Dhansing was tried on a charge of defamation in the Court of the Chief Presidency Magistrate.

[265] It was alleged by the prosecution that on the 18th June, 1891, the accused, in company with two other persons, went to the office of Messrs. Craigie, Lynch and Owen, solicitors of the High Court, and that the accused had there made a statement to Mr. Craigie (partner in the above firm) which had been taken down in writing, and which the prosecution were desirous of having produced and put in evidence. Mr. Craigie was, accordingly, called as a witness, but claiming professional privilege he declined to say whether the accused had visited him on that day in question, alleging that he had learned the name of his visitor in the course of and for the purpose of his professional employment.

Mr. Craigie's evidence was as follows :—

"I am a solicitor and attorney of the High Court, Bombay. On the 18th day of June, 1891, the last witness Mr. Kapadia came to me at my office. Cursetji Devitre came with him and *another person. I decline to answer the question, who the other person was, on the ground of privilege.*

Q.—Who was the third person, who came?

A.—I believe, it was the third person who communicated the name.

Q.—What was the name?

A.—I decline to answer the question.

Q.—Who was your client?

A.—The only knowledge which I have of the name of my client is derived from a communication made to me in the course of, and for the purpose of my employment as an attorney."

On a subsequent day Mr. Craigie was re-called and re-sworn and examined by the Court.

Q.—Who was your client?

A.—I beg respectfully to decline to answer that question.

Q.—In what matter was he your client?

A.—I beg respectfully to decline to answer the question, as it is impossible for me to do so without disclosing a communication made to me in the course and for the purpose of my professional employment.

[266] *Q.*—Did one Mohansing Dhansing make a statement to you?

A.—I am totally unable to say whether a man of the name of Mohansing Dhansing made a statement to me; my only knowledge of the name of the person who made a statement to me is derived from a communication made to me in the course and for the purpose of my professional employment.

Q.—Did any person make a statement to you on the 18th of June, 1891, between 1 and 2 o'clock in the day?

A.—A person made a statement to me on the 18th of June, 1891. Whether it was at the time stated in the question, I can't say.

Q.—Who were present at that occasion?

A.—Mr. Kapadia, Mr. Devitre and the person who made the statement.

Q.—Who brought the person who made that statement to your office?

A.—I don't know who brought that person to the office; they all three came in together, so far as I recollect.

Q.—Was the statement taken down in writing?

A.—Yes.

Q.—By whom?

A.—By me.

1893

APRIL 4.

CRIMINAL REFERENCE.

18 B. 263.

Q.—Did the person making the statement give his name as Mohansing Dhansing?

A.—I respectfully decline to answer this question for the same reason.

Q.—On whose behalf did you take down this statement?

A.—On behalf of my client.

Q.—Did you take the signature of the person making the statement to the statement after it was written by you?

A.—No.

Q.—Did you sign the statement with your name or initials or the name or initials of your firm or in any other way to identify or authenticate the statement?

[267] *A.*—I did not sign the statement with the name or initials of my firm or myself. The statement was in my handwriting, and I did not add anything to the statement for the purpose of identifying it or authenticating it. The statement is in Court.

COURT:—I call upon you to produce that statement, as you have placed before me no grounds entitling you to retain it.

Mr. Craigie respectfully declines to produce it on the same grounds as before.

Q.—Were you paid for your professional services in taking down that statement?

A.—Yes.

Q.—By whom?

A.—My client.

Q.—By what person?

A.—I decline to give his name for the same reasons as before.

* * * * * *

The Magistrate overruled Mr. Craigie's objections, but as he still refused to answer the questions on the ground of privilege, the Magistrate made the following reference to the High Court:—

"Mr. Adair Craigie, a solicitor of the High Court, on the 1st and 15th of March instant, was called as a witness on behalf of the complainant and duly sworn. A question arose as to his privilege as a solicitor under s. 126 of the Evidence Act to answer certain questions. I stated what I considered the law as to the right to put certain questions. I said s. 126 of that Act forbids the disclosure of (1) any communication made to a solicitor in the course and for the purpose of his employment; (2) the contents or condition of any document with which the solicitor has become acquainted in the course and for the purpose of such employment; that it was the Court and not the solicitor (witness) who had to decide whether the disclosure by the latter of any matter was or was not within the veto of the section, and in order to enable the Court to come to a decision the examination of the solicitor (witness) was permissible and necessary; that those questions I thought should be directed to the following points. Did the communication or the acquaintance [268] with the contents or condition of the document, as the case might be, come to the solicitor's knowledge in the course and for the purpose (it must be both in the course and for the purpose) of his professional employment? I referred to the cases of the *Queen* v. *Cox and Railton* (1); *Bursill* v. *Tanner* (2); *Crawcour* v. *Salter* (3).

3 "I then put, amongst others, the following questions to Mr. Craigie:—Who was your client? In what matter was he your client? Did

(1) 14 Q. B. D. 153. (2) 16 Q. B. D. 1. (3) 18 Ch. D. 30.

1893
APRIL 4.

CRIMINAL REFERENCE.

18 B. 263.

the person making the statement to you give his name as Mohansing Dhansing? By whom were you paid for your professional services in taking down that statement?

4. "Mr. Craigie declined to answer those questions, on the ground that the answers would involve a disclosure of communications made to him in the course and for the purpose of his professional employment. I decided that he was not entitled to claim the privilege, under s. 126, of refusing to answer those questions, and that he was bound to give the name of his client, to what matter the employment had reference, and the name of any party making the statement to him.

5. "The question, referred to the High Court for opinion, is whether Mr. Craigie was bound or not to give the name of his client; the matter of the employment and the name of the person making any statement to him; and whether, having refused to answer such questions, he was in any way sheltered, on the ground of privilege under s. 126 of the Evidence Act, from answering relevant and admissible questions put to him in the course of his examination as a witness."

The reference was argued before Candy and Fulton, JJ.

Craigie:—The first question referred to this Court is whether I was bound to give the name of my client, on whose behalf I claimed the privilege. I submit, I was not bound to disclose my client's name. *Crawcour* v. *Salter* (1) and *Queen* v. *Cox and Railton* (2) are not in point. In *Bursill* v. *Tanner* (3) it is no doubt laid down that a solicitor, who claims privilege, is bound to state the name of his client, on whose behalf he claims the privilege. And that has been the rule ever since the case of *Parkhurst* **[269]** v. *Lowten* (4). But it is a rule of practice under the English law, and not under the Indian law. It does not follow that, because the rule has been observed for some time, it is a just or a proper rule. Many rules of practice have been followed for a much longer period, and yet have been at last set aside as unjust. The mere fact that the rule relating to a solicitor's privilege has been followed in England for over seventy-five years, is immaterial. The English rule is not binding on this Court, unless it is based on reasonable grounds. It is clear that great injustice may sometimes be done to a client if a solicitor is compelled to disclose his client's name. Suppose a woman was ill-treated by her husband and she went to a solicitor to consult him as to what her remedies were. If the solicitor was afterwards called upon to disclose her name, and relate the interview, the consequences to the wife might be serious. It may be no doubt that to conceal a client's name may cause difficulty and inconvenience. On the other hand, however, the interest of one man should not be sacrificed simply for the purpose of advancing the interest of another. A solicitor is an officer of the Court, and is entitled to credit. If he states that an interview with him related strictly to professional business, it should be treated as strictly confidential, and the solicitor should not be compelled to disclose any part of the interview. Suppose a client A comes to me and consults me as his legal adviser. Suppose he is accompanied by another man B. In the course of my interview with A, B's name is disclosed and disclosed simply for A's business. After A's business is over, B comes to consult me on business relating to his own affairs. I submit that under such circumstances, B's name would be privileged, because it was communicated to me in connection with A's business. If

---

(1) 18 Ch. D. 30.
(2) 14 Q. B. D. 153.
(3) 16 Q. B. D. 1.
(4) 2 Sw. 194.

1893
APRIL 4.
CRIMINAL REFERENCE.
18 B. 263.

I were afterwards called as a witness, and examined with reference to my interview with B, I would be justified in saying that B's name was known to me during the course and for the purpose of my professional employment on behalf of A, and that, therefore, B's name would not be disclosed. Of course, if a further question were put to me on whose behalf I claimed the privilege, I would be bound to give A's name. The facts in the present case are analogous to those [270] in the hypothetical case I have just put to the Court. I was asked to give the name of the person who had made the statement to me, and I refused to disclose his name. I was then asked the name of my client. I refused to give my client's name, on the ground that the name was communicated to me in the course and for the purpose of my professional employment by another client. If I had been asked that client's name, I would have been bound to disclose it. But that question was not put to me. The first and third questions stand on the same footing. As regards the second question, I submit that if a solicitor were to state the nature of the business on which his client consulted him, the most valuable part of the privilege would be lost. Section 126 of the Evidence Act prevents a solicitor from disclosing the matter of his employment.

Jardine, contra :—When a solicitor is in the witness-box, he is in the same position as an ordinary witness, and he must, therefore, answer every relevant question put to him, unless he can make out a clear case that he is prevented from answering such a question. A solicitor has no privilege at all. He can only claim it on behalf of his client. He is, therefore, bound to give the name of the client on whose behalf he claims the privilege. Until the client's name is disclosed, how can you say that the client does or does not object to the solicitor's disclosing certain facts ? To establish the privilege, the solicitor must mention the name of his client, and the purpose of his employment.

[FULTON, J.—Is there any authority to show that he must state the purpose of his employment also ?]

Jardine.—I do not think there is any ; but the words of s. 126 of the Evidence Act are to the effect that the solicitor must state the purpose of his employment in order to establish privilege. It should not be left to the solicitor to determine whether he should answer certain questions or not. The authorities cited by the Magistrate in his reference show that the disclosure of the client's name is not a matter of professional communication, and that, unless the name of the client is disclosed, no privilege can be claimed.

JUDGMENT.

[271] CANDY, J.—The reference by the Chief Presidency Magistrate is thus put by him : " Whether Mr. Craigie was bound or not to give the name of his client, the matter of the employment, and the name of any person making any statement to him ; and whether having refused to answer such questions he was in any way sheltered on the ground of privilege under s. 126 of the Evidence Act, from answering any relevant and admissible questions put to him in the course of his examination as a witness."

Mr. Craigie appeared in person before us to support his objections to answer the questions put to him by the Magistrate, and he contended that the opinions of Judges in England, however eminent, on the question of privilege were not binding on this Court, and had no application to the law

1893
APRIL 4.
CRIMINAL REFERENCE.
18 B. 263.

in India regarding the question. Mr. Craigie, however, did not show in what respect the law in India on this point differed from the law in England.

The law in India is contained in s. 126 of the Evidence Act, and with one exception appears to be the same as the law in England, which has been established by many decisions through a long course of years. The one exception relates to the substitution of "illegal purpose" for "criminal purpose" in the first portion of the proviso to s. 126; and, as Mr. Field says in his Law of Evidence in British India, this "carries the principle enunciated in the proviso somewhat further than what can be said to be the established law in England, but is in conformity with the expressed opinion of several able Judges." It is unnecessary to consider this point further, for the Magistrate in making the reference has not alluded to the proviso to s. 126. He has then apparently asked this Court to give an opinion on the question referred solely as regards Mr. Craigie's contention that he is prevented by the body of s. 126 from answering the question put to him.

That the law in India on this point is practically the same as in England, and that in interpreting s. 126 of the Evidence Act this Court may rightly refer to English cases, is shown by the judgments of Westropp, C.J., and Sargent, J., in the case of *Memon Haji Harun* v. *Moulvi Abdul Karim* (1) in which **[272]** Chief Justice Sir M. Westropp said: "Communications to be protected by that section (126 of the Evidence Act) must, we think, be confidential." The words contained in it are indeed "any communication, &c.," but the word "disclose" shows, and common sense seems to demand, that the privileged communication must be confidential or private. Sargent, J., said: "The use of the word 'disclose' in s. 126 of the Evidence Act shows that the communications to be privileged must be of a confidential nature between a solicitor and his client." Both Judges in the course of their judgments quoted English cases.

This was exactly the principle followed in England in *Ex parte Campbell*; *in re Cathcart* (2). In that case the solicitor (writer to the signet) refused to disclose the place of residence of his client, because he said it came to his knowledge in his professional capacity and in consequence of the professional employment in which he was engaged on his behalf, and in no other way. Justice James, L.J., said: "That is not sufficient, according to my view of the law, to protect the solicitor from answering. What a solicitor is privileged from disclosing is that which is communicated to him '*sub sigillo confessionis*'—that is to say, some fact which the client communicates to the solicitor for the purpose of obtaining the solicitor's professional advice and assistance: the principle being that such communications ought to be privileged, because otherwise a man would be deterred from fully disclosing his case, so as to obtain proper professional aid in a matter in which he is likely to be thrown into litigation. But a solicitor's knowledge of his client's residence, even though he knows it simply in consequence of the professional business in which he has been acting for him, is not on that ground alone a matter of confidence, so as to be in the nature of a privileged or confidential communication. The solicitor may know it because the client may say, "I have got a lease to execute—you must send it to me there and I will execute it," or because he may have received letters, dated from such a place, telling him where he may see **[273]** him for the purpose of making a communication. The client's place of residence in such case is a mere

(1) 3 B. 91.

(2) L.R. 5 Ch. 703.

1893
APRIL 4.
CRIMINAL REFERENCE.
18 B. 263.

collateral fact, which the solicitor knows without anything like professional confidence and, therefore, the mere statement "The place of residence of my client came to my knowledge in my professional capacity, and only in consequence of my employment as his solicitor," is not to my mind nearly enough to warrant the solicitor in refusing to answer the question as to where his client is residing. If, indeed, the gentleman's residence had been concealed; if he was in hiding for some reason or other, and the solicitor had said: "I only know my client's residence because he has communicated it to me confidentially, as his solicitor, for the purpose of being advised by me, and he has not communicated it to the rest of the world," then the client's residence would have been a matter of professional confidence; but the mere statement by the solicitor that he knows the residence only in consequence of his professional employment, is not sufficient."

So here Mr. Craigie refused to state the name of his client on a certain occasion on the 18th June, 1891, because it came to his knowledge in his professional capacity, and in the course and for the purpose of his professional employment and in no other way. That is not sufficient. Mr. Craigie does not say, nor is it asserted that he could say, "I only know my client's name because he communicated it to me confidentially as his solicitor, for the purpose of being advised by me, and he has not communicated it to the rest of the world." Therefore his ground of objection fails.

The same principle was followed in 1885 in the case of *Bursill* v. *Tanner* (1), in which judgment having been signed in an action against a married woman, an enquiry was directed to be held as to whether she was possessed of a separate estate. A solicitor being called as a witness by the judgment-creditor under a subpœna to give evidence on such enquiry and produce documents, stated that there was a settlement executed upon the defendant's marriage, and that he knew who the trustees of the settlement were, and that his firm acted as their solicitors, [274] but he refused to state the names and addresses of the trustees, or to produce the settlement or give any information as to its contents on the ground of his privilege as a solicitor. Lord Esher, Master of the Rolls, said: "I agree with the opinion expressed by Lord Justice James in *Ex parte Campbell*; *in re Cathcart* (2), that the fact who the clients were, was not the subject of a professional confidence. The client does not consult the solicitor with a view to obtaining his professional advice as to whether he shall be his solicitor or not." Lord Justice Cotton said: "It is not everything that solicitors learn in the course of their dealings with clients that is privileged from disclosures. This matter was much discussed in the case of *Lyell* v. *Kennedy* (3). The privilege extends only to confidential communications. In my opinion, the names of the trustees did not constitute such a communication. The mere fact who the trustees are, cannot be said to be a matter communicated to the solicitor confidentially for the purpose of obtaining his professional advice, or, at any rate, it is highly improbable that it should be so. There is also another ground for compelling the disclosure of their names. The solicitor claims this privilege as that of his clients. He must, then, state the names of the persons for whom he claims the privilege. On both these grounds I think he was bound to answer the question and to give the names and addresses of the trustees."

---

(1) 16 Q.B.D. 1. (2) L.R. 5 Ch. 703. (3) 23 Ch. D. 387=9 Ap. Ca. 81.

1893
APRIL 4.
CRIMINAL REFERENCE.
18 B. 263.

On both these grounds, then, Mr. Craigie is bound to give the name of his client. We understood Mr. Craigie in the course of his argument before this Court to assert that he refused to state to the Magistrate the name of the persen who was his client when Mr. Kapadia and Mr. Devitre and another person came to him to his office on the 18th June, 1891, because the name of that person had been communicated to him in the course and for the purposes of his employment as attorney by another client on a previous occasion, and that he would be willing, should the ruling in the case of *Bursill* v. *Tanner*(1) be held to apply in India, to state the name of the person who was his client on the previous occasion. The principles indicated above would still apply. Supposing Mr. Craigie gives, as he is willing to do, the name B as the person **[275]** who consulted him professionally on the previous occasion, and that in the course and for the purpose of his employment as B's attorney A's name was communicated to him, then the simple question would be, Did that constitute a confidential communication? Ordinarily it would not be so, it would be a mere collateral fact which Mr. Craigie would know without anything like professional confidence. But if B said: "This gentleman's name A has been concealed, and he and I wish it to remain concealed, I communicate it to you confidentially for the purpose of your advising me, but it must not be communicated to the rest of the world," then no doubt Mr. Craigie would not be allowed without B's express consent to disclose A's name in connection with his employment as B's attorney. But that is not the case here. Mr. Craigie is being examined in regard to his employment by A as A's attorney. Before he can refuse to give the name of his client he must be able to say: "That client communicated his name to me confidentially for the purposes of being advised by me, and he has not communicated it to the rest of the world; or he must be able to say, "A for the purposes of being advised by me told me, that his name, which had been confidentially communicated to me by or on behalf of B in the course and for the purpose of my employment as B's attorney, must still be treated as confidential communication for the purpose of my employment as his (A's) attorney, not having been communicated to the rest of the world, and, therefore, it was not a mere collateral fact which I knew without anything like professional confidence." I do not understand that Mr. Craigie asserts that such was the case, and it is highly improbable that it should be. His contention is that every communication made by a client to an attorney must be privileged, and that contention is unsound. The hypothetical instances suggested by Mr. Craigie afford no support to his contention. The fact that a client falsely charged with assault may prove an *alibi* by calling his attorney, is no argument for holding that an attorney cannot without his client's express consent state his client's name. The attorney comes to know that his client is at one place and not another at a certain time by the circumstance of his being the client's attorney, but "of which fact any other man, if there would **[276]** have been equally conversant" (per Lord Brougham in the case of *Greenough* v. *Gaskell* (2).)

The second portion of the question referred by the Magistrate is whether or not Mr. Craigie was bound to give the matter of his employment. As I understand the Magistrate's reference, the answer to that portion of the question should be, I think, in the negative. The Magistrate apparently thinks that if a solicitor claims privilege for a client, the

(1) 16 Q.B.D. 1.

(2) 1 Myl. & K. 96.

1893

APRIL 4.

CRIMINAL REFERENCE.

18 B. 263.

Court is entitled to demand the nature of the solicitor's employment, and the solicitor is bound in every case, without asking his client, to disclose the nature of the employment whatever it may have been. That such is not the law may be seen by a reference to the case of the *Queen* v. *Cox and Railton*(1). There the solicitor was asked the purpose for which his clients had consulted him. The answer to that would have disclosed the confidential communication which had passed between solicitor and clients. It was not then contended that in any case the solicitor was bound to state the nature of his employment by his clents ; but it was contended that in that particular case the rule of law did not protect the communications from disclosure, because they had been made in furtherance of a criminal purpose; in other words, if the case had occurred in India, the proviso to s. 126, Indian Evidence Act, would have been relied on as compelling the disclosure, and the fact that the solicitor may have been an innocent instrument, would make no difference. It was strongly urged in argument in the *Queen* v. *Cox and Railton* (1) that, speaking practically, the admission of any such exception to the privilege of legal advisers in that it is not to extend to communications made in furtherance of any criminal or fraudulent purpose, would generally diminish the value of that privilege. The privilege must, it was argued, be violated in order to ascertain whether it exists. The secret must be told in order to see whether it ought to be kept. The answer to that given by the full Court of ten Judges was that in each particular case the Court must determine upon the facts actually given in evidence or proposed to be given in evidence whenever it seemed probable that the client consulted the solicitor for a criminal or fraudulent purpose. In that particular [277] case the facts proved made it probable that the visit to the solicitor really was intended for a criminal purpose, and, therefore, it was held that the Court had been right in questioning the solicitor as to the nature of his employment.

It has been necessary to refer to the above case of the *Queen* v. *Cox and Railton* (1) at some length, as it shows clearly the circumstances under which a solicitor would be bound to answer the question as to the nature of his employment. But it appears in the present case that the Magistrate, though quoting *Queen* v. *Cox and Railton*, did not hold that the facts brought out in evidence before him made the proviso to s. 126 applicable. On the contrary, in his referring letter he did not once quote that provision, but confined himself to the body of the section. Looking at the case, then, apart from the proviso to s. 126, it is obvious that, when the solicitor had given the name of his client it would not be necessary to ask the solicitor the nature of his employment. If the employment was in its nature public and not private, there would be no necessity to ask the solicitor to disclose it. For instance, if a man asked his solicitor to defend him as he had been committed to the Criminal Sessions on a charge of forgery, or to file a plaint for him in the Civil Court, those facts would not partake of the nature of confidential communication. They would be public and known to all. On the other hand, in the majority of cases to disclose the nature of his employment would be for the solicitor to tell the very essence of the confidential communication made to him. And that is forbidden, unless it comes within the proviso of s. 126 of the Evidence Act.

The third portion of the question as put to us seems rather vague. It is difficult to say whether Mr. Craigie is bound to give the name of the

(1) 14 Q.B.D. 153.

1893
APRIL 4.
CRIMINAL REFERENCE.
18 B. 263.

persons making any statement to him. If this portion of the question refers to the third person who (Mr. Craigie says) accompanied Messrs. Kapadia and Devitre at the interview in his office on the 18th June, 1891, and who Mr. Craigie says made a statement to him, then the same principle as indicated above must be applied. Mr. Craigie would identify this third person if he could; he is willing to say that the man [278] came to his office and that he (Mr. Craigie) acting as attorney for his client took down in writing the man's statement, but he is unwilling to state the name given to him as the man's name, because he says it came to his knowledge in the course and for the purpose of his professional employment. The answer to that, apart from relevance or any other point, is that, unless Mr. Craigie can depose that he was told the name in confidence with a view to its not being disclosed, he must state the name so far as privilege is concerned. If there was no secrecy about the man's name, there was no privilege. As Baron Parke said in *Dwyer* v. *Collins* (1), "the privilege does not extend to matters of craft which the attorney knows by any other means than confidential communications with his client, though if he had not been employed as attorney, he probably would not have known them."

I am not sure whether I correctly understand the fourth and last part of the question referred by the Magistrate. If Mr. Craigie's refusal to answer any question is not justified, then he is bound to answer it. A person relying upon the privilege is undoubtedly bound to bring himself clearly and distinctly within it, as per Lord Cottenham in *Desborough* v. *Rawlins*. His refusal, whether justified or not, would not entitle him to claim the shelter of s. 126 of the Evidence Act in refusing to answer any other relevant or admissible question, if that shelter did not exist. The application of s. 126 must depend upon the facts of the case and the form of the question.

FULTON, J.—On the first question put by the Magistrate, I think our answer must be that, as Mr. Craigie claims privilege on behalf of his client, he must answer the question "who was your client?" by naming him. The cases of *Parkhurst* v. *Lowton* (2) and *Bursill* v. *Tanner* (3) show that when a solicitor claims the privilege, he must state the name of the client, on whose behalf he claims it. There appears to be no doubt that such is the law in England, and equally little that the law in India is the same. The case of *Parkhurst* v. *Lowton* (2) and the more recent case of *Ex parte Campbell*; *in re Cathcart* (4) were within the cognizance of the Legislature, and the fact that it was intended to [279] make the law on this point the same in India as in England appears from the identity of language used in s. 126 of the Indian Evidence Act with that employed by Mr. Pitt Taylor in dealing with the subject. The passage from Taylor on Evidence to which I refer will be found in s. 832 (ed. 1864) and is as follows:—"The rule is now well settled that when a barrister, solicitor, or attorney is professionally employed by a client, *all communications which pass between them in the course and for the purpose of the employment* are so far privileged that the legal adviser, whether he be called as a witness, or be made a defendant in equity on a bill of discovery being filed against him, cannot be permitted to disclose them." The similarity between the words in italics and the corresponding words in s. 126 is apparent.

---

(1) L.R. 7 Exch. 646.
(2) 2 Sw. 194.
(3) 16 Q.B.D. 1.
(4) L.R. 5 Ch. 703.

1893

APRIL 4

CRIMINAL REFERENCE.

18 B. 263.

Mr. Craigie indeed contended that we were not bound by English authorities: but holding, as I do, that it was the intention of the Legislature to adopt the English practice, I think we must look to the English decisions, of which *Bursill* v. *Tanner* is the most recent, to ascertain what that practice is. In the course of argument it was suggested that the question "who was Mr. Craigie's client?" was really irrelevant to the issue before the Magistrate, and that, therefore, Mr. Craigie was not bound to answer it: but I do not take this view. The question (though probably otherwise irrelevant) became relevant on Mr. Craigie's refusal to answer other questions to enable the Magistrate to decide whether those questions ought to be answered or not, for after such an objection has been raised it becomes, I think, obligatory on the Magistrate to ascertain whether the claim to privilege that has been advanced is valid, and for this purpose to ascertain the name of the client. If Mr. Craigie on behalf of his client withdraws the objection, he need not of course disclose his name unless it is otherwise relevant. Mr. Craigie in this Court explained that his objection to give the name of the client in the business transacted at the interview of the 18th June, 1891, whom for convenience we may call A, was because it was disclosed to him in a communication made to him in the course and for the purpose of professional employment by another client who may be called B; that he did not know A's name *aliunde*; and that, therefore, he could not **[280]** disclose it without breach of confidence towards B. In my opinion, this objection cannot be sustained. The name borne by A, and under which he employed Mr. Craigie as a solicitor, is a fact now within Mr. Craigie's knowledge and cannot be called a communication. Doubtless (as he says) he learnt it in the course of B's business, but he is not asked how he learnt it, or by whom the knowledge was communicated to him, or anything connected with B's business. All he is asked is what his client's name is, and the answer to this is not in any way affected by the manner in which he got to know that name. My answer, then, to the first question would be that Mr. Craigie must disclose the name of the client on whose behalf he has claimed privilege.

Turning to the second question, I am of opinion that Mr. Craigie is not at liberty, without his client's express consent, to disclose the matter of the employment. From one case (*Beckwith* v. *Benner* (1),) it seems at first sight that an attorney may be compelled to divulge the character in which his client employed him, but in an American case (*Chirac* v. *Reinicker*(2)) the opposite view has been upheld. An examination of *Beckwith* v. *Benner* leads me to doubt whether the decision of Gurney, B., can be relied on as an authority for holding that a solicitor may disclose the matter of his employment, inasmuch as the order seems to have been based on the fact that the answer might be inferred as a necessary consequence on certain circumstances peculiar to that particular case; and it appears to me it would be impossible so to hold without infringing the privilege and frustrating the object of s. 126. The judgment of Mr. Justice Story in *Chirac* v. *Reinicker* will be found in point as showing that, though the fact of professional employment must be disclosed, the nature of the business cannot be revealed. It may be argued that, unless we are told the matter of the employment, we cannot judge whether the communication was made in the course and for the purpose of such employment, but, as was urged in argument in the case of the *Queen* v. *Cox and Railton* (3), we cannot require the privilege to be violated in order to

(1) 6 C. and P. 688. (2) 11 Wheat. 90. (3) 14 Q.B.D. 153.

1893
APRIL 4.
CRIMINAL REFERENCE.
18 B. 263.

see whether it exists. It was [281] suggested that a mere statement of the matter of the employment without going into details would not be a violation of professional confidence, but in some cases a vague statement of the matter would do more harm to the client than a complete disclosure of the details. A merchant going to consult his solicitor about a mortgage might find his credit affected by a general statement, that his business was to effect a mortgage on his property, whereas the bad impression might be entirely removed if the details of some family settlement, for which the mortgage was required, were made known; but it would be rather unreasonable that he should be required to explain his private family affairs, because his solicitor had been compelled to state generally the matter in which he was employed. Such, however, does not seem to be the law contained in s. 126, which, I think, protects from publicity not merely the details of the business, but also its general purport, unless it be shown *aliunde* that such business, or the communications made in respect of it, fall within proviso (1) or (2).

So far there seems no special difficulty in answering the questions that have been referred to us, but when we come to the third question, the case is different. We are asked, in the 5th paragraph of the Magistrate's letter, whether Mr. Craigie is bound or not to give the name of the person making any statement to him. The question thus put is not very precise, but to ascertain exactly what is intended we must look to the deposition. The undermentioned questions were put and answered as follows:— "*Q.*—Did one Mohansing Dhansing make a statement to you? *A.*—I am totally unable to say whether a man of the name of Mohansing Dhansing made a statement to me. My only knowledge of the name of the person who made a statement to me is derived from a communication made to me in the course and for the purpose of my professional employment. *Q.*—Did any person make a statement to you on the 18th June, 1891, between 1 and 2 P.M.? *A.*—A person made a statement to me on the 18th June, 1891. Whether it was at the hour stated in the question I cannot say. *Q.*—Did the person making the statement give his name as Mohansing Dhansing? *A.*—I respectfully decline to answer the question for the same reason. *Q.*—[282] On whose behalf did you take down the statement? *A.*—On behalf of my client." The question, then, which Mr. Craigie declined to answer was "Did the person making the statement give his name as Mohansing Dhansing?" and I understand that we are now asked to determine whether he was bound to answer it or not.

The accused in Court was Mohansing Dhansing, and the point at issue was whether he had made a certain statement. Whether on such an issue, the question whether the man who made the statement had given the name of Mohansing Dhansing was relevant to show that the accused was that man it is not necessary to determine, as the matter has not been referred to us, and no argument was addressed to us on the subject. But assuming that it was relevant, I should say that s. 126 of the Evidence Act would not debar Mr. Craigie from answering it, unless he were prepared to swear that the name was told to him by the client, or by some one on behalf of the client, as a secret in confidence. As pointed out in *Memon Haji Harun Mahomed* v. *Moulvi Abdul Karim*, *&c.* (1), although the words used in s. 126 are "any communication," the use of the word "disclose" shows, and common sense, as remarked by

(1) 3 B. 91.

1893
APRIL 4.
CRIMINAL REFERENCE.
18 B. 263.

Westropp, C.J., seems to demand that the privileged communication must be confidential or private. Now, the fact that a particular person bears a particular name is not a confidential matter, except in very peculiar circumstances. It is a fact which is known to all that person's acquaintances, and is not usually a secret. If it could be argued that the fact that a particular person had made a statement was privileged, his name doubtless would be equally privileged; but the language of s. 126 does not apply to such a fact which cannot be called a communication, and no authority has been shown us to support the opinion that such a fact is privileged. Consequently, unless the name were made the subject of special confidence, and it were stipulated by or on behalf of the client that it was not to be disclosed, there seems nothing in s. 126, as interpreted in the Bombay case above noted, to protect the name from disclosure. Under these circumstances, I think our answer to the [283] third question should be that, unless Mr. Craigie swears that the name was told him confidentially as a secret by or on behalf of his client, he must state what name was told him, provided such statement is otherwise relevant.

The fourth question hardly arises now that the first question has been answered; but if for any reason the name of the client is not disclosed, no privilege can be claimed under s. 126, and all relevant and admissible questions put to Mr. Craigie in the course of his examination as a witness must be answered.

---

18 B. 283.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Candy.

TRIBHOVANDAS JEKISANDAS (*Original Plaintiff*), *Appellant v.* KRISHNARAM KUBERRAM AND OTHERS (*Original Defendants*), *Respondents.** [6th April, 1893.]

Bhag—*Bhagdari Act (Bombay) V of* 1862, *s.* 3—*Mortgage—Alienation of a portion of* bhag—*Deed— Property comprised in deed — Construction — General words— Particulars of property stated in deed—Leading description*—Falsa demonstratio —*Vendor and purchaser.*

A mortgage-deed of certain *bhagdari* lands stated that "all the properties appertaining to the entire *bhag*" were thereby mortgaged to the plaintiff. The *bhag* comprised (*inter alia*) four *gabhans* (building-sites). But the clause which set forth the particulars of the property mortgaged thereby, specified only two *gabhans*, one only of which belonged to the *bhag* and the other did not. The deed then proceeded:—"According to these particulars, lands, houses and *gabhans*, barnyards, wells, tanks, *padars* and pasture lands also, together with whatsoever may appertain to the *bhag*—all the properties appertaining to the whole *bhag* have been mortgaged and delivered into your possession . . . . . There is no other property appertaining to the said *bhag* of which mention is not made here."

Held, that the particulars were "the leading description," and the supplementary description of them as constituting the entire *bhag* should be regarded as "*falsa demonstratio*."

Held, also, that the mortgage, so far as it included property belonging to the *bhag*, was void under the 3rd section of the Bhagdari Act (Bombay) Act V of 1862 (1), but was valid as to property not comprised in the *bhag*.

[Rel. on, 17 O.C. 256; 24 Ind. Cas. 465.]

---

* Second Appeal, No. 627 of 1890.

(1) Section 3 of the Bhagdari Act (Bombay Act) V of 1862:—

It shall not be lawful to alienate, assign, mortgage or otherwise charge or incumber any portion of any *bhag* or share in any bhagdari or narwadari village [284] other than a

1893
APRIL 6.
APPELLATE CIVIL.
18 B. 283.

[284] SECOND appeal from the decision of G. Jacob, Assistant Judge, F. P., of Surat, at Broach.

Suit to recover money due on a mortgage.

The plaintiff sued to recover Rs. 1,699 alleged to be due on a mortgage. He alleged that by a mortgage-deed dated the 1st May, 1880, defendants Nos. 1 and 2 mortgaged to him their entire *bhag*, together with other land situate at the village of Vadadla, a *bhagdari* village in the Broach Taluka. The mortgage-deed contained the following clauses :—

"On account hereof (*i.e.*) as *aivej* (security) we have mortgaged to you all the undermentioned properties in our possession and enjoyment appertaining to the whole *bhag* namely, the Sarkari *bhag* land situate within the *sim* of mauje Vadadla * * which stands in the *khata* of ourselves and our deceased brother Keshav Makan, and the houses and *gabhans* (building-sites) appertaining to the said *bhag*, and we have delivered the same into your possession. Particulars are as follows :—

"The Sarkari *bhag* land situate within the *sim* of the village of mauje Vadadia.

2—33. No. 31, acres two and gunthas thirty three.

* * * * * *

0— 3. No. 157, acre zero and gunthas three.

33—35.

[285]"The houses and the *gabhans* (building-sites) appertaining to the said *bhag* in the village of mauje Vadadla are as follows :—

1, house one including the ground * *
1, house one including the ground * *
1, one plot of open *gabhan* * *

4

"According to these particulars, land acres 33 and 35 gunthas * * * houses and *gabhans* * * together with whatever may appertain to the said *bhag*, all the properties appertaining to the whole *bhag* have been mortgaged and delivered into your possession * * *. There is no other property appertaining to the said *bhag* of which mention is not made here."

The defendants resisted the claim on the ground (*inter alia*) that the plaintiff's mortgage-deed was invalid under the Bhagdari Act (Bombay

---

recognized sub-division of such *bhag* or share, or to alienate, assign, mortgage or otherwise charge or incumber any homestead, building-site (gabhan) or premises appurtenant or appendant to any such *bhag* or share or recognized sub-division, appurtenant or appendant thereto, apart of separately from any such *bhag* or share, or recognized sub-division thereof.

Any alienation, assignment, mortgage, charge or incumbrance, contrary to the provisions of this section, shall be null and void ; and it shall be lawful for the Collector or other chief revenue-officer of the district, whenever he shall, upon due inquiry, find that any person or persons is or are in possession of any portion of any *bhag* or share of any homestead, building-site (gabhan) or premises appurtenant or appendant to such *bhag* or share in any *bhagdari* or narwadari village other than a recognized sub-division of such *bhag* or share in violation of any of the provisions of this section, summarily to remove him or them from such possession, and to restore the possession to the person, or persons whom the Collector shall deem to be entitled thereto ;

And any suit brought to try the validity of any order or orders which the Collector may make in such matter, must be brought within three calendar months after the execution of such order or orders.

1893

APRIL 6.

APPELLATE CIVIL

18 B. 283

Act) V of 1862, as it related only to a portion of the *bhag* and not to the whole of it.

The Subordinate Judge allowed the plaintiff's claim, holding that though three out of the four *gabhans* (building-sites) belonging to the *bhag* were not expressly mentioned in the detailed description given in the mortgage-deed, still as the deed purported to mortgage the entire *bhag*, and not only a portion of it, any omission in the particulars was a *falsa demonstratio*, and that the deed was, therefore, not opposed to the provisions of the Bhagdari Act.

On appeal by defendant No. 3, who alleged himself to be *bona fide* purchaser of the property from defendants Nos. 1 and 2, the Judge reversed the decree and rejected the claim on the following grounds:—

"I am of opinion that upon the second issue, (*viz.*, whether the plaintiff's mortgage was void under the Bhagdari Act, Bombay Act V of 1862) the plaintiff's deed must fail. The Subordinate Judge has found, and his finding is not disputed, that three *gabhans* of the *bhag* are not included in the detailed description in the mortgage-deed; but holding that the intention of the parties was that the whole *bhag* should pass, he considered that this was only matter of *falsa demonstratio*, and not an omission which could affect the validity of the mortgage. The respondents' pleader relies principally on the expression in the mortgage-deed coming at the close of the description of the property and [286] including whatever may be appended to this *bhag*, the whole *bhag*. The first part of this expression, in the connection in which it occurs, must, I think, be taken as applying to appended rights and interests such as those of trees, water, &c.; and, having regard to the fulness of the detail given, I cannot think that the description of the lands and *gabhans* was intended to be other than complete. The *bhag*, as mortgaged, was that consisting of the property described in the deed, and that is found not to be the whole *bhag*, and the fact that in the mortgage-deed it is called the whole *bhag* is immaterial. If a mere recital of this sort were admitted as sufficient to prove the intention of the parties to alienate a whole *bhag*, the provisions of Act V of 1862 (Bombay) would soon become a dead letter. * *

"If the deed had merely purported to mortgage the whole *bhag* without any description of the property in detail, the plaintiff might have been secure; but, taking the deed as it is, I cannot hold the omission to be merely matter of *falsa demonstratio*."

The plaintiff preferred a second appeal and respondent No. 2 (defendant No. 3) Bapubhai Shivlal, who claimed to be a purchaser of one of the *gabhans* (building-sites) in dispute, filed cross-objections under s. 561 of the Civil Procedure Code (Act XIV of 1882).

Inverarity with *Vasudeo G. Bhandarkar*, for the appellant (plaintiff):—The main question in this case turns upon the construction of the mortgage-deed. The Judge held the deed to be invalid under the Bhagdari Act, because a part (*viz.*, three *gabhans*) of the *bhag* has not been included in the details of the property given in the deed. But we contend that though the two *gabhans* have not been specifically mentioned, still as the deed states that the entire *bhag* is mortgaged, the two *gabhans* must be regarded as included, and their omission in the details is merely *falsa demonstratio*. We rely on *Travers* v. *Blundell* (1) and *West* v. *Lawday* (2). The intention

(1) 6 Ch. Div. 436. (2) 11 H.L.C. 384.

of the parties was that the deed should comprise the entire *bhag*. Otherwise the plaintiff would not have entered into the transaction at all.

[287] But even if it be held that the whole *bhag* is not mortgaged under the deed, and that the transaction is, therefore, invalid as to the *bhag*, that will not affect the mortgage of the property which is not a part of the *bhag*. Survey No. 157 and one of the *gabhans* in dispute do not belong to the *bhag*. The transaction with respect to these at least must stand. Further, we contend that we should be given a money decree in this suit, because our personal remedy would now be barred if we were to bring a separate suit for it. The limitation to a suit for the recovery of money under a registered bond is six years.

P. M. Mehta (with *Gokuldas K. Parekh*), for the respondents (defendants Nos. 3, 4 and 5):—The Judge finds that the transaction is not a mortgage of the whole *bhag*, but only of a portion of it, and that it thus practically effects the dismemberment of the *bhag* and thus violates the Act. The omission of the *gabhans* (building-sites) in the description of the property was intentional, and not caused by mistake, as shown by the other documents and the circumstances of the case. The Judge was right in holding that the general words in the deed must be read with the particulars of the property given therein. The details must control the general words—*Griffiths* v. *Parsons* (1). The Bhagdari Act prohibits partial alienation of a *bhag*.

JUDGMENT.

SARGENT, C. J.—The important question in this case is, whether the plaintiff's mortgage of 1st May, 1880, was, as found by the lower appellate Court, void under s. 3 of the Bombay Act V of 1862, which forbids the alienation of any portion of any *bhag* other than a recognised division of such *bhag* or of any homestead, building-site (*gabhan*) apart or separately from such *bhag* or recognised sub-division. It was found by the Subordinate Judge, and his finding was not disputed before the lower Court of appeal, that there were four *gabhans* appertaining to the *bhag*, of which only one is expressly referred to in the particulars of the property mortgaged.

But it has been contended that upon the proper construction of the mortgage-deed, it was a mortgage of the entire *bhag*, and that the particular description of the *gabhans* was what is termed [288] "*falsa demonstratio*." In the case of *West* v. *Lawday* (2) Lord Westbury explains the maxim "*falsa demonstratio non nocet*," relied on by the appellant, in the following terms :—"Where some subject-matter is devised as a whole under a denomination which is applicable to the entire land, and then that description is followed by words which are added on the principle of enumeration, but which do not exhaust all the particulars, then the entirety, which hasbeen expressly and definitely given, shall not be prejudiced by an imperfect and inaccurate enumeration of the particulars." In the case of *Travers* v. *Blundell* (3) the testator was exercising a power given him by his father's will over an estate called the Rigby Estate which his father had purchased, and Sir G. Jessell after saying that the real question in cases of this description was "which is the leading description" held that the words in the will "that part of Rigby's Estate purchased by my father" was the leading description, although the enumeration of the

(1) 1 New Reports, 330. (2) 11 H.L.C. 384. (3) 6 Ch. Div. 436.

1893

APRIL 6.

APPELLATE CIVIL.

18 B. 283.

closes, of which the will said the estate consisted, made no mention of two of the closes.

In the present case, the mortgagors say they have mortgaged to the plaintiff "all the undermentioned properties in their possession and enjoyment appertaining to the entire *bhag* standing on Government records in their *khata*, and the houses and *gabhans* appertaining to this share. Particulars are as follows." These particulars enumerate the lands and houses, and conclude by mentioning 2 *gabhans* of which one only is a *gabhan* appertaining to the *bhag*, and the other being a *gabhan* which has been found to belong no longer to the *bhag*. The deed then proceeds as follows:—"According to these particulars, lands, houses and *gabhans*, barnyards, wells, tanks, *padars* and pasture lands also, together with whatsoever may appertain to the said *bhag*,—all the properties appertaining to the whole *bhag* have been mortgaged and delivered into your possession," and the deed concludes with the statement "There is no other property appertaining to the said *bhag* of which mention is not made here."

The document, therefore, down to the end of the particulars is, in terms, a mortgage of certain properties therein expressly [289] enumerated, supplemented by the description that they appertain to the entire *bhag*. The passage which follows—"According to these particulars all the properties belonging to the *bhag* have been mortgaged to you"—does not enlarge or alter what had already been said; it is only a repetition of it in another form. The particulars are, therefore, in the words of the Master of the Rolls, "the leading description," and the supplementary description of them as constituting the entire *bhag* together with the houses or *gabhans* appertaining to it, which is admittedly incorrect, must be regarded as "*falsa demonstratio*." The statement by the mortgagor, at the close of the document, that the particulars of property constituted the entire *bhag*, only emphasises what is implied by the general description, and cannot affect the clear conclusion to be drawn from the language of the operative part itself of the instrument, or prevent the operation of the Act in invalidating the instrument if, as a fact, all the *gabhans* were not included. The Assistant Judge was, therefore, in our opinion, right in holding that the plaintiff's mortgage, so far as it included property belonging to the *bhag*, was void under the Bhagdari Act.

It has, however, been found by both the Courts that Survey No. 157 is not included in the *bhag*, and, therefore, as to that piece of land and the second *gabhan* mentioned in the particulars, which, it is admitted, does not belong to the *bhag*, the mortgage can have effect given to it. The plaintiff is also entitled to a money decree against the defendants Nos. 1 and 2 for the sum of Rs. 1,699 as found due by the Subordinate Judge, and against which no appeal was brought by those defendants.

We must, therefore, vary the decree by directing that defendants Nos. 1 and 2 do pay the plaintiff the sum of Rs. 1,699, and that in default of so paying, the Survey No. 157 and the second *gabhan* mentioned in the particulars of property in the mortgage be sold, and the proceeds applied in payment of the mortgage-debt. The appellant to pay the costs of this appeal to the defendants other than defendants Nos. 1 and 2.

Decree varied.

18 B. 290.

1891
JULY 24.

ORIGINAL CIVIL.

18 B. 290.

[290] ORIGINAL CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Telang.

GOSWAMI SHRI 108 SHRI GIRDHARIJI MAHARAJ (*Original Plaintiff*), *Appellant v.* SHRI GOVARDHANLALJI GIRDHARIJI MAHARAJ (*Original Defendant*), *Respondent.** [24th July, 1891.]

Jurisdiction—Letters Patent, 1865, *cl.* 12—*Dwell—Carry on business—Personally work for gain.*

The word "dwell" must be construed with reference to the particular object of the enactment in which it occurs.

Residence in Bombay merely for a temporary purpose is not to "dwell" there so as to give jurisdiction to the High Court under cl. 12 of the Letters Patent, 1865.

Held, that the mere fact that the defendant had purchased the house which he occupied during a temporary visit to Bombay afforded no inference of an intention to dwell there.

A defendant who was the *Acharya* or high priest of the Vaishnava community and the Maharaj Tikait of Shri Nathji at Nathdwara had a *pethi*, or place of business, in Bombay, where devotees paid in any presents they intended to offer him.

Held, that this did not amount to "carrying on business" so as to give the High Court jurisdiction under cl. 12 of the Letters Patent, 1865.

The defendant when in Bombay was invited by his devotees and pupils to their houses, where he was treated as an incarnation of the deity with certain forms and ceremonies, and received presents, and gave his blessing.

Held, that this did not amount to "personally working for gain" within the meaning of cl. 12 of the Letters Patent, 1865.

[Affirmed, 18 B. 294 **(P. C.)** ; **Cons.**, 29 M. 239=16 M.L.J. 238=1 M.L.T. 71.**]**

APPEAL from a decree of Farran, J., dismissing the suit on the ground that the Court had no jurisdiction to entertain it (see I. L. R., 14 Bom., 541).

Up to the year 1876 the plaintiff was the Acharya or high priest of the Vaishnava community, and the Maharaj Tikait of Shri Nathji at Nathdwara in the territory of the Maharana of Udepur in Rajputana. In that year he was deposed from his office and expelled from the territory by the Udepur authorities, and his son the defendant was installed in his place. At the time of his deportation the plaintiff had at Nathdwara a large amount of treasure in his treasury, which he alleged to be his private property, and which he had entrusted to his son (the defendant). Being himself prevented from returning to Udepur [291] he had called upon the defendant to remit this property to him, but the defendant had not done so. He accordingly filed this suit in the High Court of Bombay to recover the property in question.

The defendant contended that the Court had no jurisdiction over him. He stated that he resided at Nathdwara and only occasionally visited Bombay. He contended that he did not dwell or carry on business or personally work for gain within the Court's jurisdiction as required by cl. 12 of the Letters Patent, 1865, which is as follows :—

"And we do further ordain that the said High Court of Judicature at Bombay in the exercise of its ordinary original civil jurisdiction shall be empowered to receive, try, and determine suits of every description, if in the case of suits for land or other immoveable property such land or

* Suit No. 234 of 1889.

1891
JULY 24.
ORIGINAL CIVIL.
18 B. 290.

property shall be situated, or in all other cases if the cause of action shall have arisen either wholly, or, in case the leave of the Court shall have been first obtained in part, within the local limits of the ordinary original jurisdiction of the said High Court, or if the defendant at the time of the commencement of the suit shall dwell or carry on business or personally work for gain within such limits, except that the said High Court shall not have such original jurisdiction in cases falling within the jurisdiction of the Small Cause Court at Bombay, in which the debt or damage or value of the property sued for does not exceed 100 rupees."

The defendant was in Bombay on a visit from the 2nd April, 1889, until the 11th August, 1889, and while there he lived in a house which he had purchased in May, 1888. This house, however, he sold before leaving Bombay in August, 1889. It was on the 3rd May, 1889, while the defendant was in Bombay on the occasion of this visit that the plaintiff filed this suit.

It further appeared that the defendant had in Bombay a *pedhi*, or place of business, in which a *munim*, *mehtas* or other servants were employed. Into this *pedhi* offerings to the shrine of Shri Nathji were paid by the devotees and also offerings to the defendant personally. From thence they were transmitted by *hundi* to Nathdwara.

[292] It was also proved that while in Bombay the defendant was in the habit of visiting the houses of his devotees and pupils, on which occasions certain ceremonies were performed and presents were made to the defendant, who received them and gave his blessing to the persons offering them.

The material facts are fully set out in the judgment of Farran, J. (see I. L. R., 14 Bom., 541), who held that the defendant did not dwell or carry on business or personally work for gain within the jurisdiction, and, therefore, dismissed the suit.

The plaintiff appealed.

Inverarity, *Jardine* and *Sethna*, for the appellant (plaintiff).

Lang and *Scott*, for the respondent (defendant).

The following authorities were cited:—*Emritloll* v. *Kidd* (1); *Kavasji* v. *Wallace* (2); *Subbaraya* v. *The Government* (3); *Bramwell* v. *Lacy* (4); *Mitchell* v. *Hender* (5); *Anonymous* (6); *Muthaya Chetti* v. *Allan* (7); *Chinnammal* v. *Tulukannatummal* (8); *Kessowji* v. *Khimji Jairam* (9).

JUDGMENT.

TELANG, J.—The only question in this case relates to the jurisdiction of this Court to try it, and it has been sought to place the jurisdiction on the grounds that the defendant dwells, carries on business, and also personally works for gain within the local limits of the civil jurisdiction.

As regards the first point, the English and Indian cases mentioned in the judgment of Farran, J., show that the word "dwell" must be construed with reference to the particular object of the enactment in which it occurs. And construing cl. 12 of the Letters Patent, 1865, in that way, we are of opinion that the cases of *Emritloll* v. *Kidd*(1) and *Kavasji* v. *Wallace* (2) were rightly decided. It was not, we think, the intention of the Letters Patent to give jurisdiction in cases of temporary residence only. Now in this case the defendant came to Bombay only in the course of a progress he was making, in the course of which he

(1) 2 Hyde, 117. (2) 1 B. H. C. R. 113. (3) 1 M. H. C. R. 286.
(4) 10 Ch. D. 691. (5) 23 L. J. (Q. B.). 273. (6) 23 W.R. 223.
(7) 4 M. 209. (8) 3 M. H. C. R. 146. (9) 12 B. 507.

[293] intended to visit the various establishments he keeps up in various parts of the country. He actually stayed here from 2nd April to 11th August, 1889. It seems probable that he stayed longer than he had originally intended. But in any case, his stay here was only for a temporary purpose, such as, we think, does not satisfy the requirements of cl. 12 of the Letters Patent.

It was, however, argued that the defendant had purchased a house in Bombay in the year preceding the year of his visit, and that that circumstance would afford a foundation for the jurisdiction of the Court, on the ground of residence. No doubt, according to the case of *Bailey* v. *Bryant* (1), a man may have more than one residence, but, in order to afford foundation for jurisdiction, the residences must be of a permanent character, and be visited from time to time. Here there is no evidence whatever of any intention on the part of the defendant himself to visit Bombay from time to time. The house, after being purchased, was in fact occupied by the defendant's servants, and, from the mere fact of purchase, no inference of an intention to personally dwell in the house from time to time can be drawn. On the other hand, the fact of the house having been sold some time after the purchase, affords some ground for an opposite inference. On the whole, therefore, we are of opinion that the argument for jurisdiction on the ground of residence fails.

The next point to be dealt with, turns on the meaning of the phrase "carry on business." The defendant admittedly has a *gedhi*, or place of business, in Bombay, where devotees pay in whatever presents they wish to offer to him. We think, however, that it would be a straining of language to call that carrying on business. These presents are mere voluntary offerings, which the pupils and devotees of the defendant make to him for their own spiritual benefit. They are received on behalf of the defendant by his servants, and transmitted to him in due course. We do not think that this can be properly held to be equivalent to carrying on business within the jurisdiction.

Lastly, comes the question whether the defendant personally works for gain within the jurisdiction. The evidence shows **[294]** that when the defendant is in Bombay, his devotees and pupils invite him to their houses, and, treating him as an incarnation of the deity, go through certain forms and ceremonies, which are held to be appropriate to the occasion, and make presents to the defendant. The defendant receives the presents, and gives his blessing to the devotees. It requires, we think, a straining of language in this case also to hold that this is "personally working for gain." There is no work in the matter at all.

Upon the whole we are of opinion that the several grounds on which the jurisdiction is sought to be vested in this case have all failed, and that the appeal must be dismissed with costs.

Appeal dismissed.

Attorneys for appellant (plaintiff) :—Messrs. *Conroy and Brown.*
Attorneys for the respondent (defendant) :—Messrs. *Craigie, Lynch and Owen.*

---

(1) 1 Ellis & Ellis, 340.

1893
NOV. 14.

PRIVY COUNCIL.

18 B. 294 (P.C.) = 21 I.A. 13 = 6 Sar. P.C.J. 396.

18 B. 294 (P.C.) = 21 I.A. 13 = 6 Sar. P.C.J. 396.

PRIVY COUNCIL.

PRESENT:

Lords Hobhouse, Macnaghten, and Morris, and Sir R. Couch.

[*On appeal from the High Court at Bombay.*]

GOSWAMI SHRI 108 SHRI GIRDHARIJI MAHARAJ, (*Appellant*) *Plaintiff v.* SHRI GOVARDHANLALJI GIRDHARIJI, (*Respondent*) *Defendant.** [14th November, 1893.]

Jurisdiction—Carrying on business—"Dwell"—Letters Patent, 1865, *cl.* 12.

The expression "carry on business" in cl. 12 of the Letters Patent, 1865, is intended to relate to business in which a man may contract debts, and ought to be liable to be sued by persons having business transactions with him.

The defendant, who was an Acharya of the Vaishnav community and was head of their institution at Nathdwara in Udepur, where he usually resided, was, when this suit was brought, in Bombay for a time. He had in the latter place a treasurer and other servants employed in an establishment for the collection and entry of gifts made by devotees; and there, also, donations, made in like establishments elsewhere, were received for transmission to Nathdwara. The defendant, also, while in Bombay accepted offerings on ceremonial visits made, or received, by him personally; but no bargain for the amount was made beforehand.

Held, that in the above transactions there was no "carrying on business" within cl. 12 of the Letters Patent, 1865.

[295] APPEAL from a decree (24th July, 1891) of the High Court (*see supra* p. 290) affirming a decree (20th June, 1890) made by that Court in its ordinary original jurisdiction (1).

The suit (3rd May, 1889) out of which this appeal arose, was for discovery, by the defendant, of articles and sums of money, in addition to those specified in a schedule to the plaint, and claimed by the plaintiff as owner; and in default, for Rs. 31,45,171, with a further sum for interest.

The question now raised was whether the Court below had rightly construed cl. 12 of the Letters Patent of 1865, in deciding that the defendant was not subject to the local jurisdiction. There was no dispute as to the facts, on this appeal.

The plaintiff (now appellant) was, until the year 1876, Tikait Maharaj (religious head) of the Vaishnav shrine of Shri Nathji at Nathdwara in Udepur in Rajputana. In that year he was deprived of the office, and expelled from the Rana's territory. His son, the present defendant, was installed in his place. In February, 1889, the defendant, who resided at Nathdwara, left that place, and visited temples and shrines in Gujarat, Kathiawar and elsewhere. He came to Bombay on the 2nd April, 1889, intending to make a short stay there. On the 3rd May following, this suit was commenced against him by his father. The defendant remained in Bombay till the 11th August, 1889, detained by domestic occurrences.

The plaintiff alleged that, at the time of his compulsory departure from Udepur, he had private treasure at Nathdwara amounting to the sum claimed in this suit. This property he had, as he alleged, then and there entrusted to the care of his son, the defendant, with instructions to forward it to him. These instructions had not been carried out.

In his defence, the son denied that any such private treasure had been entrusted to him; denied that he had written letters acknowledging this trust; and denied being subject to the local jurisdiction.

(1) 14 B. 541.

1893
NOV. 14.

PRIVY COUNCIL.

18 B. 294 (P.C.) = 21 I.A. 13 = 6 Sar. P.C.J. 396.

On the last issue only, the suit was heard by Farran, J., in the original jurisdiction (1). The Judge dismissed the suit, holding [296] that jurisdiction over the defendant had not been made out with reference to cl. 12 of the Letters Patent of 1865, which is as follows :—

"And we do further ordain that the said High Court of Judicature at Bombay in the exercise of its ordinary original civil jurisdiction shall be empowered to receive, try, and determine suits of every description, if in the case of suits for land or other immoveable property such land or property shall be situated, or in all other cases if the cause of action shall have arisen either wholly, or in case the leave of the Court shall have been first obtained, in part within the local limits of the ordinary original jurisdiction of the said High Court, or if the defendant at the time of the commencement of the suit shall dwell or carry on business or personally work for gain within such limits, except that the said High Court shall not have such original jurisdiction in cases falling within the jurisdiction of the Small Cause Court at Bombay, in which the debt or damage or value of the property sued for does not exceed one hundred rupees."

At the hearing of the evidence given as to the kind of business said to have been carried on by the defendant in Bombay was, generally, to the following effect :—That the defendant had in Bombay an establishment, called by the witnesses a *pedhi*, in which a *chaudhari* or treasurer, a *munim*, and *mehtas*, and servants, were regularly employed. Offerings made to Shri Nathji by devotees were paid into this *pedhi*, and other offerings to shrines at Nathdwara, of which the defendant claimed to be the head, and offerings to the defendant, personally, in that character. There were similar establishments in other places over the Presidency, and the offerings collected in them were transmitted to the Bombay *pedhi*, and dealt with there. The moneys from that *pedhi* were sent to Nathdwara, sometimes by *hundis* drawn in that place on the Bombay *pedhi*, by which the *hundis* were honoured and paid ; and were sent, sometimes, by the purchase of articles for the defendant's use, which were despatched to Nathdwara. The balances, not immediately wanted, were deposited with soukars, who allowed interest on the sums from time to time in their hands. The sums coming into the *pedhi* at Bombay, from these sources, for transmission to Nathdwara were considerable ; and might be roughly estimated at Rs. 2 lakhs per annum.

The Judge did not consider that any of the above transactions brought the defendant within cl. 12, on the ground of his carrying on business in Bombay. The judgment, which also dealt [297] with other grounds, on which it had been alleged for the plaintiff that the defendant came within the clause, is reported at length at p. 543 of I. L. R., 14 Bom.

On appeal, the appellate High Court (Sargent, C. J., and Telang, J.) affirmed the decision of the first Court (see *supra*, p. 292).

The plaintiff appealed to the Privy Council.

Mr. *J. D. Mayne* and Mr. *J. H. A. Branson*, for the appellant :—According to the evidence, the defendant, being both the spiritual head and general manager of the affairs of the institution at Nathdwara, made collections in Bombay in the manner in which a business may be said to be carried on. In his capacity as spiritual guide he possessed, according to the belief of his followers, attributes enabling him to promote their well-being. In this regard, he received gifts from devotees, and made collections through an agency, with a set of clerks and servants in Bombay.

(1) 14 B. 541.

1893
NOV. 14.
PRIVY COUNCIL.
18 B. 294 (P.C.) = 21 I.A. 13 = 6 Sar. P.C.J. 396.

Reference was made to the *pedhi*. If these transactions were not in the nature of a contract between the defendant and the worshippers, still that would not necessarily negative the carrying a business within the meaning of cl. 12. The proceedings, so far as they went, were a business for certain purposes; and there were the arranging, entering, and transmission of gifts. In connection with the argument, reference was made to *Rolls* v. *Miller*(1) and *Smith* v. *Anderson*(2).

Sir *J. Rigby*, Q. C. (Solicitor General), Mr. *R. B. Finlay*, Q. C., and Mr. *H. Sutton*, for the respondent, were not called upon.

JUDGMENT.

Their Lordships' judgment was then delivered by

LORD MORRIS.—The suit, out of which this appeal arises, was brought by the appellant against the respondent in the High Court of Judicature at Bombay in the exercise of its ordinary original civil jurisdiction, and the question for determination in the High Court and here is, whether the High Court had jurisdiction to hear and determine the suit. Both Courts below have determined that there was no jurisdiction.

The 12th section of the Letters Patent of 1865, establishing the High Court, is as follows, so far as it is material to the [298] matter now in dispute:—"And we do further ordain that the said High Court * * * shall be empowered to receive, try, and determine suits of every description * * * if the defendant at the time of the commencement of the suit shall dwell, or carry on business, or personally work for gain within such limits."

The greater portion of the arguments in the Courts below was addressed to the contention that the defendant "dwelt" in Bombay, within the meaning of the section, and that, therefore, he was liable to the High Court's jurisdiction. That point was abandoned by the plaintiff on the argument before this Board, his counsel confining himself to the contention that the defendant "carried on business" within the meaning of the section.

The phrase "carry on business," as has been often said, is a very elastic one, and is almost incapable of definition. The tribunal must in each case look to the particular circumstances. It appears to their Lordships that the Letters Patent intended it to relate to business in which a man might contract debts, and ought to be liable to be sued by persons who had business transactions with him.

There is nothing of this kind here. The defendant is the high priest of the shrine of Shri Nathji, at Nathdwara, in the territories of the Rana of Udepur. At the time of this suit he was on a temporary visit to Bombay, for the purpose of meeting his devotees. He has in Bombay an establishment called a *pedhi* in which a treasurer and servants are regularly employed. Into this *pedhi*, offerings made by devotees to the shrine of Shri Nathji, and to other shrines at Nathdwara, of which the defendant claims to be the owner, are paid. The defendant has similar establishments in other places in the Bombay Presidency, and the offerings collected there are transmitted to the *pedhi* in Bombay. Something like two lakhs of rupees pass into this *pedhi* in the course of each year. While the defendant was in Bombay he received his followers, and when invited to do so he visited their houses. On the occasions of such visits he invariably received an offering in money, but no bargain for the amount was

(1) 27 Ch. D. 71.
(2) 15 Ch. D. 247.

made before hand. Such offerings were strictly personal, and were not paid into the *pedhi*.

[299] Their Lordships are unable to hold that either the payment of the offerings in the *pedhi*, or the receipt of them by the defendant personally, constitutes "carrying on business" within the meaning of the Letters Patent. Devotion to the shrine was the reason for the offerings in each case.

Their Lordships will, therefore, humbly advise Her Majesty that the judgment of the appellate Court should be affirmed, and this appeal dismissed. The appellant will pay the costs of this appeal.

Appeal dismissed.

Solicitors for the appellant:—Messrs. *Hore and Pattisson.*
Solicitor for the respondent:—Mr. *Edward F. Turner.*

1893
NOV. 14.
PRIVY COUNCIL.
18 B. 294 (P.C.) = 21 I.A. 13 = 6 Sar. P.C.J. 396.

---

18 B. 299.

ORIGINAL CIVIL.

Before Mr. Justice Farran.

CURSETJI JEHANGIR KHAMBATTA AND ANOTHER (*Plaintiffs*) *v.* W. CROWDER AND ANOTHER (*Defendants*).*

[11th, 15th, 16th and 18th January, 1894.]

Arbitration—Award—Setting aside award—Arbitrator receiving evidence from one side in absence of other side—Misconduct—Civil Procedure Code (XIV of 1882), s. 521—Contract—Contract to sell from 2,500 to 3,500 tons of coal—Breach of contract—Non-delivery of coal—Damages—Number of tons on which damages to be calculated.

An arbitrator ought not to hear or receive evidence from one side in the absence of the other side, without (if he does) giving the other side affected by such evidence the opportunity of meeting and answering it. This proposition is, however, subject to the qualification that the parties may agree that a reference may be conducted in any particular way, and such an agreement may be either express or implied from their conduct during the arbitration, and they may also expressly or by their conduct waive their objection to an irregular course of conduct on the part of the arbitrator.

Where an arbitrator received certain papers and documents from the defendants in a suit referred to his arbitration, together with a letter from the defendants containing certain comments on the documents sent to him and made his award without giving the plaintiffs an opportunity of seeing the said papers and documents, and of meeting the inferences deducible from them.

Held, that there was such a breach of duty on the part of the arbitrator as entitled the plaintiffs to have the award set aside.

On the 18th May, 1893, the defendants sold to the plaintiffs "the entire cargo of coal per steam-ship ———May shipment, *via* canal, amounting to 2,500 to 3,500 tons or thereabouts." The defendants intended a certain steamship called the "Ethelaida,"**[300]** which carried a cargo of 3,395 tons of coal to satisfy this contract. This ship, however, did not load in May, and consequently her cargo did not fulfil the conditions of the contract. From the day of making the contract the plaintiffs had been urging the defendants to declare the name of the vessel in which the coal contracted for was to be shipped. On the 14th June the defendants by letter informed the plaintiff that the "vessel chartered for their May shipment" had not loaded in May, and they offered to cancel the contract. On the same day, however, and about an hour after the plaintiffs had received this letter, and before they had replied to it, the defendants sent them another letter as follows:—"We have now been informed that the boat, our coals have been loaded

* Suit No. 415 of 1893.

1894
JAN. 18.

ORIGINAL CIVIL.

18 B. 299.

in, is the 'Ethelaida,' and we now beg to declare it." Correspondence subsequently passed between the parties. On the 15th June the plaintiffs wrote to the defendants as follows:—"Please inform us finally what you intend. In case the 'Ethelaida' is declared as bringing coals sold to us under contract of 18th May, please let us know the date of her sailing, landing and the particular date of her arrival in Bombay, and also how much coal she has on board." On the following day the defendants replied: "The 'Ethelaida' is the boat chartered for the cargo we sold you.....We do not positively know whether she commenced to load in May or June. She was expected to load about 3,300 tons." On the 20th June the defendants wrote definitely stating that the "'Ethelaida' did not load in May." The plaintiffs refused her cargo, and sent in a statement of their alleged loss calculated upon 3,300 tons, the amount stated to be the cargo of the "Ethelaida" in the defendant's letter of the 14th June.

Held, that the damages must be calculated upon a cargo of 2,500 tons only. The "Ethelaida" was never incorporated into the contract. The defendants declared her against the contract; but, after they had informed the plaintiffs that she had not loaded in May, the plaintiffs refused her cargo. The contract which the defendants failed to fulfil was a contract to deliver 2,500—3,500 tons and not a contract to deliver the "Ethelaida" cargo, which they were always ready and willing to deliver. The option rested with the defendants whether they would deliver 2,500 or 3,500 tons, or any intermediate quantity, and upon no principle could the Court exercise that option for them and declare that they were liable to deliver more than a cargo of 2,500 tons.

[R., 6 Ind. Cas. 963=73 P.W.R. 1910.]

SUIT to recover Rs. 5,803-14-0 as damages for breach of contract and for a declaration that a certain award was not binding.

On the 18th May, 1893, the defendants by a contract of that date sold to the plaintiffs "the entire cargo of coal per steam-ship——— May shipment *via* canal amounting to 2,500 to 3,500 tons or thereabouts. The coal to be of the description known as Davison's West Hartley, and to be delivered into purchaser's boat alongside at Rs 15-4-0 per ton. Delivery to be taken at a rate not less than 500 tons per diem." The other terms of the contract are not material to this report.

Between the date of the contract and the 14th June the plaintiffs wrote several letters to the defendants to declare the [301] name of the vessel in which the coal was to be shipped, but the defendants replied that they were as yet unable to supply the information. On the 14th June, the defendants wrote to the plaintiffs stating that the vessel chartered for their May shipment did not take in her cargo during May, and they offered either to cancel their contract with the plaintiffs or to supply them with other coal. On the same day, and about an hour after the plaintiffs had received this letter, and before they had replied to it, the defendants sent them another letter as follows:—

"14*th June*, 1893.

"Dear Sirs,—We have now been informed that the boat, our coals have been loaded in, is the 'Ethelaida' and we now beg to declare it.

"Yours faithfully,
"(Signed) W. CROWDER & Co."

On the next day, the plaintiffs wrote to the defendants acknowledging the receipt of both the above letters. They declined the offer of other coal, and referring to the latter, declaring the "Ethelaida," they said:—

"Please inform us finally what you intend. In case the 'Ethelaida' is declared as bringing coals sold to us under contract of 18th May, please let us know the date of her sailing, loading, and the probable date of the arrival in Bombay, and also how much coal she has on board."

On the 16th June the defendants replied by the following letter :—

"16*th June*, 1893.

"Dear Sirs,—In reply to yours of yesterday's, we beg to say that the 'Ethelaida' is the boat chartered for the cargo of Davisons we sold you. We have had no advice, so far, of her sailing, and up to the present we do not positively know whether she commenced to load in May or June, but expect to get a cable shortly. She was expected, according to 6/P, to load about 3,300 tons.

"Yours faithfully,
"(Signed) W. CROWDER & CO."

On the 28th June the defendants wrote a letter to the plaintiffs, of which the following is the material part :—

"For reasons that we have already explained to you both by letter and verbally at our interview yesterday, the 'Ethelaida' did not load in May. You promised us yesterday that you would write us a letter declining to accept the 'Ethelaida's' cargo, and which you might have done a fortnight ago on 14th June. We wish you to clearly understand that whatever claim you may ultimately prefer against us, we [302] have a right at once to know whether you intend to accept this cargo or not ; otherwise we shall hold you responsible for any losses that may take place on a resale in a falling market.

" We have asked you and we now again ask for a statement of what you consider to be your losses, and would like to have this in writing as soon as possible without prejudice to our case."

To this letter the plaintiffs replied as follows :—

" *Bombay*, 28*th June*, 1893.

"Messrs. W. CROWDER & CO.,
" Bombay.

" Dear Sirs,—We think you made a mistake when you wrote that we might have declined the 'Ethelaida's' cargo a fortnight ago, seeing that it was only by your letter dated the 22nd instant that you informed us of the date of sailing. We had many times asked you for the date before.

" On the 23rd we wrote to you and said we should be glad to hear from you in reply, because we intended to ask our solicitors to reply to your letter of the 22nd. This must have been understood by you to mean that we did not intend to accept the 'Ethelaida's' cargo, and that we should instruct our solicitors to write a letter claiming damages for your breach of contract. If you had replied at once, you would have received this letter. As you now request us to send in our claim, we do so by enclosing our bill No. 976 for Rs. 5,803-14-0.

"Yours faithfully,
"(Signed) C. J. KHAMBATTA & CO."

The defendants objected to the amount of the plaintiffs' claim, and on the 5th July both the parties agreed to refer their dispute to the sole arbitration of Mr. F.L. McAfee, who on the same day undertook to arbitrate between them.

Both the plaintiffs and the defendants subsequently sent to the arbitrator written statements of their respective cases. The plaintiffs also sent him certain other papers connected with his case.

1894
JAN. 18.

ORIGINAL CIVIL.

18 B. 299.

On the 18th July, 1893, the defendants wrote to the arbitrator as follows:—

"18*th July*, 1893.

"Dear Mr. McAfee.—Please do give your decision *re* May shipment, Davison's, without further delay, as it will decide us in what we have to do with the cargo—land or resale. The ship 'Ethelaida' is expected in at any moment now, and we will be awkwardly placed if the matter is not settled before she arrives.

"Yours truly,
"(Signed) W. CROWDER."

[303] On the same day the arbitrator addressed the following letter to both parties:—

"*Bombay*, 18*th July*, 1893.

"Messrs. C.J. KHAMBATTA & Co.
and
"Messrs. W. CROWDER & Co.

"Gentlemen,—To enable each of your good selves to discuss opposing points brought out in your respective statements, I would feel obliged by your arranging to call at my office from 3 to 5 this afternoon. I would suggest your bringing with you, in original, such letters as have been interchanged between you on the matter now in question.

"I am, &c., &c.,
"(Signed) F.L. MCAFEE."

On the same day (*viz.*, the 18th July) the arbitrator sent the following note to the plaintiffs:—

"Dear Sirs,—Messrs. W.Crowder & Co. say three o'clock this afternoon will suit them. Please say by bearer whether this hour will answer you. If it will not, appoint your time, please.

"I am, &c.,
"(Signed) F. L. MCAFEE."

In reply, the plaintiffs sent him the following memorandum:—

"All my papers are at Mr. Hemming's, and unless I get them, my presence will be useless. I am ready to be at your place at the appointed time, and will let you know as soon as they are received.

"I am just writing to Mr. Hemming.

"Yours faithfully,
"(Signed) C. J. KHAMBATTA."

At the trial the plaintiff stated in his evidence that immediately on receipt of the above letter from the arbitrator he sent to his solicitor (Mr. Hemming) for the documents which he desired to have at the meeting. He, however, only obtained some of them, as Mr. Hemming was not then in his office. With these, however, he attended the arbitration meeting. No other person was present before the arbitrator except the plaintiff and the defendant. The plaintiff stated in his evidence that the whole time of the meeting, which lasted about two hours, was occupied by the defendant Crowder in addressing the arbitrator, and that, except by way of occasional interruption and correction, he (the plaintiff) said nothing, and in spite of his remonstrances was not given any opportunity of stating his case. He further [304] stated that he was so dissatisfied

1894
JAN. 18.
ORIGINAL CIVIL.
18 B. 299.

with the way in which the meeting was conducted, and the refusal to allow him to speak, that he went immediately, at the close of the meeting, to his solicitor Mr. Hemming, complained that he could not get a hearing, and arranged that Mr. Hemming should represent him at the next meeting. Mr. Hemming gave evidence and corroborated the plaintiff on this point. The plaintiff swore that he had no idea that there was not to be another meeting.

On the other hand, the arbitrator and the defendant deposed that the plaintiff was fully heard, and that the points in dispute were taken up at the meeting and discussed *seriatim*, and that the business of the arbitration was then concluded. The arbitrator, however, in his evidence stated that no formal announcement to that effect was made.

On the following morning, *viz.*, the 19th July, the arbitrator sent the following note to the plaintiff and defendant:—

"Messrs. W. CROWDER & CO.,
and
Messrs. C. J. KHAMBATTA & CO.

"Gentlemen,—Will you do me the favour to let me have any contracts for sale or purchase of Davison's West Hartley coal that you may have entered into for May shipment between the 20th May and the 15th June.

"As also prices of same species of coal ruling in Bombay between the 1st and 7th July.

"I am, &c., &c.,
"(Signed) F. L. MCAFEE"

The plaintiff's reply was as follows:—

"*Bombay*, 19*th July* 1893.

"Dear Sir,—Referring to your enquiry in your memo, of to-day's date, we beg to state that as there was no coal to be got at the time, no rate was fixed.

"All that was going on, was the demand for May shipment by S. S. 'Indrapoora', which was offered at Rs. 17 (seventeen), but no sellers.

"The 'Indrapoora' completed her discharge on 30th June.

"Yours faithfully,
"(Signed) C. J. KHAMBA'TTA & CO."

The defendant's reply was the following:—

"*Bombay*, 19*th July*, 1893.

"Dear Sir,—In reply to yours of date, we beg to say that we have not sold any May shipment of Davison's between the dates mentioned by you since the 28th **[305]** June. We have tried to get an offer for the 'Ethelaida' cargo, and the best that we have had so far is Rs. 14.

"We send you copies of *Times of India*, *Gazette* and Messrs. Brooks & Co.' s Coal Circular for the 30th June, 7th and 14th July, from which you will see that the price quoted for ready Davison's is about Rs. 14, and this being so, Messrs. C. J. Khambatta are Rs. 1¼ to the good not having to take delivery of the cargo.

"Yours faithfully,
"(Signed) W. CROWDER & CO."

On the afternoon of that day (the 19th July) the arbitrator published his award, finding that the plaintiffs had sustained no loss by the

1894
JAN. 18.

ORIGINAL CIVIL.

18 B. 299.

defendants' failure to fulfil the contract of the 18th May, 1893, and that no compensation was due to the plaintiffs.

The plaintiff alleged that he was wholly taken by surprise in receiving the award; that he was altogether unaware that the enquiry before the arbitrator was concluded; and that he had fully expected that another meeting would be held, at which he could place his case before the arbitrator.

Immediately on receiving the award he wrote the following letter to the arbitrator:—

"19*th July*, 1893.

"To F. A. MCAFEE, ESQ.

"Dear Sir,—I am surprised to receive your letter with what you call your award. As you know quite well, I have not yet had the opportunity of putting my case before you, and no evidence whatever has been given. I shall take steps in the matter, and will, if I can, upset such conduct. It was distinctly understood last evening that there was to be another meeting, and I object to be imposed upon in this manner. It is ridiculous for you to state that the ruling rate was between 14 and 14½, and it shows that you know nothing about it. I have overwhelming evidence to show that the rate was much higher. I do not trouble to state anything further, but will ask you to return what papers you have of mine at once, and please to keep a list of them, as I shall show that you have not yet given me opportunity of putting all my papers before you, and I regret that you ever had anything to do with it."

"Yours faithfully,

"(Signed) C. J. KHAMBATTA."

Further correspondence took place between the plaintiffs and the arbitrator which is not material to this report, and on the 24th August, 1893, the plaintiffs filed this suit, praying for a declaration that proceedings with regard to the arbitration and award were invalid and not binding, and for Rs. 5,803-14-0 as damages for the defendants' breach of contract.

[306] The defendants pleaded the award, and denied the damages alleged by the plaintiffs.

Krikpatrick and *Russell*, for plaintiffs:—The award should be set aside—*Haigh* v. *Haigh* (1); Russell on Arbitration (7th ed.), p. 185 *et seq.*; *Hurpurshad* v. *Sheo Dyal*(2); *Harvey* v. *Shelton* (3); *Brook* v. *Delcomyn* (4); *Doddington* v. *Hudson* (5); Civil Procedure Code (XIV of 1882), s. 521; *Ganga Sahai* v. *Lekhraj Singh* (6). As to damages, Benjamin on Sale (4th ed.), pp. 916—923; *Hammond* v. *Bussey* (7); *Hinde* v. *Liddell* (8).

Jardine (with *Lang*, Advocate General), for defendant:—No case has been made out to set aside the award made by the arbitrator. The award is binding, unless misconduct is shown; Civil Procedure Code (XIV of 1882), s. 521. The evidence shows that the proceedings were properly conducted, and the award duly made. If, however, the award is set aside, the question will be what damages should be given. Mayne on Damages (4th ed.), p. 30; Contract Act (IX of 1872), s. 73, ill. (*l*), and Cunningham's Contract Act, note to s. 39; Benjamin on Sales (4th ed.), p. 755—906-7; *Phillpotts* v. *Evans* (9).

---

(1) 3 DeG. F. & J. 157 (166). (2) 3 I. A. 259. (3) 7 Bea. 455 (462-464).
(4) 16 C. B. (N. S.) 403. (5) 1 Bing. 384. (6) 9 A. 253.
(7) 20 Q. B. D. 79. (8) L.R. 10 Q. B. 265. (9) 5 M. & W. 475.

1894
JAN. 18.
ORIGINAL CIVIL.
18 B. 299.

JUDGMENT.

FARRAN, J.—On the 18th May, 1893, the defendants contracted to sell an entire cargo of Davison's West Hartley coal, May shipment, of 2,500—3,500 tons, to the plaintiff at Rs. 15-4-0 per ton. This contract the defendants were unable, or failed, to carry out; and the plaintiff now sues for damages for its breach. On the 5th July, the parties, being unable to arrive at a settlement, referred the matter to the sole arbitration of Mr. F. L. McAfee, and agreed to abide by his decision; and on the same day, Mr. McAfee undertook the arbitration. On the 19th July, the arbitrator published his award, and found that the plaintiff had sustained no loss by the defendants' failure to perform the contract, and that, therefore, no compensation was due to him.

Three questions arise upon the pleadings, and are embodied in the issues: (1) Whether the award is binding upon the plaintiff? **[307]** (2) Whether the plaintiff suffered damages by reason of the defendants' breach of contract? (3) What is the amount of such damage, if any? The plaintiff impeaches the award on various grounds. His charges of collusion and moral misconduct against the arbitrator were, for the most part, tacitly abandoned by his counsel; and as I consider that they were without foundation, I shall make no further allusion to them. Counsel, in reply, rested his case mainly upon the grounds (1) that the plaintiff had not a proper opportunity afforded to him of stating his own and meeting his opponents' case, and was taken by surprise by the award being made with too great precipitation, and (2) that the arbitrator had before him, and took into consideration, (*a*) papers and documents furnished to him by the defendants which the plaintiff had no opportunity of seeing, or discussing, or meeting by argument or counter-proof, and (*b*) evidence afforded by his own book which he did not inform the parties that he intended to use.

The following facts are not greatly in dispute. I shall indicate those upon which the parties are at variance. After the 5th July, the plaintiffs and the defendants sent in written statements of their respective cases to the arbitrator and some papers, but no meeting was held until after the 17th July, the arbitrator being anxious to arrange about his fees. These the defendants guaranteed to him by their letter of that date, asking him at the same time for a prompt decision. The defendants were evidently under the impression that the arbitrator might give his decision without holding a meeting. Their written statement, dated July 6th, ends with the following passage after offering to explain any points which might not be clear to the arbitrator:—"We would also suggest that, after you have gone into the case and before you finally decide, both sides be given the opportunity of meeting with you to discuss away any points that you may desire cleared. Perhaps Saturday afternoon, the 8th, may be convenient to you." The plaintiff does not appear to have read, or made himself acquainted with, the contents of the defendants' written statement. He expected the matter to be orally discussed, but whether in the presence of both parties, is not so clear. His case, with certain extracts referred to in it in the **[308]** form of rough notes, was received by the arbitrator before the 12th July. On the 18th July the defendant Crowder wrote a private and very urgent letter to the arbitrator to give his decision without delay, as the defendants' hands, he wrote, with reference to the "Ethelaida's" cargo, were tied until they knew it. On this the arbitrators wrote, appointing a meeting from

1894
JAN. 18.
ORIGINAL CIVIL.
18 B. 299.

3 to 5 that afternoon, to enable each of the parties to discuss the opposing points brought out in their respective statements. The plaintiff wrote that his papers were with his solicitor, and that he was writing for them, and would let the arbitrator know as soon as he received them. His solicitor sent him some papers, and he and the defendant Crowder attended the meeting, which lasted about two hours. Unfortunately, the arbitrator took a wretchedly meagre and most unsatisfactory note. It conveys no idea, to the mind, of what really took place. From the oral evidence, however, of the witnesses and what subsequently occurred, I think that it may safely be concluded that the salient points of the case underwent discussion, such as the meaning of the contract, whether the defendants had any valid excuse for their non-performance of it, and the date at which the coals ought to have been delivered; and that a more or less definite conclusion was arrived at as to these points, the parties being at one as to or not strongly contesting them; but as to what should be deemed to be the proper price of coal at the date of the performance, though that also was discussed, the parties took up very different positions, and, I think, the arbitrator had not and did not consider that he had materials before him to enable him to determine it. When the meeting broke up, nothing was said, I think, as to another meeting being held, nor, on the other hand, was it stated that the proceedings had terminated, and that the matter was ripe for an award; nor do I think that anything took place which would lead either of the parties necessarily to that conclusion. The defendant Crowder says that, at the end of the meeting, he wanted to raise the question of a sort of counter-claim which he contended for, and that the plaintiff objected, saying "I object to any more papers or documents going in; the case is finished;" but he is not borne out by the arbitrator as to this latter part of the plaintiff's statement. **[309]** The plaintiff did object to the defendant's entering upon his counter-claim, but the statement that he considered the case finished, is quite irreconcileable with his conduct immediately afterwards. What was to happen after the meeting was left, I find, quite vague and undetermined. That the defendant Crowder considered the proceedings terminated, is probable. Having made the suggestion as to the arbitrator's proper course which I have already read from his written statement, and knowing how urgently he had pressed the arbitrator for a special decision, it probably did not occur to him that a second meeting could be contemplated. The plaintiff's broad views on the subject of time and his ignorance of the defendant's letter urging the arbitrator to haste, would naturally lead him to a different conclusion. At the close of the meeting he saw his solicitor and discussed with him the desirability of his attending the next meeting.

The plaintiff complains that at this meeting he was not accorded a proper hearing and had no opportunity of explaining his case fully to the arbitrator, and says he remonstrated at the time in strong language, and, in support of this, he called his solicitor to give evidence as to the complaints he made to him after the meeting. The arbitrator and the defendant both deny that he made these remonstrances, and say that he had ample opportunity allowed to him for speaking. The plaintiff, I think, has over-coloured this part of his case, and has attributed to some possible petulant observations a weight which they did not convey to the mind of the hearers. His complaint to his solicitor cannot have been more than such as was suggested by the feeling that his arguments had not impressed the arbitrator as strongly as he desired. If his present account

is accurate, it is impossible to believe that he would not have written, or caused a letter of remonstrance to be written, to the arbitrator, or withdrawn from the arbitration. I am of opinion that nothing occurred at the meeting which would justify the Court in setting aside the award.

The next day (19th July) the arbitrator, at about 2 P.M., sent a duplicate letter to the plaintiff and to the defendants, running thus :—"Messrs. W. Crowder and Co. and C. J. Khambatta and Co. Gentlemen,—Will you do me the favour to let me have any contracts for sale or purchase of Davison's West **[310]** Hartley coal that you may have entered into for May shipment between the 20th May and 15th June, as also prices for same species of coal ruling in Bombay between 1st and 7th July." The plaintiff replied on the same day that, as there was no coal to be got at the time, no rate was fixed. All that was going on was the demand for May shipment by S. S. "Indrapoora," which was offered at Rs. 17, but no sellers. The "Indrapoora," he added, completed her discharge on 30th June. The defendants replied as follows :—"Dear Sir,—In reply to yours of date, we beg to say that we have not sold any May shipment of Davison's between the dates mentioned by you. Since the 20th June, we have tried to get an offer for the 'Ethelaida' cargo, and the best that we have had so far is Rs. 14. We send you copies of *Times of India*, *Gazette*, and Messrs. Brooks and Co.'s coal circular for the 30th June, 7th and 14th July, from which you will see that the price quoted for ready Davison's is about Rs. 14; and this being so, Messrs. C. J. Khambatta are Re. 1-4 to the good, not having to take delivery of the cargo." No further communication took place between the arbitrator and the plaintiff, and the plaintiff was unaware that the defendants had sent the above papers to the arbitrator. The arbitrator stated at the hearing that he had before him, as evidence, his own book and the result of his private enquiry as to rates; but that he did not inform the parties of this. The arbitrator after receipt of the defendants' letter and documents, and the plaintiff's letter, at once made his award and published it by sending it the same day to the parties at about 5 P.M. He awarded nothing to the plaintiff. The plaintiff immediately wrote a strongly-worded letter to the arbitrator, protesting against his conduct and the award, and stating that he had no further evidence to adduce, and asking him for a return of his papers. The arbitrator replied by simply sending the plaintiff his application for arbitration, and undertaking to return the plaintiff's papers on receipt of the amount. The plaintiff next day (21st July) sent a solicitor's letter to the arbitrator setting out his grievances in great detail. On the 28th August, the present suit was filed.

Such being the facts as I find them, the question arises whether the award is, at law, binding on the plaintiff? It follows, from **[311]** what I have said, that the plaintiff did not know that the defendant had sent to the arbitrator the particular accounts I have referred to, and that he did not see them or offer any comment upon them, and that no opportunity was afforded him of doing so, except that arising from his receiving the duplicate letters asking the defendant, as well as himself, to send contracts and rates to the arbitrator. Now it is a well-established principle of law that an arbitrator ought not to hear or receive evidence from one side in the absence of the other side, without, if he does, giving the side affected by such evidence the opportunity of meeting and answering it. In Russell on Awards (7th ed., p. 191), the proposition is put thus :—"Neither side can be allowed to use any means of influencing his (the arbitrator's) mind, which are not known to, and capable of being

1894
JAN. 18.
ORIGINAL CIVIL.
18 B. 299.

met and resisted by, the other. As much as possible the arbitrator should decline to receive private communications from either litigant respecting the subject-matter of the reference. It is a prudent course to make a rule of handing over to the opponent all written statements sent to him by a party, and to take care that no kind of communication concerning the points under discussion be made to him without giving information of it to the other side." And, again, (p. 194): "This course of conduct, of examining one party, or the witnesses of one party, or receiving evidence from one party in the absence of the other, is often adopted by mercantile arbitrators. But the Courts in the above instance and in many others, have strongly repudiated the idea that a different course is allowable in this respect in the case of mercantile referees; and although the lawful usage of merchants may be imported into the contract of reference, they have said that the practice of receiving evidence which the party affected has no opportunity of meeting, is not a lawful one." "In every case in which matters are litigated, you must attend to the representations made on both sides, and you must not, in the administration of justice in whatever form, whether in the regularly constituted Courts or in arbitrations, whether before lawyers or merchants, permit one side to use means of influencing the conduct and the decisions of the Judge, which means are not known to the other side." Per Lord Langdale, M. R. in *Harvey* v. *Shelton* (1).

[312] In laying down the above proposition, it must be understood that it is subject to this qualification that the parties may agree that a reference may be conducted in any particular way, and such an agreement may be either express or implied from their conduct during the arbitration; and they may also, expressly or by their conduct, waive their objection to an irregular course of conduct on the part of the arbitrator. In the present case, there is no evidence of any agreement, expressed or implied, that the arbitration was not to be conducted on the ordinary lines; and applying the above principles to what, in fact, occurred, I think that the receipt, by the arbitrator, of the papers and documents sent to him by the defendants, with the comments contained in the defendant's letter of the 19th July, without giving the plaintiff the opportunity of seeing them or meeting the inferences deducible from them, would amount to such a breach of duty on the part of the arbitrator as would entitle the plaintiff to have the award set aside. The difficulty in the case arises from the circumstance that the plaintiff must have known, from the arbitrator's joint letter, that the defendants were asked to send the arbitrator particulars of the ruling rates of coal, and that the defendants would adopt means to furnish the arbitrator with information on that subject, and yet did not remonstrate against this course, or ask to see the defendants' proofs, but contented himself by replying that there was no rate fixed by reason of the absence of sales. It may be said that this is an acquiescence, on the plaintiff's part, in the course adopted by the arbitrator. I do not think that this is so. If I am correct in my view of the facts, the plaintiff expected another meeting, and the arbitrator calling for fresh evidence was eminently calculated to impress him in that expectation. So expecting, he would understand that he would have the opportunity to see and answer the defendants' rates and proofs. There was, in this view, nothing in the arbitrator's conduct in asking for fresh evidence which called for remonstrance. When the arbitrator made his award without any meeting and

(1) 7 Beav. 455 (462).

without giving him an opportunity of seeing the defendants' proofs of rates, he was, in my judgment, completely taken by surprise, which he expressed in very strong and uncourteous language, which a man is apt to use when he considers that he has been **[313]** unfairly dealt with. Under these circumstances, the award cannot, I am of opinion, be held binding on the plaintiff. I need not, therefore, consider the further objections made to it that the arbitrator ruled upon evidence in the shape of his own contract, but which neither party knew that he proposed to use. In my own mind, I am not satisfied that he did use it as evidence. It was not among the documents which were shown to and initialled by the plaintiff's solicitor, but as I have held against the award on another ground. It is unnecessary to pursue the question further. His reference to the book further confirms me in my view, that the arbitrator was, on the 18th July, without materials to guide him in fixing the price of coal, and must then have himself contemplated further evidence being necessary. I find the first issue in favour of the plaintiff.

I now turn to the question of damages. The defendants had intended the "Ethelaida," which carried a cargo of 3,395 tons of Davison's West Hartley coal, to satisfy the plaintiff's contract. She did not load in May, and so her cargo did not fulfil the conditions of the contract. She left Port Said on the 21st June, and arrived in Bombay on the 22nd July. On the 14th June, it was known to the defendants that she had not loaded in May, and they informed the plaintiff of this, and offered to cancel the contract. They, however, later on the same day declared her against the contract. Time letters then passed, in which the parties fenced with each other, each knowing that though the "Ethelaida" had been declared against the contract, her cargo did not fulfil its requirements. It was not, however, till the 28th June that the defendant repeated the statement made in his earlier letter of the 14th June, and the plaintiff refused her cargo; and at the defendant's request sent in a statement of his alleged losses amounting to Rs. 5,800-14-0. On that day, or two or three days later, a May shipment of Davison's West Hartley coal might naturally be expected to arrive in Bombay. It is not important to fix the date with precision, even if it were possible to do so. There is no evidence of any alteration in the market price of Davison's West Hartley coal between the 28th June and the first few days of July. The defendants cannot, I think, object to the **[314]** 28th June being taken, as they asked for the plaintiff's bill of damages on that day. A question arises as to the number of tons upon which the damages should be calculated. The plaintiff has suggested 3,300 tons according to the charter-party of "Ethelaida," but the "Ethelaida" was never, so to say, incorporated into the contract. The defendants declared her against the contract, but after they had informed the plaintiff that she had not loaded in May, the plaintiff refused her cargo. The contract which the defendants have broken is a contract to deliver a cargo of 2,500—3,500 tons, and not a contract to deliver the "Ethelaida's" cargo, which they were always ready and willing to deliver. The option rested with the defendants whether they would deliver 2,500 or 3,500 tons or any intermediate quantity, and upon no principle can the Court exercise that option for them and declare that they were liable to deliver more than a cargo of 2,500 tons.

(His Lordship then discussed the evidence as to the damages and continued :—)

Taking all the circumstances into consideration, (including the price of June shipment of Davison's coal and coal of other classes), I have, as a

1894
JAN. 18.
ORIGINAL CIVIL.
18 B. 299.

juror, come to the conclusion that the plaintiff could have sold a cargo of Davison's coal arriving at the end of June at Rs. 15-12 per ton. I justify that finding, in point of law, by the consideration that this coal was selling at Rs. 17 per ton during the week ending 23rd June, and that the defendants have not established a greater fall than one rupee per ton the following week. I have taken off four annas per ton, feeling that there would probably have been a difficulty in selling the whole cargo at Rs. 16. This is almost the exact loss which the plaintiff sustained by not being able to satisfy his contracts for the 2,250 tons with the coal purchased from the defendants. I find the second issue for the plaintiff : and on the third, that the plaintiff be entitled to recover Rs. 1,250 from the defendants. I pass a decree for the amount, but make no order as to costs.

Attorneys for the plaintiffs : Messrs. *Turner and Hemming.*
Attorneys for the defendants : Messrs. *Roughton and Byrne.*

---

18 B. 315.

[315] APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Telang.

MANCHARAM PRANJIVAN (*Original Applicant*), *Appellant v.* BAI MAHALI AND ANOTHER (*Original Opponents*), *Respondents.**
[11th April, 1893.]

Succession Certificate Act (VII of 1889), *s.* 4 (*a*)—*Preamble—Representative of a deceased person—Person claiming to be entitled to the effects of the deceased—Purchaser at sale in execution of a decree against a deceased person.*

A certain debt due to P. (deceased) was sold in execution of a decree against him and was purchased by M. In order to enable him to recover the said debt, M applied to the District Judge for a certificate under the Succession Certificate Act (VII of 1889). The Judge rejected the application on the ground that the applicant was not a representative of the deceased.

Held, reversing the decree, that the applicant having purchased at the auction sale the debt as part of the deceased's effects, which was sold as such by the Court, was entitled to a certificate under s. 4 (*a*) of the Succession Certificate Act (VII of 1889).

FIRST appeal from the decision of J. B. Alcock, District Judge of Surat.

A firm named Motiram Kevalbhai was indebted to the extent of Rs. 1,075 to one Punjia Jagjivan, deceased, against whom a money decree was obtained by one Nathu Kasan in the Court of the Small Causes at Surat. In execution of the said decree the debt due by the firm of Motiram to the deceased Punjia was sold by public auction and purchased by Mancharam Pranjivan, who presented an application to the District Judge for a succession certificate, under Act VII of 1889, in order to recover the debt due to the deceased. The District Judge rejected the application, holding that the applicant was not a representative of the deceased.

The applicant appealed.

Govardhanram M. Tripathi, for the appellant.—It is not necessary that the applicant for a certificate under the Succession Certificate Act (VII of 1889) should be the actual heir of the deceased. Section 4 (*a*) of the Act expressly contemplates applicants like the present, and in such

---

* First Appeal No. 1 of 1893.

cases the preamble of the Act cannot be allowed to cut down the express enactment. In *Kirparam* v. *Nagindas* (1), the point has been virtually decided.

[316] There was no appearance for the respondent.

1893
APRIL 11.

APPELLATE CIVIL.

18 B. 315.

JUDGMENT.

SARGENT, C.J.—The District Judge dismissed the appellant's application for a certificate under s. 4 (*a*) of Act VII of 1889 on the ground that he was not a representative of the deceased Jagjivan, meaning, we presume, not his heir. The preamble to the Act speaks of representatives of the deceased. But s. 4 (*a*) expressly provides for the production of a certificate by a person suing the debtor of the deceased "who claims to be entitled to the effects of the deceased or to any part thereof." Here the appellant claims the debt as part of the deceased's effects which was sold as such by the Court and purchased by him at auction sale. In *Kirparam* v. *Nagindas* (1) it was apparently assumed, and we think correctly, that such a purchaser would require a certificate before the Court could pass a decree on the debt.

We must, therefore, reverse the decision of the lower Court and send back the case to be disposed of according to law without intending to express any opinion as to the merits. Costs to abide the result.

Decree reversed.

---

18 B. 316.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Telang.

LALITAGAR KESHARGAR (*Original Plaintiff*), *Appellant v.* BAI SURAJ (*Original Defendant No. 1*), *Respondent.**

[18th April, 1893.]

Husband and wife—Suit for restitution of conjugal rights—Cause of action—Jurisdiction.

The plaintiff sued his wife for restitution of conjugal rights in the Court of the Subordinate Judge of Borsad, within whose local jurisdiction the plaintiff resided. Ths defendant contended (*inter alia*) that the Subordinate Judge of Borsad had no jurisdiction to entertain the suit, on the ground that she was living outside his jurisdiction. The Subordinate Judge dismissed the suit for want of jurisdiction. On appeal by the plaintiff, the decree was confirmed. On second appeal,

[317] *Held*, reversing the decree, that the Court of Borsad had jurisdiction. The cause of action, in a suit by a husband for restitution of conjugal rights, consists in the wife's absenting herself from her husband's house without his consent, and it must, therefore, be deemed to arise at his house.

SECOND appeal from the decision of T. Hart-Davies, Joint Judge of Ahmedabad.

The plaintiff sued his wife Bai Suraj and others for restitution of conjugal rights. The suit was filed in the Court of the Subordinate Judge of Borsad, within whose local jurisdiction the plaintiff resided.

---

* Second Appeal No. 900 of 1891.

(1) P. J. for 1893, p. 55.

1893

APRIL 18.

APPELLATE CIVIL.

18 B. 316.

The plaint alleged that Bai Suraj was plaintiff's wife, and lived and cohabited with him till about a year and a half prior to the institution of the suit, when she went to reside at her father's house, and declined to return to the plaintiff. The other defendants, who were the parents and other relatives of Bai Suraj, were joined, as she was acting under their advice.

The defendants alleged that the plaintiff ill-treated his wife, and contended (*inter alia*) that the Subordinate Judge of Borsad had no jurisdiction to entertain the suit, because they (the defendants) resided at Kasore, a village in the Gaikwar's territory.

The Subordinate Judge decided all the issues, on the merits of the case, in the plaintiff's favour, but rejected the suit, on the ground of want of jurisdiction, for the following reasons:—

"It is now to be seen whether the Court has jurisdiction to entertain this claim against these defendants, who reside at a place outside the jurisdiction of the Court. Under s. 17 of the Civil Procedure Code a suit may be instituted in a Court within the local limits of whose jurisdiction (*a*) the cause of action arises, or (*b*) all the defendants at the time of the commencement of the suit actually or voluntarily reside or carry on business or personally work for gain, or (*c*) any of the defendants at the time of the commencement of the suit actually or voluntarily resides * * * *; provided that either the leave of the Court is given or the defendants who do not reside * * * * as aforesaid, acquiesce in such institution. It seems that neither the cause of action has arisen, nor the defendants Nos. 1, 2 and 3 actually or voluntarily reside within the jurisdiction of this Court. According to the plaintiff's own allegations and also [318] according to the allegations of his witnesses Nos. 26 and 30, the defendant No. 1 went by the permission of her husband (the plaintiff) to her parents' house with her brother. The plaintiff admits that he had sent the witness No. 32 to call her, but that she did not come. Thus the cause of action arose at Kasore and not at Borsad. The cause of action accrued where the demand was made, and that demand was met with refusal. * * "I find that the Court has no jurisdiction, and the suit must be dismissed."

On appeal by the plaintiff the Joint Judge concurred with the Subordinate Judge in his view as to jurisdiction, and confirmed the decree.

The plaintiff preferred a second appeal.

Govardhanram M. Tripathi, for the appellant.—It is the duty of married persons to live together—*Weldon* v. *Weldon* (1); *Dadaji* v. *Rukmabai* (2). The cause of action, therefore, in cases like this, arises at the place from which the wife improperly absents herself, that is, at the husband's house; see also *Binda* v. *Kaunsilia* (3).

JUDGMENT.

SARGENT, C. J.—It is unnecessary to consider where the defendant was residing at the time the suit was instituted. The cause of action, in a suit by a husband for restitution of conjugal rights, arises from the duty of the wife to reside with her husband, unless he has been guilty of some matrimonial offence, which justifies her, in the eye of the law, in living apart from him. See the remarks of Sir J. Hannen in *Weldon* v. *Weldon* (1). As the cause of action consists in absenting herself from her husband's

(1) 9 P.D. 52. (2) 10 B. 301. (3) 13 A. 126 (140).

house without his consent, it must be deemed to arise at his house. In this view of the cause of action, it arose, in the present case, at Borsad, and the Subordinate Judge had, therefore, jurisdiction. We must, therefore, reverse the decree, and send back the case to the lower Court of Appeal for disposal on the merits.

Decree reversed and case sent back.

---

18 B. 319.

[319] APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Bayley.

DE SOUZA DEVINO (*Original Plaintiff*), *Appellant v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL (*Original Defendant*), *Respondent.** [20th April, 1893.]

Service inam land—Suit for a declaration of title to trees thereon and for damages—Jurisdiction of Civil Courts—Section 4†, Clause (a) of the Bombay Revenue Jurisdiction Act (Bombay Act X of 1876)—Hereditary Offices Act (Bombay Act III of 1874)—Hereditary office—Hereditary officer—Officiator.

Section 4, cl. (*a*) of the Bombay Revenue Jurisdiction Act (Bombay Act X of 1876) is not intended to apply only to the property appropriated to the payment of the officiating member of a vatandar family, the expression used being "hereditary officer" and not the person performing the duties of the "hereditary office" to which by the Hereditary Office Act (Bombay Act III of 1874) the distinct denomination of "Officiator" is given.

The plaintiff complained that he was prevented from cutting the trees growing on land situate in the village of Tungarli, belonging to certain persons who had sold the trees to him. He claimed damages and an injunction restraining the Collector from interfering with him. The defendant pleaded that the trees did not belong to the plaintiff's vendors, being on service inam land. The lower Court dismissed the plaintiff's claim, holding that the land, on which the trees were growing, was service inam land, and that the plaintiff's vendors had no title to them. On appeal, the High Court, on the evidence, upheld the lower Court's decision that the land was inam service land, but held that it did not necessarily [320] follow that the trees upon it were the property of Government and not of the vatandars. The latter might be the owners of the trees subject to a condition. The case was, therefore, remanded to the District Court for a finding on an issue as to whether the holders of service inam lands had a title to the trees on the lands, and if so, whether they had the right to cut down trees without the permission of the Collector. On this finding the District Judge found in the affirmative. The case then came again before the High Court, when a preliminary objection was taken that under s. 4 of Act X of 1876 the Court had no jurisdiction.

---

* Appeal No. 45 of 1891.

† Section 4, cl. (*a*) of the Bombay Revenue Jurisdiction Act :—

4. Subject to the exceptions hereinafter appearing, no Civil Court shall exercise jurisdiction as to any of the following matters :—

(*a*) Claims against Government relating to any property appertaining to the office of any hereditary officer appointed or recognized under Bombay Act No. III of 1874 or any other law for the time being in force, or of any other village officer or servant, or

Claims to perform the duties of any such officer or servant, or in respect of any injury caused by exclusion from such office or service, or

Suits to set aside or avoid any order under the same Act or any other law relating to the same subject for the time being in force passed by Government or any other officer duly authorized in that behalf, or

Claims against Government relating to lands held under treaty, or to lands granted or held as saranjam, or on other political tenure, or to lands declared by Government or any other officer duly authorized in that behalf to be held for service.

1893

APRIL 20.

APPEL-LATE CIVIL.

18 B. 319.

Held, that it having been decided that the land in question was service inam land, the Court under s. 4. cl. (*a*) of Bombay Act X of 1876, ceased to have jurisdiction over the plaintiff's claim against Government in respect of the trees growing thereon, as such claims related to property appertaining to the office of a village officer.

FIRST appeal from the decision of T. Hart-Davies. Acting Assistant Judge of Poona.

Certain forest land (Survey No. 45) situate at the village of Tungarli, in the Poona District, belonged to one Sakharam bin Kondaji and his brothers, who were the vatandar patels of the village. In June, 1889, the plaintiff bought the trees standing in this land, and was proceeding to cut them down, when he was stopped by an order of the Forest Department dated 20th September, 1889. The Collector of Poona seized the wood that was cut and sold it, crediting the proceeds to Government. The plaintiff thereupon instituted this suit in the District Court of Poona, praying for damages and for an injunction restraining the Collector from preventing him cutting down the trees.

The defendant pleaded that the land was service vatan land, that the vatandars had no right to the trees growing upon it, and that the plaintiff was, therefore, not entitled to damages. The lower Court dismissed the plaintiff's claim, holding that the land was service inam land, and that the possession of land of that description did not, in the absence of an express stipulation in the *sanad*, include proprietary right in the trees growing upon it.

The plaintiff appealed.

Jardine (with *Shivram V. Bhandarkar*), for the appellant.

Rao Saheb *Vasudev Jagannath Kirtikar*, Government Pleader, for the respondent.

[321] 22*nd April*, 1892. SARGENT, C.J.—The plaintiff complains that he was prevented by order of the Collector of Poona from cutting the trees on certain land in the village of Tungarli belonging to Sakharam bin Kondaji and others, who had sold the trees to him, and from removing so much timber as he had already cut before the issue of the Collector's order. He sues for damages and for an injunction restraining the Collector from prohibiting him to cut the trees.

The defendant replies that the trees in question are not the property of the plaintiff's vendors, as they are on service inam land, the vendors being the holders of the patelki vatan of Tungarli, and that the amount of damages claimed is excessive.

The Assistant Judge has found that the plaintiff's vendors held the land, on which the trees were growing, as service inam, and that they had no title to the trees; and he has, therefore, rejected the claim.

The plaintiff's vendors are admittedly the patels of Tungarli; and the questions for consideration in this appeal are, *first*, whether they held the land in question as ordinary survey occupants, in which case their right to the trees would be undoubted, or whether the land forms part of their service inam land; and, *secondly*, if it forms a part of a service inam, whether the patels were owners of the trees sold to the plaintiffs and had the right to sell them without the Collector's permission,

The land is described in the documentary evidence, consisting of extracts from revenue records, as "No. 103" and as measuring 15 acres. This description does not correspond with that in the plaint; but it was not contended before us that the records produced in the case do not relate to the land in question. In those records, the land is entered as inam

land, in respect of which a quit-rent of Rs. 2, equal in amount to the assessment, was leviable. The land is *varkas* land, on which no assessment was imposed till 1859-60. The patels had, apparently, used the land for the purpose of obtaining loppings of trees therefrom to burn as *rab* on the rice fields in their vatan land. Occasionally, they cultivated parts of this forest land ; and when they did so, they paid a one-third share of the crop to the Government and retained **[322]** the remainder themselves. The share paid to the Government was credited in the Government accounts as *judi* or quit-rent, and the two-thirds retained by the patels were held to form part of the emoluments of the vatan. (See Exs. Nos. 11 and 13 in appeal.) In 1859 60, an assessment seems for the first time to have been placed on the land. On the 10th July, 1860, the Superintendent of Revenue Survey made an order, which, we were informed, was applicable to this land and other similar lands, in which he intimated to the Collector that an assessment had been imposed on them, and that one-third of the assessment should be levied and two-thirds given credit for, whether the lands were actually cultivated or not. He added : "If those people do not agree to this proposal, you should, without paying any heed to their claims, take steps to levy the whole of the assessment settled on the aforesaid numbers." The Collector ordered the Mamlatdar to act upon this order. It would appear that, when this order was made, the *varkas* land of the patels of Tungarli was regarded by the Revenue authorities as appurtenant to their vatan ; and it was subsequently entered in the revenue books as forming a part of the vatan. The mere circumstance that a full assessment was levied on it would not, apparently, of itself alter the nature of the tenure. Whatever sum was paid by the patels in respect of this land, was credited as *judi*, and the land seems always to have been treated as service inam. In a petition, Ex. 43, which Kondaji Patel made in 1863, for permission to cut 20 cart-loads of fuel on the land, he described it as inam land standing in his name as 'Patel Pasodi.' In a similar petition, No. 44, made in 1865, he describes the land as bearing an assessment of Rs. 2 and continued in his *vahivat* as inam granted to him as inam Patel Pasodi. Against these admissions by the father of one of the plaintiff's vendors, and the evidence supplied by the Collector's books, there is no evidence to show that the patels held the land as survey occupants and not as part of their service inam lands. We must, therefore uphold the Assistant Judge's decision that the land is inam service land.

By a Resolution No. 9578 of the 19th December, 1889, (Ex. No. 79) the Government sanctioned the proposals of the **[323]** Commissioners of Divisions for conferring rights to forests on the holders of certain service inams. This Resolution, however, if applicable to the patelki vatan in Tungarli, had not been issued when the trees in dispute were sold and cut down. But it cannot be safely inferred from the issue of this Resolution in 1889 that the vatandars, to whom it was applicable, had, previously, no rights to trees on their vatan lands. They are not the holders of a succession of life estates. The whole family of vatandars owns the vatan ; and the holders of land are presumably the owners of the trees on the land. It may be argued that, as the vatan was granted as remuneration for service, the holders at any time are bound to keep the estate unimpaired as a source of remuneration to the officiating vatandars and to pass it on unimpaired to each successive generation of vatandars. But it does not follow that trees which may not be recklessly felled by the vatandars are the property of Government and not of the vatandars. They may be the owners of the trees subject to a condition. In the present case, no evidence

1893
APRIL 20.
APPEL-
LATE
CIVIL.
18 B. 319.

has been pointed out to us as to the precise rights of vatandars in respect of trees on their service lands anterior to the issue of the Government Resolution of the 19th December, 1889. We think that enquiry should have been particularly directed to this point. As the evidence on the record is far too meagre to enable us to arrive at a satisfactory decision regarding it, we refer the following issue to the District Court for trial :—

Whether, before the issue of Government Resolution No. 9578 of the 19th December, 1889, the holders of service inam lands had a title to the trees on their lands ; and, if so, whether they had the right to cut down trees without the permission of the Collector ?

Both parties to be at liberty to adduce evidence on this point. The Court to certify its finding within three months.

On the above issue the District Judge (W. H. Crowe) found in the affirmative, but in his remarks he observed that the issue as framed was general, and did not confine itself to the land in dispute ; he, therefore, found in the affirmative with respect to the land in dispute as well as with respect to all service inam lands.

[324] Against the finding of the Judge the respondent (defendant) presented objections, which are not material for the purpose of this report.

Rao Saheb *Vasudev Jagannath Kirtikar*, Government Pleader, for the respondent (defendant).—We raise a preliminary objection with respect to jurisdiction. On the former occasion the Court found that the land in dispute was service inam land. Under the Bombay Revenue Jurisdiction Act (Bombay Act X of 1876), s. 3, the term "land" includes trees standing thereon ; therefore the appellant's claim to the trees means claim to the land which is service inam. But the Civil Courts have no jurisdiction to entertain a claim with respect to such lands, and, that being so, the appellant's claim to the trees cannot be entertained—s. 4 of the Act.

[SARGENT, C.J.—Why was not this point taken on the last occasion ?]

There were no instructions on the last occasion to urge the point. The objection is fatal to the appellant's claim.

Macpherson (with *Shivram V. Bhandarkar*), for the appellant (plaintiff).—The question to be considered is whether the claim relates to land at all. In order to oust the jurisdiction of the Civil Courts under the Revenue Jurisdiction Act the land must be declared to be service inam by the Government under s. 4. There is nothing, in the present case, to show that the Government has made any such declaration. What the Government did, was that the revenue of the land was credited as *judi*, and nothing more. But the crediting of the revenue as *judi* is quite a different thing from a declaration. It was impliedly argued that, as the Government credited the revenue as *judi* the act of the Government should be considered to be a declaration. But that cannot be done. The declaration by the Government must be strictly proved, and no amount of book-keeping will alter the character of the land.

[SARGENT, C.J.—Though there is no formal declaration by the Government, still the Government having all along treated the land as service inam, the conduct of the Government may amount to a declaration.]

[325] We submit that under s. 4 of the Act there must be an actual declaration by the Government, and without such declaration anything done by the Government cannot operate to our prejudice. A vatan cannot be brought into existence by a village kulkarni, who is merely a

village accountant, or by entries made in the revenue records. The present vatan is a new one, and s. 22 of the Vatandars Act (Bombay III of 1876) applies to it. Under that section the Government is authorized to create a vatan, and when the Government has exercised that authority, then under the Revenue Jurisdiction Act (X of 1876) the Government should by itself or by an officer duly authorized declare that a vatan has been so created. The Government may create a vatan; but, unless it is declared to be a vatan, it does not become a vatan as such.

We further contend that s. 4 of the Revenue Jurisdiction Act has no application to the present case, because it relates to the property of a hereditary officer, that is, the property which the officiating vatandar is to enjoy on account of the service rendered by him.

On the point of jurisdiction we contend that there are no materials before the Court to allow the plea; we, therefore, submit that the appeal should be decided on the merits.

(The case was then argued on the merits.)

JUDGMENT.

SARGENT, C.J.—In this case the Court, having found that the land in question was service inam land, sent down an issue for determination as to whether, before the issue of Government Resolution No. 9578 of 19th December, 1889, the holders of service inam lands had a title to the trees on their lands, and, if so, whether they had the right to cut down trees without the permission of the Collector. The District Judge has found this issue in the affirmative on two grounds, the first of which is applicable to the particular lands as being, in his opinion, "unalienated" land within the contemplation of s. 40 of the Revenue Code, V of 1879, and the second applies to all service inam lands.

A preliminary objection, however, has now been taken by Rao Saheb Vasudev Jagannath Kirtikar, for the defendant, that the **[326]** Civil Courts have no jurisdiction to try the question which is the subject of the issue sent down, as being a "matter" within the contemplation of s. 4, cl. (*a*) of Act X of 1876. It was said that this Court having decided that the land was service inam land, and not survey occupancy land as the plaintiff contended, it ceased to have jurisdiction over the plaintiff's claim against Government in respect of the trees, as such a claim would be "relating to property appertaining to the office of a village officer." We think that this is the necessary result of the above section. The plaintiff's claim, having regard to our finding and to the definition of 'land' as contained in the Act, undoubtedly "relates to property appertaining to the office of a hereditary officer." But it was said indeed that cl. (*a*) was only intended to apply to property appropriated to the payment of the officiating member of the family. The expression used, however, is "hereditary officer" and not the persons performing the duties of the "hereditary office" to which by the Hereditary office Act, III of 1874, the distinct denomination is given of "officiator," and by which we should expect him to have been referred to in s. 4, cl. (*a*) of the Act of 1876, had the intention been, as appellant contends it was, to confine the term "property" to his remuneration.

We feel, therefore, constrained to hold that the Court by deciding the land was service inam land ceased to have jurisdiction over the plaintiff's claim, and we must, therefore, reject the claim on that account with costs.

Decree confirmed.

1893
APRIL 20.

APPELLATE CIVIL.

18 B. 327.

18 B. 327.

[327] APPELLATE CIVIL.

Before Mr. Justice Candy and Mr. Justice Fulton.

KESHAVLAL GIRDHARLAL (*Original Plaintiff*), *Appellant v.* BAI PARVATI (*Original Defendant*), *Respondent.**

[20th April, 1893.]

Husband and wife—Restitution of conjugal rights—Decree—Decree not executed—Subsequent voluntary co-habitation followed again by desertion—Satisfaction of decree—Second suit for restitution of conjugal rights—Res judicata—*Cause of action—Civil Procedure Code (Act XIV of* 1882), *ss.* 13 *and* 244.

Plaintiff obtained a decree against his wife for restitution of conjugal rights in 1885 which was never executed. In 1887, however, she returned to his house, and stayed with him for two months. She afterwards deserted him again. Thereupon the plaintiff filed a second suit for restitution of conjugal rights.

Held, that the suit was not barred either under s. 13 or 244 of the Code of Civil Procedure (Act XIV of 1882). A second withdrawal from cohabitation constitutes a fresh cause of action.

THIS was a second appeal from the decision of T. Hart-Davies, Joint Judge of Ahmedabad, in appeal No. 75 of 1891 of the district file.

In 1885 the plaintiff obtained a decree against his wife for restitution of conjugal rights. He made several attempts to execute the decree, but failed. In June, 1887, however, his wife returned and lived with him for about two months. She applied to the Court to enter satisfaction of the decree in accordance with s. 258 of the Code of Civil Procedure (XIV of 1882). But this application was rejected on the ground that it was not made within twenty days.

Subsequently she again deserted the plaintiff, and in 1890 he filed this suit for restitution of conjugal rights.

This suit was dismissed by the Subordinate Judge on the ground that the matter was *res judicata*.

This decision was confirmed, on appeal, by the Joint Judge, who held that the plaintiff's only relief was by way of execution of the decree already obtained, but that that remedy was barred.

The plaintiff thereupon preferred a second appeal to the High Court.

[328] *Ganpat Sadashiv Rao*, for appellant.—The present suit is not barred under s. 13 of the Code of Civil Procedure. It is not based on the same cause of action as the former suit. The decree in the former suit was satisfied when the wife returned and stayed with her husband for some time. Her subsequent desertion gave a fresh cause of action. A wife's desertion of her husband constitutes a continuing wrong giving rise to constantly recurring causes of action, on demand and refusal. See *Bai Sari* v. *Sankla Hirachand* (1). The present suit is not, therefore, barred.

Rao Saheb *Vasudev Jagannath Kirtikar*, for respondent.—The plaintiff, having already obtained a decree for restitution of conjugal rights, his only remedy was to execute that decree, and not to bring a fresh suit for asserting the same rights. If a fresh suit, like the present, were permitted, there would be no end to litigation ; it would be in the power of the husband to detain his wife in jail for an indefinite period. Such a

---

* Second Appeal No. 7 of 1892.

(1) 16 B. 714.

result could not have been contemplated by the Legislature. Section 260 of the Code of Civil Procedure (XIV of 1882) clearly shows that, if the wife has once undergone imprisonment for six months for disobeying a decree for restitution of conjugal rights, the matter is at an end. She cannot be imprisoned again in execution of the decree. See *Ardesar Jahangir* v. *Avabai* (1). If further proceedings in execution are barred, *a fortiori* a fresh suit in respect of the same matter is equally barred, whether we take into consideration s. 13 or s. 244 of the Code of Civil Procedure.

JUDGMENT.

CANDY, J.—The facts in this case are simple. Plaintiff obtained in 1885 a decree for restitution of conjugal rights. He made some attempts to execute the decree, which apparently failed owing to his being unable to serve notice on defendant. Then defendant applied to the Magistrate for an order of maintenance against her husband. The Magistrate told her that she must go and live with her husband. She did so twice. It is clear that in 1887 she lived with him for two months. And she applied to the Subordinate Judge to enter up satisfaction of her husband's decree, but the Subordinate Judge replied that he could not do so under s. 258, as she had not applied within twenty days. **[329]** Then, in 1890, the present suit was filed by the husband, the Subordinate Judge at the same time deciding a suit filed by the wife for maintenance, holding that the husband had not turned the wife out of his house, and that she was not entitled to separate maintenance. The Subordinate Judge and the Joint Judge, in appeal, held that the husband's claim for restitution of conjugal rights must also be rejected. The Joint Judge was of opinion that as the wife's living with her husband in 1887 was not in execution of the decree, the husband's only relief was by way of executing his former decree, and that was now barred. I am unable to adopt that view, according to which, if the wife, after decree, went to live with her husband for three years and a day, though not in execution of the decree, and she then left her husband, he would be for ever barred from obtaining a fresh restitution of conjugal rights. Whether a husband, who has obtained a decree for restitution of conjugal rights, which can, in no sense, be said to have been satisfied, can at any time file a fresh suit for restitution, is not the question before us. Nor, indeed, is the question put by the Joint Judge, whether the husband having executed his decree by imprisoning the wife for six months can bring a fresh suit after a fresh demand and refusal. Here the wife returned to her husband and *bona fide* lived with him for two months. Then she left him. She may have a good defence of her conduct. Circumstances may have arisen entitling her to leave him. These, if existing, should be pleaded in a fresh suit if brought, rather than on an application for execution of the former decree. Therefore, I think that the lower Courts were wrong in holding that the present action is barred by the former suit of 1885. I would reverse the decision of the District Court, and remand the case for re-hearing. Costs to abide the result.

FULTON, J.—The Joint Judge having found that subsequently to the first decree for restitution of conjugal rights the defendant did return and live with her husband for a short time, I am unable to see on what principle it can be held that the present claim is barred by the previous suit. As pointed out in *Dadaji Bhikaji* v. *Rukmabai* (2), "the gist of the action for restitution **[330]** of conjugal rights is, that married persons are bound

(1) 9 B.H.C.R. 290.

(2) 10 B. 301 (311).

1893
APRIL 20.

APPELLATE CIVIL.

18 B. 327.

to live together, and that one or other has withdrawn himself or herself without lawful cause," and it does not seem possible to argue that a second withdrawal of a wife from cohabitation does not constitute a cause of action just as much as a first withdrawal. Consequently, it follows that, unless it can be shown that a second suit for restitution of conjugal rights is barred by some section of the Civil Procedure Code, such suit will lie. Now, if the Subordinate Judge's view were correct, that the decree in a suit for restitution of conjugal rights directed the defendant to live permanently with the plaintiff, there would be a great deal of force in the argument that either s. 13 or s. 244 would be a bar to a second suit; but I am unable to agree with him as to the real nature of the decree. No form is prescribed by the schedule to the Code, but the reported cases referred to in Woodman's Digest, columns 5100 and 5101, show that the proper form is simply that the wife do return and live with her husband. The learned Subordinate Judge has argued that such a decree is not limited as to time, and that, therefore, any subsequent desertion by the wife is a disobedience of the decree, and not a fresh cause of action. But it appears to me that the Court cannot direct a wife to live with her husband for the rest of her life, as many things may occur entitling her to leave him. Gross cruelty would justify her departure, and it would be very anomalous if the decree should direct permanent cohabitation without regard to the possibility of occurrences which might render it dangerous. All, then, that the decree appears to order, is that the wife do return to her husband's house in order to live with him, and when she has once done so with the *bona fide* intention of cohabitation, it seems that the decree is satisfied and incapable of further execution. In the case of *Motiram Harkisan* v. *Bai Mancha* (1), an application for execution was made by a husband on the desertion of his wife after her return to him for three days under a decree for restitution of conjugal rights, but the application was rejected on other grounds, and the question whether the wife's return for three days satisfied the decree, was not considered. The answer to such a question, however, would [331] appear to depend on the intention of the wife returning to her husband's house. If she did so with the *bona fide* intention of living with him, her return would, I think, constitute a complete satisfaction of the decree; but if she had not such intention, and meant to run away again after a merely nominal compliance, the Court would probably hold that the decree was not satisfied. The intention could only be determined by reference to the circumstances of her return and subsequent withdrawal.

In the present case, it appears that the wife applied to the Court, under s. 258, to enter satisfaction of the decree, but that her application was refused, as the time for making it had expired. It may well be doubted whether s. 258 has any application to a decree for restitution of conjugal rights; but the fact that she made such application, shows that she intended to live with her husband when she returned to his house, and that the decree has, in fact, been satisfied.

Under these circumstances, I think that the subsequent withdrawal of the wife gave a fresh cause of action; but I abstain from deciding whether, whilst a decree for restitution remains unsatisfied, a husband can file a second suit based on the continued absence of his reluctant wife, and thereby, as feared by the Subordinate Judge, succeed in detaining her permanently in jail, or whether such second suit to obtain a result already

(1) P.J., (1876), p. 129.

directed by the first decree will not be barred by s. 244, Civil Procedure Code.

I concur in reversing the decree of the Courts below, and remanding the case to the Court of the District Judge for disposal on the other issues arising between the parties, and in directing that the costs of this appeal do abide the result.

Decree reversed.

1893
APRIL 20.
APPELLATE CIVIL.
18 B. 327.

---

18 B. 332.

[332] APPELLATE CIVIL.

Before Mr. Justice Candy and Mr. Justice Fulton.

TRIKAM MADHAV SHET (*Original Plaintiff*), *Appellant v.* HIRJI HARJIVAN SHET (*Original Defendant*), *Respondent.** [12th June, 1893.]

Registration—Mortgage—Priority—Unregistered mortgage with possession and without notice not entitled to priority as against a mortgage earlier in date, but subsequently registered—Bombay Regulation IX of 1827—*Act XIX of* 1843—*Possession—Hindu law.*

The plaintiff sued to enforce a mortgage dated 8th June, 1863, which was registered on 15th September, 1864, but was unaccompanied with possession. The defendant relied on a mortgage of the same property dated 9th May, 1864. This mortgage was unregistered, but was accompanied with possession.

Held, that, apart from any special peculiarities of Hindu law, the plaintiff's mortgage of the 8th June, 1863, which was registered on the 15th September, 1864, was entitled to priority over the unregistered mortgage of the 9th May, 1864, although the latter was without notice of the earlier mortgage and was accompanied with possession,

Held, also, that plaintiff's mortgage was not invalid under Hindu law owing to its not being accompanied with possession.

[R., 27 B. 452 (472).]

SECOND appeal from the decision of C. E. G. Crawford, District Judge of Thana, in Appeal No. 225 of 1890.

The plaintiff sued to enforce his mortgage lien by sale of a portion of the property mortgaged.

He claimed under three following mortgage-deeds executed by the defendant Bhagu and his father Chimnia, each being a renewal of the one preceding it, *viz.*—

(1). 11th January, 1860, not registered or accompanied with possession.

(2). 8th June, 1863 registered on the 15th September, 1864, but not accompanied with possession.

(3). 4th August, 1867, registered, but not accompanied with possession.

The present suit was filed in 1889. Defendants Nos. 1 to 4 did not contest the claim.

Defendant No. 5 pleaded that he was in possession, and he relied upon a mortgage executed by Bhagu and Chimnia to one Mahadaji Ravji, dated 9th May, 1864, which was not registered **[333]** but which was accompanied with possession. He contended that he was entitled to the benefit of this mortgage, he having, in 1878, advanced

---

* Second Appeal No. 955 of 1891.

1893
JUNE 12.

APPELLATE CIVIL.

18 B. 332.

money to Bhagu and Chimnia to pay it off, and having then obtained a fresh mortgage to himself, which was duly registered and under which he had ever since been in possession.

The Subordinate Judge passed a decree for the plaintiff, holding that though the defendant was entitled to the benefit of Mahadaji's mortgage, Mahadaji had notice of the plaintiff's prior mortgages, and that plaintiff, therefore, had a preferential right over the defendant, who stood in Mahadaji's place.

On appeal, the District Judge reversed the lower Court's decree, holding that there had been no sufficient notice to Mahadaji of the plaintiff's prior mortgage.

The plaintiff filed a second appeal to the High Court.

The question argued was whether the plaintiff's mortgage of 8th June, 1863, was preferable to Mahadaji's later mortgage of 9th May, 1864, which, though unregistered, was accompanied with possession; the plaintiffs' mortgage not having been registered until the 15th September 1864.

Vasudev Gopal Bhandarkar, for appellant.

Mahadeo Chimnaji Apte, for respondent.

The following authorities were referred to in argument:—*Hari Ramchandra* v. *Mahadaji Vishnu* (1); *Balaram Nemchand* v. *Appa* (2); *Lallubhai* v. *Bai Amrit* (3).

JUDGMENT.

CANDY, J.—The mortgage of 8th June, 1863, which the plaintiff seeks to enforce, was registered on the 15th September, 1864, but was unaccompanied with possession.

The mortgage to Mahadaji relied on by the fifth defendant was dated the 9th May, 1864, and was accompanied with possession, but was unregistered.

The portions of the Registration Law in force when these transactions took place, which govern this case, are contained in s. 6 of Reg. IX of 1827 and s. 2 of Act XIX of 1843, and are as follows:—

[334] Section 6 of Reg. IX of 1827:—"Every deed or other writing transferring or mortgaging immoveable property situated within the zilla if registered in the register of title-deeds shall, without regard to the date of execution, if proved to be valid, be preferred to and satisfied before any deed of the nature of those * specified in s. 3, cl. 1, either subsequently registered or not registered at all; but this preference shall extend only to the immoveable property thereby transferred or mortgaged."

Section 2 of Act XIX of 1843:—"And it is hereby enacted that from the first day of May last past every deed of sale, or gift of lands, houses or other real property, a memorial of which has been or shall be duly registered according to law, shall, provided its authenticity be established to the satisfaction of the Court, invalidate any other deed of sale or gift for the same property which may not have been registered, and whether such second or other deed shall have been executed prior or subsequent to the registered deed; and that from the said day every deed of mortgage on land, houses, and other real property, as well as certificates of the discharge of such incumbrances, a memorial of which has been or shall be duly registered according to law, and provided its authenticity

* Sanads, deeds of sale, gift, devise, or mortgage of lands, houses, offices or other immoveable property situated within the zilla, &c.

(1) 8 B H.C.R.A.C.J. 50. (2) 9 B.H.C.R. 121. (3) 2 B. 299.

be established to the satisfaction of the Court, shall be satisfied in preference to any other mortgage on the same property which may not have been registered, and whether such second or other mortgage shall have been executed prior or subsequent to the registered mortgage, any knowledge or notice of any such unregistered deed or certificate alleged to be had by any party to such registered deed or certificate notwithstanding."

The District Judge has found, on the evidence, that it is not proved that when Mahadaji obtained his mortgage of the 9th May, 1864, he had any notice of the prior mortgage of 8th June, 1863, and no grounds have been shown to us for questioning the correctness of this finding.

[335] On these facts it seems clear that, apart from any special pecularities of Hindu law, the mortgage of 8th June, 1863, registered on 15th September, 1864, must prevail over the unregistered mortgage of 9th May 1864. The language of s. 2 of Act XIX of 1843 is so clear as to admit of no dispute on this point. But it was urged that, as the parties were Hindus, the mortgage of the 9th May, 1864, must get preference, as it was accompanied with possession. The case of *Balaram Nemchand* v. *Appa* (1) and of *Lallubhai* v. *Bai Amrit* (2) were relied on to support this theory. But in the former of these cases the unregistered deed of sale accompanied with possession was anterior in date to the registered mortgage; and in the latter both documents were registered and the latter was preferred to the earlier, on the ground that it was accompanied with delivery of possession, which under Hindu law was held essential to complete the title of the vendee. On the other hand, there is the decision of Couch, C. J., and Warden, J., in the case of *Sunder* v. *Gopal* (3) (which does not seem to have been alluded to in *Lallubhai* v. *Bai Amrit*), of which the facts are fully explained on p. 182 of I.L.R., 6 Bom., in the judgment in *Lakshmandass Sarupchand* v. *Dasrat*. The remarks made in that judgment on this case are as follows:—

"*Sundar* v. *Gopal* (3) decided by the High Court (Couch, C. J., and Warden, J.) in 1867 was a case from the Konkan. It was a struggle between a registered mortgagee without possession against a subsequent purchaser with possession. The dates show that it must have turned wholly upon the force of Reg. IX of 1827, s. 6, and not upon any theory as to registration being notice. The mortgage was dated 22nd March, 1851. The deed of purchase was dated 12th March, 1855. The mortgage was registered on the 19th October, 1859, and the deed of purchase (as an examination of the records shows was registered on the 24th December, 1860. The registration of the mortgage, being subsequent to the execution of the deed of purchase, could neither have afforded notice, nor the means of obtaining notice, of the mortgage to the purchaser before he made his purchase and **[336]** obtained possession of the mortgaged premises; but the registration of the mortgage being anterior to the registration of the deed of purchase, gave, by virtue of Reg. IX of 1827, s. 6, to the mortgagee priority over the purchaser notwithstanding his possession. The parties were Hindus."

The facts of this case are, it will be noticed, very similar to those of the present case. In both the earlier cases, the mortgage unaccompanied with possession was not registered till after the delivery of possession to the subsequent alienee. The only difference is that in *Sundar* v. *Gopal* the later conveyance was a deed of sale, while here it was mortgage.

(1) 9 B. H. C. R. 121. (2) 2 B. 299. (3) 4 B. H, C. R. A, C. J. 68.

1893
JUNE 12.
APPELLATE CIVIL.
18 B. 332.

This distinction, however, does not seem to affect the decision. In the earlier case the judgment was based on Reg. IX of 1827. In the present instance, as both documents were of the same class and notice of the earlier was not proved, we may rely both on the Regulation and on Act XIX of 1843, by either of which the registered mortgage is to be preferred to the unregistered document. It is true that in *Lallubhai* v. *Bai Amrit* (1) the Court laid stress on the necessity of a transfer of possession as the complement of a contract of sale in order to effect an absolute change of ownership; but this judgment is qualified by the decision of the Privy Council in *Kali Das Mullick* v. *Kanhya Lal Pundit* (2), which has been followed by this Court in *Ugarchand* v. *Madappa* (3), *Lullubhai* v. *Keso* (4), *Shankar* v. *Visaji* (5), and *Ramchandra* v. *Mhasu* (6). Moreover, in *Lallubhai* v. *Bai Amrit* it was pointed out that the transfer of possession might be replaced by registration.

We are, therefore, unable to hold that the registered mortgage, on which the plaintiff relies, was invalid by Hindu law owing to its not being accompanied with possession; and as it was anterior in date to Mahadaji's mortgage (though subsequently registered), it is impossible to apply the reasoning followed in *Balaram Nemchand* v. *Appa* (7), in which it was held that a vendor having by an unregistered deed sold an estate, and having completed the **[337]** transaction by delivery of possession, retained no interest therein on which a subsequently executed and registered deed of sale could operate. This judgment was explained in *Sambhubhai* v. *Shivlaldas* (8) as follows:—"What we decided in that case was that the priority given by Reg. IX of 1827 and Act XIX of 1843 to registered over unregistered instruments did not operate to defeat the title of a person who had obtained possession under an unregistered conveyance previously to the execution of a registered conveyance to another person."

Under these circumstances, then, we think that we must follow the decision in *Sunder* v. *Gopal* (9), which is strictly in accordance with the provisions of the registration law in force when the transactions took place, and has never been overruled. We, accordingly, reverse the decision of the District Judge and restore that of the Subordinate Judge, with costs on the respondent (defendant No. 5) in this Court and the lower appellate Court.

Decree reversed.

(1) 2 B. 299.
(2) 11 I. A. 218.
(3) 9 B. 324.
(4) P. J. (1886), p.33.
(5) P.J. (1886), p. 35.
(6) P.J. (1888), p. 14.
(7) 9 B.H.C. R. 121.
(8) 4 B. 89 (92).
(9) 4 B.H. R. A.C. J. 68.

18 B. 337.

1893
JUNE 12.

APPELLATE CIVIL.

APPELLATE CIVIL.

18 B. 337.

Before Mr. Justice Candy and Mr. Justice Fulton.

FRAMJI DORABJI GHASWALA (*Original Defendant No.* 1), *Appellant* *v.* ADARJI DORABJI GHASWALA (*Original Plaintiff*), *Respondent.**

[12th June, 1893.]

Indian Succession Act (*X of* 1865), *ss.* 190, 266—*Executor* de son tort—*Suit by one executor* de son tort *against another*—*Letters of administration*—*Administration suit.*

D, a Parsi, died intestate in 1877, leaving him surviving a widow, three daughters and two sons A and F. On D's death his sons without taking out administration assumed the management of the estate, and each received sums of money on account of it. The widow and daughters of the deceased obtained letters of administration, but limited to the extent of their interest in the estate. In 1888 A brought a suit against his brother F and the other members of the family to recover out of the estate a certain sum of money advanced by him to D.

[338] *Held*, that the estate being unrepresented, the suit could not be maintained (s. 190 of Act X of 1865). The letters of administration issued to the widow and daughters of the deceased being limited only to the extent of their shares in the estate, were not letters of administration such as are meant by s. 190 of the Indian Succession Act (X of 1865).

Held, also, that the only course open to the plaintiff was to take proceedings for the appointment of an administrator of the estate who would either administer it by the payments of the debts and the distribution of the surplus (if any) amongst the heirs after taking an account of all property already received out of it by the creditors or heirs or who could be compelled to do so by an administration suit.

[R., 7 Ind. Cas. 242=20 M L.J. 984 (985)=8 M.L.T. 77=(1910) M.W.N. 272.]

APPEAL from the decision of L. G. Fernandez, First Class Subordinate Judge of Poona, in Suit No. 88 of 1888.

One Dorabji Pestonji Ghaswala died intestate on the 23rd August, 1877, leaving him surviving two sons, Adarji and Framji, a widow, and three daughters. He left considerable moveable and immoveable property at Poona.

On his death his estate was managed by his sons Adarji and Framji. Both of them collected the rents and outstandings of the estate and both dealt with the creditors of the deceased by executing and renewing *khatas* in their favour. They even mortgaged a portion of the estate to pay off the debts of the deceased. But they did not take out letters of administration to the estate of their deceased father.

The widow and the daughters of the deceased obtained letters of administration, but limited to their shares or interests in the deceased's estate.

In 1888 Adarji filed a suit against his brother Framji and all other members of the family to recover a sum of Rs. 61,948-8-0 alleged to be due to him on account of moneys lent and advanced to his deceased father from time to time during his life-time. He sought to recover the amount by sale of the deceased's property.

Defendant No. 1, Framji, denied the alleged loans to the deceased, and contended that the suit was not maintainable in its present form.

Defendants Nos. 2, 3 and 4 admitted the plaintiff's claim.

---

* Appeal No. 6 of 1891.

1893
JUNE 12.
APPELLATE CIVIL.
18 B. 337.

The Subordinate Judge passed a decree in plaintiff's favour, directing that the amount claimed should be recovered by sale of the deceased Dorabji's property.

[339] Defendant No. 1 appealed to the High Court.

Macpherson (with him *Shivram Vithal Bhandarkar*), for appellant (defendant):—Dorabji died intestate. Neither the plaintiff nor any other member of his family has taken out letters of administration in respect of the deceased's estate. That being the case, the suit must fail under s. 190 of the Indian Succession Act (X of 1865). The letters of administration granted to the deceased's widow and daughters are only limited to their right of suing for their shares. There is no provision in the Act for granting letters of administration otherwise than of the whole estate—*In re Bai Ferozbai* (1); *In the goods of Ram Chand Seal* (2). As a creditor, the plaintiff might and ought to have obtained letters of administration. His proper remedy was an administration suit. He cannot be allowed now to convert the present suit into an administration suit.

P. M. Metha (with him *Ghanasham Nilkant Nadkarni*), for respondent (plaintiff):—The defendant No. 1 has been managing the estate of his deceased father ever since his death. In the absence of letters of administration he made himself an executor *de son tort*. As such, he is answerable to a creditor like the plaintiff to the extent of the assets that may have come into his hands. We can, therefore, proceed against him under s. 266 of the Act X of 1865. As to the necessity of obtaining letters of administration under s. 190 of the Act, this point does not appear either in the pleadings or the issues raised in the lower Court. It must be, therefore, taken to have been waived. It would not be right to reject the claim on this technical ground.

JUDGMENT.

CANDY, J.—The plaintiff, who is the son of the late Dorabji Pestonji Ghaswala, has sued his brother defendant No. 1 and other members of his family to recover Rs. 61,948 said to be due to him from the estate of his father. The first Class Subordinate Judge passed a decree for the amount claimed with subsequent interest recoverable by the sale of certain properties described in the plaint and, in case of deficiency, from the other estate of Dorabji Pestonji.

[340] Against this decree the first defendant has appealed. At the commencement of the hearing, his counsel, Mr. Macpherson, raised the objection that the suit was wholly barred by s. 190 of the Indian Succession Act. The point was taken in the lower Court, but was disposed of by the Subordinate Judge with the following remark:—

"It was urged that s. 190 of the Indian Succession Act bars this suit. But it has been admitted that letters of administration of Dorabji's estate have already been issued to some of the defendants."

To this mode of dealing with the question Mr. Macpherson objected, stating that the only letters of administration issued were granted to the widow and daughters of the deceased, limited to the extent of their interests in the estate. He contended, on the authority of *In Re Bai Ferozbai* (1) and *In the goods of Ram Chand Seal* (2), that such limited administration could not be granted and was wholly invalid; but, without deciding whether the letters in question have any validity in regard to the shares of the ladies who obtained them, it seems clear that

(1) P. J. (1884) p. 172.

(2) 5 C. 2.

they are not letters of administration such as are meant by s. 190. They purport to deal only with such shares in the estate as the ladies may be entitled to, and thereby expressly exclude the portions of the estate required for the payment of the deceased's debts.

Mr. Mehta, however, contended that the suit would lie under s. 266 of the Succession Act (X of 1865), in as much as Framji by intermeddling with the deceased's estate was an executor of his own wrong. Now there can be no doubt that a creditor may sue an executor *de son tort* for the recovery of his claim; and assuming that the plaintiff was a creditor as he alleged in his plaint, and that Framji had intermeddled with his father's estate and had assumed the management of it, we held that we could not, at that stage, without going into the evidence, dismiss the claim, which *prima facie* was sustainable against defendant No. 1 to the extent of the assests which might have come into his hands. **[341]** But on examining the evidence it became abundantly clear that the plaintiff was, just as much as his brother, an executor *de son tort*. and Mr. Macpherson thereon renewed his claim for the dismissal of the suit on the ground that without taking out administration one executor of his own wrong could not sue another or enforce his claims against the estate. This contention must, we think, prevail. The plaintiff's own evidence shows that after the death of their father on 23rd August, 1877, both brothers assumed the joint management of his estate. Sometimes the one recovered the rents due for bungalows belonging to the estate and sometimes the other. The plaintiff collected all the rent due by Mr. Moore after Dorabji's decease. Some of it was credited in the family account books and some not. The plaintiff cashed one cheque for Rs. 6,000 and gave another for Rs. 7,000 to Framji. He received and retained a sum of Rs. 4,000, as he had paid some of the deceased's creditors out of his own funds. He joined with Framji in executing and renewing *khatas* in favour of other creditors of the deceased, and in mortgaging to one Natu some of the deceased's property. The family account books remained under the control of both brothers, as is clear from the fact that in February, 1888, the plaintiff had them examined by his own pleaders, while, in the following month, Framji removed some of them, at least temporarily (we are not now considering the question whether he abstracted two of them altogether), and subsequently returned them to the karkun Bapuji. Under these circumstances, until an account is taken in an administration suit of all the sums that have come into the hands of the plaintiff on the one side and Framji on the other, it is impossible to say to what extent the plaintiff remains a creditor of the estate. The Subordinate Judge has dealt with the subject in discussing the 5th issue; but we are unable to agree with him in thinking that this suit having been brought by the plaintiff as one of the creditors of Dorabji's estates, other accounts between him and Dorabji's estate as one of the heirs of Dorabji cannot be imported into it, or that an administration suit would not be a more appropriate remedy. Until we know what amount the plaintiff has hitherto received out of Dorabji's estate it is impossible to say to what **[342]** extent that estate remains indebted to him. Under these circumstances we consider—(1) That the only course open to the plaintiff was to take proceedings to obtain the appointment of an administrator of the estate who either would administer it by the payments of the debts and the distribution of the surplus (if any) amongst the heirs after taking an account of all property already received out of it by the creditors or heirs, or who could be compelled

1893
JUNE 12.

APPEL-
LATE
CIVIL.

18 B. 337.

to do so by an administration suit; and (2) that this suit must be dismissed with costs throughout.

This finding renders it unnecessary to go into the other questions argued on the appeal, and we, therefore, think it needless to express an opinion as to the validity of the alleged equitable mortgage or the effect of the alleged payment of interest by Framji. As, however, serious aspersions were thrown on Framji's character in reference to the disappearance of the books, and the whole of the evidence on this point was fully discussed, we think it right to say that that evidence, though it gives rise to some suspicion, does not appear to us to prove conclusively that the missing books were stolen or abstracted by him.

Decree reversed.

---

18 B. 342.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Telang.

HARI BALKRISHNA JOGLEKAR (*Original Defendant*), *Appellant v.* NARO MORESHVAR JOGLEKAR (*Original Plaintiff*), *Respondent.**

[15th June, 1893.]

Contract—Contract Act (IX of 1872), s. 23—Unlawful consideration—Agreement by plaintiff and defendant not to bid against each other at an auction—Specific Relief Act (I of 1877), s. 35—Void contract.

There is nothing necessarily unlawful in two or more persons agreeing not to bid against one another at an auction sale.

[343] In order that a contract should be set aside under s. 35 (1) (*b*) of the Specific Relief Act (I of 1877), the plaintiff should be shown to have been less to blame in the transaction than the defendant.

[F., 37 P.R. 1901=97 P.L.R. 1901; R., 24 B. 622 (627)=2 Bom. L.R. 483; 1 C.L. J. 85 (89); U.B.R. (1897—1901) 317.]

SECOND appeal from the decision of Rao Bahadur Kashinath Balkrishna Marathe, First Class Subordinate Judge of Ratnagiri with appellate powers.

Suit for the cancellation of a bond.

The plaintiff alleged that certain land, portion of which had been mortgaged to him and the rest to the defendant Balaji Keshav, was attached by one Govind Nagesh in execution of a money decree which he

---

* Second Appeal No. 1000 of 1891.

(1) Section 35, Specific Relief Act (I of 1877):—

Any person interested in a contract in writing may sue to have it rescinded, and such rescission may be adjudged by the Court in any of the following cases, namely:—

(*a*) where the contract is voidable or terminable by the plaintiff;

(*b*) where the contract is unlawful for causes not apparent on its face, and the defendant is more to blame than the plaintiff;

(*c*) where a decree for specific performance of a contract of sale, or of a contract to take a lease, has been made, and the purchaser or lessee makes default in payment of the purchase-money or other sums which the Court has ordered him to pay.

When the purchaser or lessee is in possession of the subject-matter, and the Court finds that such possession is wrongful, the Court may also order him to pay to the vendor or lessor the rents and profits, if any, received by him as such possessor.

In the same case, the Court may, by order in the suit in which the decree has been made and not complied with, rescind the contract, either so far as regards the party in default, or altogether, as the justice of the case may require.

(Govind) had obtained against Balaji Keshav ; that, after the attachment had been levied, he and the defendant had agreed that they would together pay off the debt due to Govind, plaintiff paying Rs. 200 of it and the defendant the remainder ; that Govind should apply to the Court to sell the mortgaged land in separate lots, and that the plaintiff and the defendant would not bid against each other at the sale, but that each would purchase the portion of the land which had been mortgaged to him ; that, of the Rs. 200 promised by the plaintiff, Rs. 100 should be paid by him immediately and the other Rs. 100 after the sales had taken place.

At the time of the agreement, however, the plaintiff had no money with him. It was arranged, therefore, that the defendant should at once pay this Rs. 100 to Govind, and the plaintiff executed a bond to the defendant for that amount.

[344] The plaintiff alleged that at the auction sale, which afterwards took place, the defendant, in breach of the above agreement, purchased some of the land which had been mortgaged to the plaintiff, and thus failed to fulfil the condition under which the bond had been passed. The plaintiff, therefore, brought this suit to have the bond for Rs. 100 cancelled.

The defendant denied that any agreement of the nature alleged by the plaintiff had been made, and alleged that when the lands of Balaji Keshav were attached by Govind Nagesh, the plaintiff applied to have the attachment raised, and had promised to pay Govind Nagesh Rs. 100 if he would not oppose the application ; that as the plaintiff had at the time no ready cash with him, he got the defendant to pay the money for him, and for this payment had executed the bond to the defendant. He further contended that the agreement alleged by the plaintiff was illegal.

The Subordinate Judge (Rao Saheb M. G. Phatak) found that the plaintiff's allegations were proved, and that the consideration and object of the agreement were unlawful under s. 23 of the Contract Act (IX of 1872), and that the bond was, therefore, void and should be cancelled (1). He passed a decree for the plaintiff. In his judgment he said :—

"The agreement alleged and proved by the plaintiff is without any consideration, or at least the consideration or object of the agreement was unlawful. The parties had agreed to purchase the lands mortgaged to them alone, and were not to interfere **[345]** with the bids of each other. This was certainly injurious to the interest of the judgment-debtor, as the parties by their agreement had consented to allow each other to purchase the property at the lowest possible bids amongst themselves. The consideration or object of the agreement becomes unlawful under s. 23 of the Contract Act, as it implies injury to the property of the third person. Any bond executed in pursuance of such an agreement inherits the defect of the original agreement, and must on that account be held to be void."

---

(1) Section 23 of the Contract Act (IX of 1872) :—

The consideration or object of an agreement is lawful unless—

it is forbidden by law ; or

is of such a nature that, if permitted, it would defeat the provisions of any law ; or

is fraudulent ; or

involves or implies injury to the person or property of another ; or

the Court regards it as immoral, or opposed to public policy.

In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.

Section 24.—If any part of a single consideration for one or more objects, or any one or any part of any one of several considerations for a single object, is unlawful, the agreement is void.

1893
JUNE 15.
APPELLATE CIVIL.
18 B. 342.

On appeal by the defendant the Court confirmed the decree on the following grounds :--

"Under s. 24 of the Contract Act, where any one of the objects, or any part of the consideration, is illegal, the contract is void. Under the circumstances disclosed by the evidence, an illegal object has entered into the transaction, of which the bond sued on is a part, and the bond is, therefore, void on account of its not being executed for a purely legal consideration * *. The parties are *in pari delicto*."

The defendant preferred a second appeal.

Ganesh Krishna Deshmukh, for the appellant (defendant).—The lower Courts have made out a case for the respondent which he himself did not make. He wanted to have the bond rescinded on the ground that we had failed to perform our part of the agreement, while the lower Courts have set it aside as illegal. The plaintiff never alleged that the bond was illegal. We submit that such an agreement is not illegal—*Doorga Singh* v. *Sheo Pershad Singh* (1). Even assuming that the agreement is illegal, still the plaintiff cannot sue to set it aside under s. 35, cl. (*b*), of the Specific Relief Act. The contract is unlawful for causes not apparent on its face, and the plaintiff and the defendant have been held equally to blame.

Mahadeo Chimnaji Apte, for the respondent (plaintiff).—The objection as to the making out of a new case and the point in connection with the Specific Relief Act have been urged for **[346]** the first time in second appeal. They ought to have been urged by the defendant in the lower appeal Court. In his written statement the defendant contended that the agreement was illegal; therefore, he cannot now turn round and say that it was legal. Clause (*a*), s. 35, of the Specific Relief Act is applicable, and not cl. (*b*). The appellant failed to comply with the conditions of the agreement, and, therefore, it became voidable or terminable at our option.

JUDGMENT.

SARGENT, C. J.—Both the Courts below have dealt with this case as one of an unlawful contract which the plaintiff was on that ground entitled to rescind. But there is nothing necessarily unlawful in two or more persons agreeing not to bid against one another at an auction-sale:—see *Doorga Singh* v. *Sheo Pershad Singh* (1). Nor, assuming the contract in this case to have been unlawful, has the other condition been satisfied, under which alone it could be rescinded under s. 35 (*b*) of the Specific Relief Act, namely, that the plaintiff should have been shown to have been less to blame in the transaction than the defendant. On the contrary, the Judge of the Court of appeal says that plaintiff and defendant were *in pari delicto*.

Mr. Apte, however, has argued that his case, as stated in the plaint, really falls under s. 35 (*a*) and not s. 35 (*b*) of the Specific Relief Act. He argues that the conditions, which under the terms of the agreement were to be performed by the defendant, have not been performed by him; and the agreement being thus "voidable or terminable" at plaintiff's option, he is entitled to claim rescission on that ground. This point has really not been gone into by the Courts below; and though there are expressions here and there in their judgments touching upon it, we cannot accept them

(1) 16 C. 194.

as amounting to findings. We must, therefore, send down the following issue to the Court below :—

1. Whether the contract, the subject of the suit, had, at the date of the institution of the suit, become on any ground voidable or terminable by the plaintiff?

Finding to be returned within two months.

Issue sent down.

1893
JUNE 15.
APPELLATE CIVIL.
18 B. 342.

---

18 B. 347.

[347] APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Telang.

RAYACHAND MAYACHAND (*Original Plaintiff*), *Appellant v.* SULTAN RAHIMBHAI AND ANOTHER (*Original Defendants*), *Opponents.**

[19th June, 1893.]

Dekkhan Agriculturists' Relief Act (Bombay Act XVII of 1879)—Special Judge—Finding of fact—Civil Procedure Code (XIV of 1882), s. 622—Practice—Procedure.

When the Special Judge under the Dekkhan Agriculturists' Relief Act (Bombay Act XVII of 1879) entertains a clear opinion that the findings of the Subordinate Judge on the questions of fact are erroneous, and exercises his discretion in setting aside the decree, the High Court will not in its extraordinary jurisdiction, interfere with that discretion, except under most exceptional circumstances.

[R., 19 B. 286 (288).]

APPLICATION under the extraordinary jurisdiction (s. 622 of the Civil Procedure Code, Act XIV of 1882) against the decision of Rao Bahadur Mahadeo Govind Ranade, Special Judge under the Dekkhan Agriculturists' Relief Act (XVII of 1879).

The plaintiff sued the defendants, Sultan, Sakkar and their surety Sakharam to recover seventy-seven rupees alleged to have been due under an oral agreement.

Defendants Sultan and Sakkar denied their liability. Defendant Sakharam admitted the claim.

The Subordinate Judge found the claim proved, and passed a decree for the plaintiff and against all the defendants.

Sultan and Sakkar being dissatisfied presented an application for revision to the Special Judge under the provisions of the Dekkhan Agriculturists' Relief Act (XVII of 1879). The Special Judge examined the evidence, and varied the decree by rejecting the claim against Sultan and Sakkar.

The plaintiff applied to the High Court under its extraordinary jurisdiction, and contended that the Special Judge had no jurisdiction, in his revisional powers, to interfere with the findings of fact of the Court of first instance.

Vishnu K. Bhatavdekar with *G. L. Chandorkar*, appeared for the applicant (plaintiff). They relied on *Shidu* v. *Bali* (1).

JUDGMENT.

[348] SARGENT, C. J.—When the Special Judge entertains a clear opinion that the findings of the Subordinate Judge on the questions of

---

* Application No. 46 of 1893 under extraordinary jurisdiction.

(1) 15 B. 180.

1893
JUNE 19.
APPEL-
LATE
CIVIL.
18 B. 347.

fact are erroneous, and exercises his discretion in setting aside the decree on that ground, we think it would be most inconvenient if this Court were to allow itself, in the exercise of its extraordinary jurisdiction, to interfere with that discretion, except under most exceptional circumstances. We must, therefore, reject the application.

Application rejected.

18 B. 348.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Telang.

BAPU BIN MAHADAJI (*Original Defendant*), *Appellant v.* MAHADAJI VASUDEO (*Original Plaintiff*), *Respondent.**

[21st June, 1893.]

Landlord and tenant—Right of possession claimed by tenant against landlord—Mortgage by landlord—Possessory suit in the Mamlatdar's Court by the tenant against the mortgagor—Decree in favour of the tenant—Assignment of mortgage by mortgagee—Purchase of the equity of redemption by the assignee—Merger—Suit brought by the assignee to recover possession—Assignee bound by Mamlatdar's order against mortgagor—S. 15† *of the Mamlatdar's Act (Bombay Act V of* 1864)—*S.* 18‡ *of the Mamlatdar's Act (Bombay Act III of* 1876)—*Art.* 46, *sch. II of the Limitation Act (IX of* 1871).

One Ramji Chikne, who was the owner of the land in dispute, mortgaged it to Baji in July, 1870. In October, 1876, Bapu, a tenant of the land, obtained an injunction against Ramji restraining him from interfering with his (Bapu's) possession, in a possessory suit which was filed in the Mamlatdar's Court in May, 1876. In July, 1877, Baji obtained a decree on his mortgage, and in execution he got possession of the property from Ramji (the mortgagor) in June, 1879. The plaintiff, who was the assignee of both Baji and Ramji (mortgagee and mortgagor), sued Bapu in ejectment in September, 1888. Both the lower Courts allowed the claim. On second appeal by Bapu, the plaintiff (*inter alia*) contended that **[349]** having taken an assignment of the mortgage from the mortgagee, he was not bound by the proceedings in the Mamlatdar's Court in 1876 against the mortgagor. But

Held, that when the plaintiff, having previously taken an assignment of Baji's mortgage, purchased the equity of redemption from Ramji, the mortgage was extinguished, there being no circumstance from which an intention could be presumed to keep it alive. The plaintiff could not stand in a better position than Ramji, and was bound by the proceedings in the Mamlatdar's Court,

---

* Second Appeal No. 972 of 1891.

† Section 15 of the Mamlatdar's Act (Bombay Act V of 1864) :—

The party to whom the Mamlatdar shall give immediate possession, or whose existing possession he shall maintain, shall continue in possession until ejected by a decree of a Civil Court.

‡ Section 18 of the Mamlatdar's Act (Bombay Act III of 1876) :—

The party to whom the Mamlatdar shall give immediate possession, or restore a use, or in whose favour an injunction has been granted, shall continue in possession or use until ousted by a decree or order of a Civil Court.

Provided that nothing in this section shall prevent the party against whom the Mamlatdar's decision is passed, from recovering by a suit in the Civil Court mesne profits for the time he may be kept out of possession of any property, or out of enjoyment of any use :

Provided further that in any subsequent suit or other proceeding in the ordinary Civil Court between the same parties, or other persons claiming under them, the Mamlatdar's decision respecting the possession of any property, or the enjoyment of any use, shall not be held to be conclusive.

notwithstanding that he had taken an assignment of Baji's mortgage. In those proceedings the defendant had claimed a right of permanent possession as against the Chikne family, and the effect of the Mamlatdar's order was to continue him in possession until ejected by the decree of a Civil Court. It was, therefore, incumbent upon Ramji to bring a suit within three years from the Mamlatdar's order, as provided by art. 46, sch. II of the Limitation Act (IX of 1871), and that not having been done, the plaintiff, who derived his title from Ramji, could not recover possession from the defendant.

Held, further, that ever since the proceedings in the Mamlatdar's Court commencing with the defendant's suit in May, 1876, the possession of the defendant, whatever may have been its nature originally, was distinctly adverse to Ramji and also to plaintiff, who as assignee might have taken possession at any time under the mortgage, and the present suit not having been brought until September, 1888 was barred by the Limitation Act (XV of 1877).

[R., 28 B. 601=6 Bom. L.R. 612 (621).]

THIS was a second appeal from the decision of the First Class Subordinate Judge of Satara with Appellate Powers.

Suit to recover possession of land.

The land in dispute originally belonged to a family named Chikne. On the 4th July, 1870, Ramji Chikne mortgaged it to Baji Moreshvar Patankar. In May, 1876, Bapu bin Mahadaji, the present defendant, brought a possessory suit in the Mamlatdar's Court for an injunction restraining Ramji Chikne from interfering with his enjoyment and possession. The Mamlatdar found that though the land belonged to the defendants in that suit, still its possession was with the plaintiff, and he granted the injunction prayed for on the 9th October, 1876.

[350] He made the following observations in his judgment:—

"Moreover, the plaintiff has stated in his application (plaint) that the aforesaid land is under his *mirasi vahivat*; and the receipt, which is given in evidence, is recorded as Ex. 7. It bears the signatures of Bahirji bin Janoji Chikne, and in the beginning the plaintiff's name is entered as 'To Bapu Mahadaji Patne.' In that receipt, items have been entered four times, from which it is clear that the land is not plaintiff's *mirasi* land, but that it belongs to Chikne, and is with the plaintiff for cultivation. The plaintiff, therefore, on being questioned regarding the same, states as follows:—'The land has not been held by me from the inamdar. There is no *khata* (account) in my name in the Government books. The defendant's father having let (the land) to my father (for) cultivation, the *vahivat* (management) is with me and I have been paying the assessment to them. I have stated in the application (plaint) that the *vahivat* (management) has been mine for over twelve years.' He makes a statement to this effect in his answer Ex. 6.

"Now the object of the defendants is to get the lands (into their possession), they having considered the same to be their own; but as the plaintiff thinking himself to have become the owner of the land according to law by reason of his being a tenant for many days would not give it up, they (the defendants) have caused obstruction and tried to recover possession of the land by getting their *vahivat* declared in a possessory suit. The case is simply this. However, it is indeed true that the original owners (of the land) must really be the defendants, and it is proved also by the admission of the plaintiff. It is clear from the receipt Ex. 7. (*i. e.*) from the receipt given to the plaintiff by Bahirji, the father of Krishna (Kusaji) Bahirji, the defendant No. 2, that the land belongs to the defendants as owners; but I did (do) not think it proper, on a consideration merely of

1893
JUNE 21.
APPEL-
LATE
CIVIL.
18 B. 348.

their ownership, to say that the *vahivat* belonged to them. From the inquiry held, and from personal inspection of the land, and from the fact of labour, &c., having been bestowed thereon, the plaintiff's evidence seems to be true. (I) therefore (order that) the plaintiff should carry on the *vahivat* of the land and the trees mentioned in the [351] plaint, and that the defendants should not cause obstruction to the same. The land belongs to defendants as owners, and they should get their suit in respect of their ownership decided by a Civil Court."

On the 13th July, 1877, Baji Moreshvar obtained a decree on his mortgage empowering him to recover the mortgage-debt, or, on the failure of the mortgagor to pay the debt, to take possession of the property. In execution of this decree, Baji Moreshvar took possession of the land from Ramji Chikne on the 17th June, 1879.

In the year 1883, Mahadaji Vasudeo Karandikar, the present plaintiff, alleging himself to be the assignee of Baji Moreshvar's right as mortgagee and also of the equity of redemption of Ramji Chikne (the mortgagor), brought a suit to eject the present defendant on a specific act of trespass said to have been committed in the year 1882. The Court of first instance dismissed the suit on the ground (*inter alia*) that although the land once belonged to the Chiknes, they had lost their right by their omission to sue for possession within three years from the date of the Mamlatdar's above-mentioned order, and that the sale to the plaintiff of their equity of redemption having been made after their right was extinguished, had conferred no right on the plaintiff. On appeal the decree was confirmed.

In second appeal, the High Court doubted whether "the omission of Chikne to sue would have the precise effect which the lower Court has attributed to it; for when the defendant brought his suit in the Mamlatdar's Court, he sued merely as a tenant whose possession had been disturbed within the period of his tenancy, and it was as a tenant entitled to present possession that he obtained an injunction against Chikne." The High Court, however, did not decide the question, but confirmed the decree of the lower Court, and left it open to the plaintiff, if so advised, to seek his remedy against the defendant as his tenant. (See Printed Judgments for 1888, p. 6)

The plaintiff accordingly in September, 1888, as assignee of the rights of the mortgagee Baji Moreshvar and of the equity of redemption of Ramji Chikne, brought the present suit against the [352] defendant to recover possession of the land and mesne profits, alleging that the defendant was merely a yearly tenant.

The defendant answered that the land did not belong to and was never in the possession and enjoyment of the Chiknes through whom the plaintiff claimed; that he (the defendant) did not hold it as yearly tenant from anybody; that it belonged to him and had been in his possession and enjoyment from the time of his ancestors; that on the 9th October, 1876, he had obtained against the Chiknes a decree in a possessory suit in respect of the land in dispute; that the alleged mortgage in favour of Baji Moreshvar was fictitious, and the decree obtained thereon was fraudulent; that the claim was time-barred, and that the suit was also barred by the decree in the suit of 1883, which the plaintiff had brought against him for possession of the land.

The Subordinate Judge found that the suit was not time-barred, nor was it barred either by the order of the Mamlatdar in the possessory suit of 1876, in which the defendant merely complained as a tenant whose possession had been disturbed, or by the decision in the suit of 1883,

and that the defendant having denied the Chiknes' title became liable to be ousted by the plaintiff, who derived his title through the Chiknes. He, therefore, allowed the claim.

On appeal by the defendant, the Court confirmed the decree, holding that the Chiknes' lease to the defendant was proved. The Court remarked: "Once a tenant always a tenant, and unless and until the relationship of tenancy is got rid of, defendant's possession cannot become adverse as against the landlords or their vendees, how long so ever his tenancy may continue and the tenancy dues have remained unpaid. Exhibit 23 contains a most distinct admission, on the defendant's part, that he accepted the lands in suit as the Chiknes' tenant and paid the rents to them as their tenant. His denial of tenure having for the first time occurred during the progress of original suit No. 37 of 1883, falls within the statutory period."

The defendant preferred a second appeal.

Manekshah J. Taleyarkhan, for the appellant (defendant):—We contend that the suit is time-barred on two grounds. First, the **[353]** Mamlatdar's decree in our favour was passed in the year 1876. The respondent's assignor, Ramji Chikne, who was one of the defendants in that suit, took no steps within the statutory period, that is, within three years, to cancel that decree, and the right to do so is now barred. In order that an aggrieved party should get relief, he must bring a suit within three years from the date of the Mamlatdar's decree; and if that be not done, the Mamlatdar's order concludes him and his assignee also. Secondly, we say that if we paid rent to the Chiknes at all, it must have been prior to 1876. There is nothing to show that we paid them rent afterwards. Non-payment of rent for more than twelve years, coupled with the fact that we have been asserting our right since the Mamlatdar's decision in 1876, supports our plea of adverse possession.

Mahadeo Chimnaji Apte, for the respondent (plaintiff):—The appellant was examined as a witness in the possessory suit, and he distinctly admitted that he was a tenant, and claimed to hold the land as *mirasdar* because he was in possession for a long time on payment of rent. The tenancy being thus admitted, his possession cannot be adverse either to the Chiknes or to the plaintiff as their assignee unless and until some overt act on his part denying our title is proved. We seek to recover possession in our twofold capacity: first, as the assignee of the mortgagee Baji Moreshvar, and, secondly, as the assignee of the mortgagor Ramji Chikne. Even supposing that our claim as the assignee of the mortgagor is barred under the Mamlatdar's Act (Bombay Act V of 1864), still our claim as the assignee of the mortgagee cannot be affected by the Mamlatdar's decree, which was subsequent to the mortgage. The decree was passed against the mortgagor, and, therefore, it cannot bind the mortgagee.

[SARGENT, C. J.—You are the assignee of both the mortgagor and mortgagee; therefore your right as mortgagee has become merged in that of the mortgagor, unless you show that there was an intention to keep the mortgage alive. See *Lomba Gomaji* v. *Vishvanath Amrit* (1).]

[354] We submit that there is nothing in the present case to show that there was no intention to keep alive the mortgage. The purchase of the equity of redemption by the mortgagee does not operate to extinguish the mortgage—*Vinayak Balvant* v. *Dhundiraj* (2). The doctrine of merger is a doctrine of English law, and is not applicable to India.

---

(1) 18 B. 86.

(2) P. J. (1882), p. 351.

1893

JUNE 21.

APPELLATE CIVIL.

18 B. 348.

The present Mamlatdar's Act (Bombay Act III of 1876) is not applicable to this case. The case is governed by Bombay Act V of 1864, which did not lay down any period of limitation. The Limitation Act then in force was Act IX of 1871, and the language of art. 46, sch. II, of that Act was different from that of art. 47 of the present Act (XV of 1877).

JUDGMENT.

SARGENT, C. J.—It has been contended by Mr. Apte that the plaintiff having taken an assignment of Baji's mortgage was not bound by the proceedings in the Mamlatdar's Court, the effect of which is the important question in this case. It appears, however, that the plaintiff subsequently purchased the equity of redemption of the Chikne family, and there being no circumstance from which an intention can be presumed to keep the mortgage alive, it must be regarded as extinguished—*Lomba Gomaji* v. *Vishvanath Amrit* (1).

The plaintiff cannot, therefore, in our opinion, stand in a better position than the Chikne family, and it, therefore, becomes necessary to consider what was the effect of the proceedings in the Mamlatdar's Court The Mamlatdar's judgment shows that the defendant, whilst admitting that the land in question had been let by the plaintiff's father to his father, claimed by long possession, whatever the exact nature of his title may be, to have acquired at any rate a right of permanent possession of which the Chikne family could not deprive him ; and the effect of the Mamlatdar's order was to maintain the defendant in possession (directing the Chikne family not to obstruct his possession) within the meaning of s. 15 of the Mamlatdar's Act V of 1864, and so to continue him in possession until ejected by a decree of the Civil Court. Such, we think, was the effect of that section having regard to the several sections of the Act, although [355] it is made clearer by the language of s. 18 of the Act of 1876. It was, therefore, incumbent on the Chikne family, who claimed to treat him as a tenant-at-will, to bring a civil suit within three years as provided by cl. 46 of the Limitation Act of 1871, and that not having been done, the plaintiff, who derives his title as owner from that family, cannot now recover possession from the defendant, whatever may be the precise nature of defendant's title to the possession.

But we think that the defendant must also succeed under the Act of Limitations. Ever since the proceedings in the Mamlatdar's Court commencing with the defendant's suit in May, 1876, the possession of the defendant, whatever may have been its nature originally, is shown, from what has been above stated, to have been distinctly adverse to the present claim as against the Chikne family, and also as against the mortgagee who might have taken possession at any time under the mortgage. As the present suit to obtain possession was not instituted till September, 1888, it is barred by the Statute.

On both these grounds, therefore, we think that the decree of the Court below must be reversed, and the plaintiff's claim be dismissed, with costs throughout on the plaintiff.

Decree reversed—Claim dismissed.

(1) 18 B. 86.

18 B. 355 (F.B.).

1893
JUNE 22.

FULL BENCH.

18 B. 355 (F.B.).

FULL BENCH.

Before Sir Charles Sargent, Kt., Chief Justice, Mr. Justice Bayley and Mr. Justice Candy.

KESHAV PANDURANG (*Original Defendant*), *Appellant v.* VINAYAK HARI (*Original Plaintiff*), *Respondent.** [22nd June, 1893.]

Registration—Registration Act (III of 1877), s. 50—Priority—Purchaser under an unregistered deed—Lease of the land by purchaser to the vendor—Decree for rent obtained by the purchaser against the vendor—Effect of such decree on purchaser's title in competition with the title of subsequent purchaser under a registered deed.

On the 7th August, 1876, the defendant purchased the property in dispute under an unregistered sale-deed. On the same day he leased it to his vendor. In 1878 he obtained a decree for rent against his vendor. On the 23rd May, 1881, the plaintiff **[356]** purchased the same property from the same vendor under a registered deed of sale. In 1888 the plaintiff sued the defendant to establish his right to the property and to recover possession.

Held, that the plaintiff was entitled to a decree, his registered deed taking priority to the prior unregistered deed of the defendant.

Section 50 (1) of the Registration Act (III of 1877) did not give the defendant priority in virtue of the decree which he obtained in the rent suit, for in that suit the defendant's ownership was not in dispute, and the decree merely adjudicated as to the relationship between the defendant and his vendors created subsequently to the sale. The defendant's title as owner was not merged in the decree, but still rested exclusively on his deed of sale.

Kolluri Nagabhashanum v. *Ammanna* (2) and *Madar Saheb* v. *Subbarayalu* (3) distinguished.

[F., 28 C. 139 (141); **R.**, 27 B. 452 (482). **]**

SECOND appeal from the decision of M. P. Khareghat, Assistant Judge of Thana.

The property in dispute originally belonged to Ladkoba Balaji, Narayan Pandurang and Nathu Pandurang as members of an undivided Hindu family. It was sold by Ladkoba Balaji and Narayan Pandurang on the 7th August, 1876, under an unregistered deed of sale to defendant Keshav Pandurang, who, on the same day, leased it to them as his tenants. In 1878, he sued them for rent and got a decree. He again sued them for rent and possession in 1885, got a decree, and obtained possession on the 26th January, 1887.

In the meanwhile, Narayan Pandurang and Nathu Pandurang sold the property to the plaintiff Vinayak Hari Sinkar with **[357]** possession

* Appeal No. 20 of 1892 under s. 15 of the amended Letters Patent of the High Court.

(1) Section 50 of the Registration Act (III of 1877):—Every document of the kinds mentioned in cls. (*a*), (*b*), (*c*) and (*d*) of s. 17, and cls. (*a*) and (*b*) of s. 18, shall, if duly registered, take effect as regards the property comprised therein, against every unregistered document relating to the same property and not being a decree or order, whether such unregistered document be of the same nature as the registered document or not.

Nothing in the former part of this section applies to leases exempted under the proviso in s. 17, or to the documents mentioned in cls. (*e*), (*f*), (*ff*), (*g*), (*h*), (*i*), (*j*), (*k*), (*l*), (*m*), (*n*), and (*o*) of the same section.

Explanation.—In cases where Act No. XVI of 1864 or Act No. XX of 1866 was in force in the place and at the time in and at which such unregistered document was executed, "unregistered" means not registered according to such Act; and where the document is executed after the first day of July, 1871, not registered under Act No. VIII of 1871, or this Act.

(2) 3 M. 71.

(3) 6 M. 88.

1893
JUNE 22.
FULL BENCH.
18 B. 355 (F.B.).

under a registered deed of sale dated the 23rd May,1881. The plaintiff now sued the defendant to establish his right to the land and for possession.

The Subordinate Judge allowed the plaintiff's claim on the following grounds:—

"The chief question for decision is, then, which of the parties is entitled to the field Hirashet * * * .

"The question must be answered in favour of the plaintiff. For his deed of sale (Ex. 37) has been registered under the provisions of Act III of 1877. He is, therefore, entitled to priority over the defendant, whose deed of sale (Ex. 9) is an unregistered document under s. 50 of Act III of 1877. But it was contended for the defendant that the possession of the vendors as tenants of the defendant operated as constructive notice of the defendant's title to the plaintiff. But this contention cannot be allowed. For the plaintiff has no reason to suppose that the possession of his vendors was otherwise than as owners It is not shown that the plaintiff had any knowledge of the defendant's decree (Ex. 10) obtained by him against his vendors for rent in 1878. Under these circumstances the plaintiff is entitled to priority. (I.L.R. 12 Bom. p. 569)."

On appeal by the defendant the decree was confirmed.

The defendant filed a second appeal.

Mahadeo Chimnaji Apte, for the appellant (defendant).

Manekshah J. Taleyarkhan, for the respondent (plaintiff).

August 1*st*, 1892. JARDINE, J.—The only point argued relates to the construction to be placed on the words "not being a decree or order" in the first part of s. 50 of the Registration Acts of 1871 and 1877. The question is, whether the Court below was right in giving priority to the plaintiff's registered deed of sale, dated the 23rd May, 1881, over the defendant's unregistered deed of sale, dated the 7th August, 1876.

It appears that in 1878 the defendant obtained a decree against his vendors for rent and another in 1887 against them for rent and possession. To these suits the plaintiff was not a party: and it is not part of the defendant's case that his deed of sale was merged in the decrees, nor that the plaintiff had any [358] sort of notice, or knew that the property was in the possession of any person other than the vendor. At the defendant's appeal here it was contended on his behalf that the effect of the excepting words quoted above from s. 50 was to affect the plaintiff with notice, and that the defendant's deed was entitled to priority. No authority was cited for this contention.

The case of *Kolluri Nagabhashanum* v. *Ammanna* (1) is not on the same footing. In that case the unregistered document became merged in, and superseded by, a decree, as is pointed out in *Madar Saheb* v. *Subbarayalu* (2), in which case also the learned Judges point out that the effect of the contention of the present appellant that his unregistered document is to have priority, because of decrees to which the plaintiff was not a party, would have this result, that it would be only necessary to put such a document in suit to be able successfully to defeat the Registration Act. The intention of the Act is to prevent fraud by giving notoriety to the document, and it may be admitted that some notoriety is given by the passing of a decree, but I think not enough to prevent fraud. In *Baijnath* v. *Lachman Das* (3) the effect of the words "not being a decree or order" is confined to the case of the unregistered document being merged in a decree. The case of *The Himalaya Bank* v. *The Simla Bank* (4) seems to

(1) 3 M. 71 (2) 6 M. 88. (3) 7 A. 888. (4) 8 A. 23.

have been decided on a point different from that now before us. The registry of an assignment of a deed which required registration was held in England to be no notice to the subsequent purchaser—*Honeycomb* v. *Waldron* (1). An assignment of a decree was held to require registration —*Gopal* v. *Trimbak* (2).

There is nothing unreasonable in the limited construction which two High Courts have placed on the excepting words. I concur in that interpretation, and would confirm the decree with costs.

We have, however, the misfortune to differ in opinion; and as the case is of general importance, we think we should affirm the decree with costs, leaving the appellant, if so advised, to appeal when the question will come before a Court of three Judges.

[359] TELANG, J.—The plaintiff sued to be declared owner, and to be put in possession of the land, the subject-matter of the suit, claiming under a deed of sale executed in his favour in 1881 by Narayan and Nathu Pandurang. The defendant claims under a prior deed executed by Narayan Pandurang and one Ladkoji, who was alleged to be an uncle of Narayan and Nathu Pandurang. The Assistant Judge held that the plaintiff's deed was proved; that Ladkoji was not, as alleged, the uncle of Narayan and Nathu; and that under s. 50 of the Registration Act the plaintiff's deed, though later in date than the defendant's, was entitled to priority. This point of priority was the only one argued before us.

The defendant's deed is admittedly one the registration of which is not compulsory, and it has been alleged, and not denied, that some years before 1881, when the plaintiff's purchase took place, the defendant had let the land to Narayan Pandurang and obtained a decree against him for the rent due. And the question is, whether an unregistered deed of sale coupled with a decree for rent against the vendor, must, under s. 50 of the Registration Act, be postponed to a later deed of sale by the same vendor which is registered.

Now, it has not been denied that, if the decree had been one containing an express declaration of title as well as an award of rent, the subsequent purchaser with a registered conveyance, even though without notice of the prior title, would have been bound by such decree. It is argued, however, that a decree which does not contain such a declaration, has not the same legal operation. I cannot concur in this view. Section 50 contains an enactment, which admittedly invalidates a transaction perfectly valid at the time it is entered into, as against a subsequent transaction to which the party claiming a benefit under the first is in no way party or privy. To the extent that the intention of the Legislature to do this is clear from the language employed by it, we are, of course, bound to give effect to that intention, without reference to what might be called its apparent hardship—see *Body* v *Halse*, *Hunt* v. *Halse* and *Fenning* v. *Halse* (3). But **[360]** we are not, I think, bound to go further. We ought not, in the case of such an enactment, to give effect to anything but clear language directing such an invalidation *ex post facto*, and we ought not, I think, by construction, to limit the words of exception or restriction in such an enactment which the Legislature has itself thought fit to employ. In spite of the large words of the enacting part, this Court has consistently limited them to the cases where the subsequent purchaser has no notice of the prior unregistered conveyance. In doing so, it has followed that series of authorities in England which is referred to by

(1) 2 Strange 1064. (2) 1 B. 267. (3) L. R. 1 Q. B. (1892) 203.

1893
JUNE 22.
FULL BENCH.
18 B. 355 (F.B.).

Lord Chancellor (Lord Cairns) in *Agra Bank* v. *Barry* (1). In the present case we have to deal not with the enacting part, but with the exception grafted upon it by the Legislature itself. And as the words except "a decree or order" generally from the operation of the enacting part, we ought, I think, to interpret them largely, and to hold that all decrees and orders whatsoever come within the purview of the exception.

If this view is correct, its application to the present case is obvious. Long before the purchase made by the plaintiff, the defendant had obtained not merely a conveyance from the plaintiff's vendor, but also a decree against that vendor for rent of these very premises under a contract of tenancy averred and proved. The effect of that decree I take to be this, that the plaintiff's vendor at the date of that decree incontestably became the defendant's tenant, and could not claim to be owner of the property. It is not pretended, in the present case, that anything occurred between the date of that decree and the sale to the plaintiff to alter the character of his legal relation to the property. The plaintiff, then, could only take such a title as his vendor had, and the decree being not invalid as against his conveyance, he must be deemed to have taken merely his vendor's title as tenant of the property, whatever such title may be. I see nothing in s. 50 of the Registration Act to prevent our giving this effect to the decree as against one who claims under the defendant in the suit in which the decree was passed.

The cases, which have been referred to, do not appear to me to militate against this view. In *Kolluri Nagabhashanum* v. **[361]** *Ammanna* (2), indeed, the Court said that "the decree was binding on the judgment-debtor, and on all persons who might thereafter acquire title from him." That remark is sufficient to govern this case. *Kolluri Nagabhashanum* v. *Ammanna* is referred to and distinguished in a subsequent case in Madras —*Madar Saheb* v. *Subbarayalu* (3), where the decree was held not to affect the title of the subsequent purchaser. But the sequence of events there rendered that conclusion almost inevitable. There was first the unregistered conveyance, and then the registered conveyance which took effect as against the former under s. 50. And *after* this second conveyance came the decree made upon the basis of the first conveyance. There being nothing in the Registration Act to justify the fiction of relation being resorted to, the decree as a document subsequent in date to the second conveyance could obviously not have any effect against the title created by such second conveyance. And the Court so decided. The gist of the decision is not, I venture to think, contained in the phrase that the prior document was "merged in, and superseded by, a decree," but in the phrase which the Court distinctly emphasizes, *viz.*, "*prior* to the execution of the registered conveyance." It is that priority on which the decision rests. The case of *Baijnath* v. *Lachman Das* (4) was also cited to us. But I do not understand that case, any more than the Madras case, as limiting the meaning of the words "a decree or order." The Allahabad Court, indeed, goes somewhat further in favour of the decree-holder than the Madras case, whether rightly or wrongly it is not now necessary to consider. The Judges there apparently hold that a decree obtained even after the registered conveyance is good as against the registered conveyance, if only it is obtained *before* a suit is instituted on the strength of the registered conveyance. But, however that may be, I confess I see nothing

(1) L. R. 7 E. & I. Ap. 135.
(2) 3 M. 71.
(3) 6 M. 88.
(4) 7 A. 888.

in this case or in the Madras cases to warrant the argument for the respondent from which, on other grounds, I have already expressed my dissent, that the words "decree or order" in s. 50 of the Registration Act must be limited to a "decree or order" in which the unregistered instrument is "merged."

[362] It is true that the result of this view is that the subsequent purchaser will be, in effect, bound by a transaction of which he has no notice. He cannot find the conveyance in the registry, and he would not necessarily have any notice of the suit. But this argument applies equally whether the decree is one which supersedes the unregistered conveyance or not. And it cannot, therefore, be allowed any weight against the construction above put forward. And, apart from any special equities, I do not see why the above suggested result should be looked upon as any thing in the nature of a *reductio ad absurdum*. It is entirely in harmony with the established rules *qui prior est tempore potior est jure* and *caveat emptor*. The later purchaser who is defrauded must trust to his remedy against his own vendor.

On these grounds, I am of opinion that, on the only ground which has been argued before us, the plaintiff's case fails. And I would reverse the decrees of the Courts below and dismiss the plaintiff's suit with all costs.

The Judges thus differing in opinion, the decree was confirmed under s. 575 of the Civil Procedure Code (Act XIV of 1882).

The defendant appealed under cl. 15 of the amended Letters Patent of the High Court, 1865.

The appeal came on for argument before a Full Bench consisting of Sargent, C. J., and Bayley and Candy, JJ.

Ganesh Krishna Deshmukh, for the appellant (defendant).—The defendant has got a decree for rent, and, therefore, under s. 50 of the Registration Act, the plaintiff's deed does not take priority. The defendant's decree for rent is a decree relating to the same property to which the respondent's registered sale-deed relates, as the rent sued for was admittedly in respect of the same property. Therefore, the condition required by s. 50 is fulfilled. There is no other condition required by the section.

Even supposing that what is required is the merger of the title in the decree, we submit that as the decree for rent must have expressly or impliedly put the question of our title under the unregistered sale in issue in the rent suit, and thus our [363] title under the deed is merged in this decree, as the very relation of landlord and tenant between the defendant and his vendor depended on our previous purchase in 1876. Thus, in any view of the case, our purchase as of 1876 must prevail against the plaintiff's subsequent purchase in 1881 by reason of our decree for rent in the year 1878.

Manekshah J. Taleyarkhan (with *Vasudev Gopal Bhandarkar*), for the respondent (plaintiff).

JUDGMENT.

The judgment of the Full Bench was delivered by

SARGENT, C. J.—The question for determination is whether the the lower appeal Court was right in giving priority to the plaintiff's registered deed of sale of 23rd May, 1881, over the defendant's unregistered deed of sale of 7th August, 1876, having regard to the decree for rent, subsequently obtained by him in 1878 against their common vendor. The exception in cl. 50 of the Registration Act operates, doubtless, to give

1893
JUNE 22.
FULL BENCH.
18 B. 355 (F.B.).

the above decree its full legal effect in competing with the plaintiff's deed of sale, and the important question, therefore, is, what is the legal effect it has for such purpose.

Assuming that the defendant's ownership was not in dispute in the suit in which that decree was passed, as would appear to have been the case from there being no declaration of his title as owner, the decree merely adjudicated as to the relationship of landlord and tenant between defendant and his vendor created subsequently to the sale. The defendant's title as owner was not merged in the decree, but still rested exclusively on his deed of sale, although his vendor might not, whilst he was his tenant, be able to dispute it. In this respect the case differs from *Kolluri Nagabhashanum* v. *Ammanna* (1) as explained in *Madar Saheb* v. *Subbarayalu* (2) where the registered document became superseded by a decree under which the plaintiff derived his title as the purchaser at the auction sale, and the competition was, therefore, between the decree and a registered document, which came within the exception. We think, therefore, that the decree of Mr. Justice Jardine should be confirmed with costs.

Decree confirmed.

---

18 B. 364.

[364] ORIGINAL CRIMINAL.

Before Mr. Justice Parsons.

QUEEN-EMPRESS *v.* SADANAND NARAYAN AND OTHERS.

[3rd February, 1894.]

Practice—Procedure—Several persons tried jointly—Right of reply where one of several accused calls witnesses and the others do not—Criminal Procedure Code (X of 1882), ss. 289, 292.

Where one of several accused persons tried jointly calls witnesses at the trial, but the other accused call no witnesses, they must all follow in their defence, and the prosecution has the right of reply on the whole case.

SADANAND Narayan, Harichand Bhikoba, Bajirao Tatia Raoji and Sayad Husain were charged, under ss. 109, 467 and 471 of the Penal Code (XLV of 1860), as follows:—No. 1 with the offence of using as genuine a forged document; No. 2 with forgery, and all of the Nos. 1, 2 3 and 4 with abetment of forgery. The case came for trial at the Criminal Sessions of the High Court, and the prisoners pleaded not guilty, and claimed to be tried.

Anderson appeared for the prosecution.

Accused No. 1 was not defended by counsel.

Lowndes appeared for accused No. 2.

Jardine for accused Nos. 3 and 4.

At the conclusion of the case for the prosecution, accused No. 1 in answer to a question put by the Court said he desired to call witnesses. Accused Nos. 2, 3 and 4 in answer to the Court stated that they did not intend to call witnesses.

Accused No. 1 then called and examined his witnesses.

---

(1) 3 M. 71.

(2) 6 M. 88.

1894
FEB. 3.
ORIGINAL CRIMINAL.
18 B. 364.

Counsel for the other accused (Nos. 2, 3 and 4), being then called upon to address the Court, objected, and contended that inasmuch as they had not called witnesses, counsel for the prosecution should sum up the case as against accused Nos. 2, 3 and 4 and that they should then have the right of reply on behalf of their clients. They contended that the fact that one of the accused had called witnesses in his defence did not affect the right of the other accused, who had called no witnesses. They cited ss. 289 and 292 of the Criminal Procedure Code (X of 1882).

JUDGMENT.

[365] PARSONS, J.—It appears to me that the prosecutor has the right to sum up only when all the accused persons say that they do not mean to adduce evidence. That is my construction of the words at the beginning of the second clause of s. 289, which deals with the case in which an accused person says he does not mean to adduce evidence. The case of the accused saying he does mean to adduce evidence is dealt with in the third clause of the same section. There the words are "if the accused or any one of several accused says that he means to adduce evidence;" but by that clause no right of summing up is given to the accused. The two cases are combined in cl. 4 of the same section, which must be construed as dealing with them separately, thus:—(1) The case of the accused or any one of several accused saying that he means to adduce evidence, and (2) the case of the accused, or all the accused, or more than one saying that they do not mean to adduce evidence, and in this latter case the prosecutor having summed up his case. The language of s. 292 is also, I think, explicit on this point. "If the accused or any of the accused has stated that he means to adduce evidence, the prosecutor shall be entitled to reply." "Reply" here must mean reply generally on the whole case. It cannot be that he is to sum up as to such of the accused as do not call evidence, and reply only on the evidence that may have been adduced by the others.

Here one of the accused said he meant to adduce evidence; I called on the accused generally to enter on their defence under the last clause of s. 289. I think they must now follow one another in their defence under s. 290, and the prosecutor will be entitled under s. 292 to reply generally on the whole case.

---

18 B. 366.

[366] PARSI MATRIMONIAL COURT.

Before Mr. Justice Candy.

SORABJI CAWASJI POLISHVALA (*Plaintiff*) *v.* BUCHOOBAI (*Defendant*).* [23rd February, 1894.]

Husband and wife—Divorce—Parsis—Parsi Marriage Act XV of 1865*—Minority—Guardians—Practice—Procedure.*

In a suit by a husband for divorce under s. 30 of the Parsi Marriage Act, XV of 1865, the defendant, if under the age of 21 years, although more than 18, must be deemed to be a minor, and a guardian for the suit of the defendant must be appointed.

[R., 22 B. 430 (435); 6 C.L.J. 36 (37).]

* Suit No. 2 of 1894.

1894

FEB. 23.

PARSI MATRIMONIAL COURT.

18 B. 366.

SUIT by a husband for divorce under s. 30 of the Parsi Marriage and Divorce Act, XV of 1865.

The plaint having been accepted, the plaintiff's attorney presented a petition for the appointment of a guardian *ad litem* for the defendant, who was over the age of 18 years but under the age of 21.

Notice was issued to the defendant and her mother to show cause against the application.

Sorabji Bezonji appeared for defendant to show cause :—He referred to s. 3 of Act XV of 1865 ; Indian Majority Act IX of 1875, s. 3, and the Guardians and Wards Act VIII of 1890, s. 4. He stated that, if the defendant was held to be a minor, her mother was willing to act as guardian, and cited *Asirun Bibi* v. *Sharip Mondul*(1).

F. P. Pavri, for plaintiff :—Section 3 of Act XV of 1865 indicates that the Legislature regarded a Parsi as a minor up to the age of 21 in matters relating to suits for divorces. The Indian Majority Act IX of 1875 does not affect the question : see s. 2, cl. (*a*). There being no express provision on the point, it must be settled by reference to English law.

Cur. adv. vult.

JUDGMENT.

CANDY, J.—As all proceedings in this Court are regulated by the provisions of the Code of Civil Procedure (No. 1 of the Rules **[367]** of this Court and s. 40 of the Act XV of 1865) the question is whether under s. 443 of the Code of Civil Procedure (XIV of 1882) the Court is satisfied of the fact of the defendant's minority. If the Court is so satisfied, then the Court *shall* appoint a proper person to be guardian for the suit for defendant. The defendant is admittedly above 18 and under 21 years of age. It is also admitted that she does not come within the terms of the first clause of s. 3 of the Indian Majority Act (IX of 1875), therefore, under the second clause of the said section she must be deemed to have attained the age of majority when she completed the age of 18, provided she is not subject to the provisions of s. 2 of the said Act, which declares that nothing therein contained shall affect the capacity of any person to act in the matter of marriage or divorce.

Here defendant is a defendant in an action for divorce brought by her husband. Her capacity to act must, therefore, be determined. I am satisfied that for such purpose defendant must be deemed to be a minor. Apart from the fact that the law applicable to Parsis in India within the jurisdiction of the High Court on the original side is that which is applied to British-born subjects (per Couch, C.J., in *Mancharsha* v. *Kamrunisa*(2)), we have the fact that the Parsi Marriage and Divorce Act (XV of 1865) evidently treats every Parsi under the age of 21 as a minor. Thus in s. 3, in treating of the requisites to the validity of Parsi marriages, it is provided that, in the case of any Parsi who shall not have completed the age of 21 years, the consent of his or her father or guardian shall have been previously given to such marriage ; and by s. 6 the father or guardian must sign the certificate according to the form as shown by the schedule to the Act, the heading to the last column of the said form running thus :—"Signature of father or guardian when husband or wife is *an infant*." I am satisfied, therefore, that the defendant is an infant, and I must appoint a proper person to be her guardian for the suit.

---

(1) 17 C. 488.

(2) 5 B.H.C.R. A.C.J. 109.

Her mother is willing to act as such ; but a married woman, though she can act as the next friend of an infant plaintiff, cannot be appointed guardian *ad litem* for an infant defendant [368] (s. 457 of the Civil Procedure Code). I must, therefore, call upon defendant's father, who is said to be a station master near Baroda, to act as guardian *ad litem* for his infant daughter.

Attorney for the plaintiff:—Mr. *F. P. Pavri.*

Pleader for the defendant :—Mr. *Sorabji Bezonji.*

1894 FEB. 23. — PARSI MATRIMONIAL COURT. — 18 B. 366.

---

18 B. 368.

ORIGINAL CIVIL.

Before Mr. Justice Farran.

RAM DYAL SALIGRAM (*Plaintiff*) *v.* NURHURRY BALKRISHNA (*Defendant*).* [10th March, 1894.]

Practice—Inspection—Defendant's right to inspection of documents referred to in plaint before written statement filed.

A defendant is entitled to have inspection of documents referred to in the plaint although he has not filed his written statement.

[F., 12 Ind. Cas. 506=256 P.L.R. 1911=185 P.W.R. 1911 ; R , 32 B. 152=9 Bom. L.R. 1084 (1085).]

IN chambers. Summons by defendant for inspection.

The plaintiff sued the defendant for Rs. 2,111, the amount alleged to be due from him for goods sold, &c.

In his plaint he stated, in the usual form, that he would rely on the documents specified in the list annexed thereto.

The defendant applied to the plaintiff for inspection of the documents mentioned in the said list. The plaintiff having declined to give inspection until the defendant filed his written statement, the defendant took out a summons calling on the plaintiff to show cause why he should not give the required inspection.

Chitnis, for the defendant, in support of the summons cited *Quilter* v. *Heatley* (1).

Inverarity, for the plaintiff showed cause.—We ought not to be required to give the defendant inspection until his written statement is filed. At present he denies our claim altogether. If he sees the letters we specify in our list he will probably alter his defence. The case of *Quilter* v. *Heatley* (1) does not apply. In that case the documents, of which inspection was sought by the defendant, were referred to in the pleadings, and made part of the [369] statement of claim. That is the ground of the decision of Jessel, M.R.

JUDGMENT.

FARRAN, J.—I think inspection must be given. Under the Code the plaintiff is required to mention the documents on which he will rely at the hearing. He has done so, and has mentioned the documents in question. There is, therefore, no difficulty as to the plaintiff knowing

---

* Suit No. 618 of 1893.

(1) 23 Ch. D. 42.

1894
MARCH 10.

ORIGINAL CIVIL.

18 B. 368.

what documents he is required to produce. I think, on the authority of *Quilter* v. *Heatley* (1), the defendant is entitled to see them, although he has not yet filed his written statement.

Summons made absolute.

Attorney for the plaintiff :—Mr. *Shroff*.
Attorneys for the defendant :—Messrs. *Chitnis, Motilal and Malvi.*

---

18 B. 369.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Telang.

CHENBASAPA AND ANOTHER (*Original Defendants*), *Applicants v.* LAKSHMAN RAMCHANDRA (*Original Plaintiff*), *Opponent.**

[22nd June, 1893.]

Stamp Act (I of 1879), s. 34—Evidence—Hundis inadmissible under Stamp Act, but admitted by defendant—Admission.

In a suit brought upon two *hundis*, which were inadmissible in evidence for want of impressed stamps, the Judge allowed the claim, holding that the defendants' admissions in their written statement rendered it unnecessary to put the *hundis* in evidence.

Held, reversing the decree, that a *hundi* is "acted upon" where a decree is passed on it, whether proved or admitted, and that the Court cannot give effect to it in either case.

[F., 30 M. 386=17 M.L.J. 303 (309); 2 L.B.R. 103 (104); 7 Ind. Cas. 320=8 M.L.T. 251; R., 25 A. 509 (525)=23 A.W.N. 104; 18 B. 745 (747); 24 B. 360 (366); 11 C.L.J. 426 (430)=14 C.W.N. 703=6 Ind. Cas. 549; 17 C.L.J. 399=19 Ind. Cas. 848; 16 Ind. Cas. 33; 66 P.R. 1906=73 P.L.R. 1907; U.B.R. (1897—1901), 556; Cons., 12 Bom L.R. 466 (470)=6 Ind. Cas. 903; 4 Ind. Cas. 1086=U.B.R. 1909, 4th Qr., Stamp, 36; 2 L.B.R. 333 (335); D., 18 B. 614 (616).]

APPLICATION under the extraordinary jurisdiction (s. 622 of the Civil Procedure Code, Act XIV of 1882) against the appellate decree of J. L. Johnston, District Judge of Dharwar.

The plaintiff sued to recover from the defendants Rs. 276-4-0 alleged to be due on two *hundis*.

The defendants Chenbasapa and Basaya resisted the plaintiff's claim on the ground that the first *hundi* was satisfied by the substitution of another payable at sight, and that no money was received for the second.

[370] The Subordinate Judge rejected the claim, holding that the *hundis* not being stamped according to the provisions of art. 11, sch. I of the Indian Stamp Act (I of 1879), were inadmissible in evidence, and that no secondary evidence in support of the claim which was based on the *hundis*, could be taken under s. 65 of the Indian Evidence Act (I of 1872).

On appeal by the plaintiff urging, among other grounds, that he should have been permitted to adduce evidence of payment to the defendants otherwise than by the *hundis*, the District Judge reversed the decree and allowed the claim on the following grounds :—

"The defendant appears to admit his liability under the first *hundi*. He alleges also that Rs. 150 are due to him from the plaintiff on account

---

* Application No. 162 of 1892 under Extraordinary Jurisdiction.

(1) 23 Ch. D. 42.

of *ganja*, for which plaintiff was surety and for which defendant drew the *hundi* for Rs. 88. The burden of proving these allegations rests on defendant. He has not discharged it. He is, therefore, still liable for the amount of the *hundis* admitted by him, and of which he has not proved payment. By his admission the defendant has supplied the plaintiff's want of independent evidence of consideration for his *hundis*. The lender of money can recover the original consideration—*Golap Chand* v. *Thakurani* (1). There was sufficient admission of the *hundis* by the defendant in his written statement. *Damodar* v. *Atmaram*(2) seems unopposed to this view, as the defendant admits that the money was lent to him."

The defendants applied to the High Court under its extraordinary jurisdiction, and obtained a *rule nisi* calling on the plaintiff to show cause why the decree should not be set aside on the ground that the Judge erred in law in holding that the plaintiff's claim could be allowed, although the *hundis* on which the suit was brought were inadmissible in evidence for want of impressed stamps.

Vishnu K. Bhatavdekar, appeared for the plaintiff to show cause:—Assuming the *hundis* to be inadmissible, consideration can be proved *aliunde*—*Golap Chand* v. *Thakurani* (1). Here the *hundis* were not drawn on money deposited, but were given in **[371]** payment of the price of goods sold. We could, therefore, fall back upon our original cause of action—*Sheikh Akbar* v. *Sheikh Khan* (3); *Hira Lal* v. *Datadin* (4); *Krishnasami* v. *Rangasami* (5). Further, we were saved from the necessity of proving consideration, because the defendants pleaded payment. The burden of proof was upon them, and the Judge says that they have not discharged it. The case of *Damodar* v. *Atmaram* (2) is distinguishable on the ground of the decision in *Sheikh Akbar* v. *Sheikh Khan* (3).

Ghanasham N. Nadkarni, appeared for the defendants in support of the rule. He relied upon *Damodar* v. *Atmaram* (2).

JUDGMENT.

SARGENT, C. J.—The opponent in this application sues the applicants on two *hundis*, which, it is not disputed, were inadmissible in evidence for want of impressed stamps. The lower appeal Court, however, awarded the plaintiff's claim on the ground that the applicants' admissions in their written statement rendered it unnecessary to put the *hundis* in evidence.

In *Ankur Chunder Roy* v. *Madhub Chunder Ghose* (6), Sir R. Couch seems to have thought that the language of the Indian Stamp Act of 1869, which prohibits a *hundi* not properly stamped not only from being received in evidence but from being acted on in any manner, precluded the application of the English cases under the Stamp Acts. He did not, however, decide the point, considering that the defendants' admissions of the contents of the *hundi* were not such as to dispense with its production in evidence. In *Damodar* v. *Atmaram* (2), the same question arose and was disposed of apparently by Mr. Justice Birdwood in the same manner as in *Ankur Chunder Roy* v. *Madhub Chunder Ghose*. Mr. Justice Jardine's remarks, however, on that case would seem to show that he thought that the defendants' admissions were precluded by the language of the Stamp Act.

It being necessary in this case to decide on the effect of the Stamp Act, it appears to us that the *hundi* is "acted upon" where a decree is passed on it, whether proved or admitted, and that owing to the language

(1) 3 C. 314. (2) 12 B. 443. (3) 7 C. 256.
(4) 4 A. 135. (5) 7 M. 112. (6) 21 W.R. 1.

1893
JUNE 22.
APPEL-
LATE
CIVIL.
18 B. 369.

of the Stamp Act the Court cannot [372] give effect to it in either case. The lower appeal Court was, therefore, wrong in deciding in favour of plaintiff's claim on the ground of defendants' admissions. But it appears, from the grounds of the plaintiff's appeal to the lower Court, that he complained that the first Court had not permitted him to adduce evidence of payment to defendant otherwise than by the *hundis*. It will be necessary for the lower appeal Court to deal with this objection, and in doing so it will be advisable for it to consider the judgments in *Damodar* v. *Atmaram* (1) *Golap Chand* v. *Thakurani* (2) and *Sheikh Akbar* v. *Sheikh Khan* (3).

We must, therefore, in the exercise of our extraordinary jurisdiction reverse the decree of the Court below and send back the case to be disposed of afresh having regard to the above remarks. Costs to abide the result.

Decree reversed and case sent back.

---

18 B. 372.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Telang.

BABAJI (*Original Defendant*), *Appellant v.* KRISHNA AND ANOTHER (*Original Plaintiffs*), *Respondents.** [28th June, 1893.]

Fraud—Sham transaction—Fraudulent conveyance—Suit for possession by purchaser of land—Defence that the sale to plaintiff was a sham transaction to defraud creditors.

The plaintiff sued for possession of certain land, which he alleged he had purchased from the defendant under a registered sale deed dated 10th November, 1876. The defendant pleaded that the deed was a sham deed and without consideration, and had been executed by him merely to save the land from his creditors.

Held, that the plea was good, and that it was open to the defendant to defend his possession by showing that the real transaction between himself and the plaintiff was to defraud, whether a third party or his creditors generally.

[N.F., 4 Ind. Cas. 233=5 N.L.R. 146 (148); Rel., 8 O.C. 278 (281); R., 23 B. 406 (412); 33 C. 967 (982)=4 C.L.J. 22=10 C W.N. 650; 8 C.W.N. 620 (621); 1 O.C. 188 (189); 3 P.R. 1906=109 P.L.R. 1906; U.B.R. (1897—1901) 544; D., 23 C. 962 (964).]

THIS was a second appeal from the decision of T. Walker, Assistant Judge of Satara.

The plaintiff Krishna bin Apa Surve and his assignee Hari Narayan Jog sued the defendant Babaji bin Sadu Kirdak to [373] recover possession of certain land, alleging that it had been sold by the defendant to plaintiff Krishna under a registered sale-deed dated the 10th November, 1876, and had been delivered into his possession, but that subsequently the defendant dispossessed him.

The defendant denied that the plaintiff was ever put in possession, and alleged that the sale-deed sued upon was a sham deed and without consideration, and was executed by him (the defendant) merely to screen the property from attachment and sale by his creditors.

The Subordinate Judge found that the transaction between the parties was a mortgage and not a sale, and was intended, the consideration

---

* Second Appeal, No. 99 of 1892.

(1) 12 B. 443. (2) 3 C. 314. (3) 7 C. 256.

being inadequate, for the protection of the property against the defendant's creditors. He, therefore, passed the following order :—

"The plaintiffs may recover from the defendant the possession of the property as described in the plaint, not as purchasers but merely as mortgagees of the land. The defendant shall bear the costs of himself and the plaintiffs."

On appeal by the plaintiffs the Assistant Judge found that the sale was a genuine transaction. He, therefore, reversed the decree and allowed the plaintiffs' claim to recover possession of the land as purchasers, observing :—

"Neither party alleges that the sale-deed (Ex. 13) the execution of which is not disputed, was a mortgage. The decree of the lower Court accordingly cannot stand, as it was not open to the Subordinate Judge to find that the deed was a mortgage. It remains to decide whether there was genuine sale or not. Defendant's statement, that Ex. 13 was passed to save the property from being taken by his creditors, amounts to this, that he committed an act punishable under s. 206 of the Indian Penal Code ; and he can hardly expect a Court of Justice to support him in such a cause. * * *"

The defendant preferred a second appeal.

Inverarity (with *Manekshah J. Taleyarkhan*), for the appellant (the defendant).—The Judge was wrong in refusing to consider **[374]** our case at all—*Ram Surun Singh* v. *Mussamut Pran Peary* (1) ; *Sreemutty Debia Chowdhrain* v. *Bimola Soonduree Debia* (2) ; *Mahadaji Gopal* v. *Vithal Ballal* (3) ; *Dharma Sakharam* v. *Nago* (4) ; *Chenvirappa* v. *Puttappa* (5). The last three rulings are distinguishable. We contend, on the strength of the above authorities, that we are entitled to show that the transaction in dispute was a sham sale to the plaintiff. The property is worth a great deal, and yet it purports to have been sold for one hundred rupeess only.

P. M. Mehta (with *Balaji Abaji Bhagavat*), for the respondents (plaintiffs).—The reason why the Judge did not enter into the merits of the transaction was that immediately after the sale to the plaintiff No. 1 he was put into possession and held possession for nearly twelve years. The finding as to whether a transaction is a sham or not, is a finding of fact. Both the lower Courts have concurred in saying that it is not a sham. They have differed merely with respect to its nature. Mere inadequacy of consideration would not render a transaction fictitious. Both the Courts have found that possession was given to us *bona fide*, and that we paid the assessment.

JUDGMENT.

SARGENT, C.J.—The judgments of the Privy Council in *Ram Surun Singh* v. *Mussamut Pran Peary* (1) and of the Calcutta High Court in *Sreemutty Debia Chowdhrain* v. *Bimola Soonduree Debia* (2) as delivered by Sir R. Couch show that it is open to the defendant to defend his possession by showing that the real transaction between himself and the plaintiff was to defraud, whether a third party or the defendant's creditors generally. The decision by Sir M. Westropp and Melvill, J., in *Mahadaji Gopal* v. *Vithal Ballal* (3), followed in *Dharma Sakharam* v. *Nago Badgu* (4), turns

(1) 13 M.I.A. 551. (2) 21 W.R. 422. (3) 7 B. 78.
(4) P.J. (1890), p. 275. (5) 11 B. 708.

1893
JUNE 28.

APPELLATE CIVIL.

18 B. 372

upon the special circumstances which in those cases were deemed to estop the defendant from pleading such a defence.

The general question is much discussed in *Chenvirappa* v. *Puttappa* (1), but we do not find that any authority of a Court of equity is referred to in that case, which questions the right of the [375] defendant to plead such a defence whatever doubt there may be as to the plaintiff's right to avoid his own deed by setting up his own fraudulent act. As the lower Court of appeal has refused to consider this defence by the defendant, and has disposed of the suit solely on the ground whether there was a valid sale independently of the question of fraudulent intention, we must send down the following issue for determination :—

Was the deed in question a colourable transaction intended to defraud the defendant's creditors?

The finding to be transmitted to this Court within two months. When the finding is returned, it will be open to plaintiffs, if the finding be in the affirmative, to contend that the defendant not having appealed against the finding of the Subordinate Judge cannot claim to keep the property unburdened by the mortgage-debt as found by the Subordinate Judge.

Issue sent down.

---

18 B. 375.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Telang.

BAI HARKOR (*Original Petitioner*), *Applicant v.* BAI SHANGAR AND ANOTHER (*Original Opponents*), *Opponents.** [29th June, 1893].

Act VIII of 1890, *s.* 39 (1)—*Guardian and ward—Minor—Removal of guardian—"Instrument"—Construction.*

The word "instrument" in s. 39 of the Guardian and Wards Act (VIII of 1890) means instruments *ejusdem generis* with a will, and a decree of a Civil Court is not an instrument within the contemplation of the section.

THIS was a reference made by Gilmour McCorkell, District Judge of Ahmedabad, under s. 617 of the Civil Procedure Code (Act XIV of 1882).

[376] One Lallu Khimchand died, leaving him surviving his widow Bai Harkor (the petitioner), a son Chotalal and a daughter Chanchal.

---

* Civil Reference, No. 2 of 1893.

(1) 11 B. 708.

(2) Section 39 of the Guardians and Wards Act, VIII of 1890 :—The Court may, on the application of any person interested, or of its own motion, remove a guardian appointed or declared by the Court, or a guardian appointed by will or other instrument, for any of the following causes, namely :—(*a*) for abuse of his trust ; (*b*) for continued failure to perform the duties of his trust ; (*c*) for incapacity to perform the duties of his trust ; (*d*) for ill-treatment, or neglect to take proper care of his ward ; (*e*) for contumacious disregard of any provision of this Act or of any order [376] of the Court; (*f*) for conviction of an offence implying, in the opinion of the Court, a defect of character which unfits him to be the guardian of his ward ; (*g*) for having an interest adverse to the faithful performance of his duties ; (*h*) for ceasing to reside within the local limits of the jurisdiction of the Court ; (*i*) in the case of a guardian of the property, for bankruptcy or insolvency ; (*j*) by reason of the guardianship of the guardian ceasing or being liable to cease under the law to which the minor is subject :

Provided that a guardian appointed by will or other instrument, whether he has been declared under this Act or not, shall not be removed (*a*) for the cause mentioned in cl. (*g*) unless the adverse interest accrued after the death of the person who appointed him, or it is shown that that person made and maintained the appointment in ignorance of the existence of the adverse interest, or (*b*) for the cause mentioned in cl. (*h*), unless such guardian has taken up such a residence as, in the opinion of the Court, renders it impracticable for him to discharge the functions of guardian.

Chotalal died, leaving him surviving his two widows, named Bai Shangar *alias* Ghebeli and Bai Moti, but no issue. Chanchal married one Chimanlal, to whom she bore a son Mafatlal, who apparently was born at the time of his uncle Chotalal's death. On the death of Chotalal, disputes arose between his mother Bai Harkor and his two widows. Ultimately the disputes were referred to arbitrators, who made an award declaring the minor Mafatlal to be the heir to the estate of his deceased uncle Chotalal. A decree was passed in the Subordinate Judge's Court embodying the result of the arbitration, and in that decree Chotalal's widows Bai Shangar and Bai Moti were declared to be the guardians of the minor Mafatlal. Thereupon, Chotalal's mother Bai Harkor presented an application to the District Judge for the removal of Bai Shangar and Bai Moti from the guardianship, and a question having arisen as to whether s. 39 of the Guardians and Wards Act (VIII of 1890), which authorizes the District Court to remove a guardian appointed or declared by the Court or a guardian appointed by a will or other *instrument*, was applicable to the case of a guardian appointed under a decree, and the Judge not being satisfied that the word *instrument* in s. 39 of the Act could be held to include "a decree," he made the reference in the following terms:—

"As there is considerable doubt in my mind on the matter, and as no appeal appears to lie against my order refusing to remove **[377]** the guardians, I beg to submit the following question * *. Does the word "instrument" in s. 39 of Act VIII of 1890 include the decree of a Subordinate Judge sitting as a Civil Court of original jurisdiction ?"

The opinion of the Judge was in the negative.

There was no appearance for the parties.

OPINION.

SARGENT, C.J.—We think that the anguage of the section requires that the word "instrument" should be confined to instruments *ejusdem generis* with a will, and that the decree, by which the first appointment of the guardians in this case must be regarded as having been made, is, therefore, not an instrument within the contemplation of the section.

Order accordingly.

---

18 B. 377 (F.B.).

CRIMINAL REFERENCE—FULL BENCH.

Before Sir Charles Sargent, Kt., Chief Justice, Mr. Justice Telang, Mr. Justice Candy and Mr. Justice Fulton.

QUEEN-EMPRESS *v.* MUGAPA BIN NINGAPA.* [3rd July, 1893.]

Criminal procedure—Charge—Alternative charge—Contradictory statements—Statement maae to a police officer during a police investigation—Contradictory statement made before a Magistrate holding a preliminary inquiry—Giving false evidence—Indian Penal Code (Act XLV of 1860), s. 193—*Separate charges.*

Where a person has made two contradictory statements, one to a police officer making an investigation under Chap. XIV of the Code of Criminal Procedure (Act X of 1882), and the other to a Magistrate holding a preliminary inquiry, he cannot be charged, and still less convicted, on an alternative charge.

---

* Criminal Reference, No. 61 of 1893.

1893

JULY 3.

FULL BENCH.

18 B. 377 (F.B.).

In such a case, if there is no other evidence at the trial but the contradictory statements made by the accused, separate charges cannot be framed.

[R., 26 M. 55 (59) = 1 Weir 169 ; 2 Weir 300 ; D., 6 Bom. L.R. 379 (392) = 28 B. 533.]

THIS was a reference to a Full Bench.

The facts of this case, so far as they are material for the purposes of this report, are as follow :—

One Fakirapa was murdered on the 21st December, 1892.

During the course of the police investigation of the case the accused was examined by the chief constable under the provisions [378] of s. 161 of the Code of Criminal Procedure (X of 1882). On this occasion he stated that he had gone to the field where Fakirapa was lying, and questioned him as to who had assailed him, and that he named Kyundgu Mudkir, Yella Hubali, Yella Ahetti, Kon Bassaya, Tarrihal Bassaya and some other persons.

Tarrihal Bassaya was, thereupon, charged with murder. At the preliminary inquiry held by Mr. Bonus, a First Class Magistrate of Dharwar, the accused was examined as a witness. On that occasion he stated that he was told by the deceased Fakirapa that he had been beaten by Kadpatta Kalla and Kon Bassaya and that the deceased did not mention the names of Kyundgu Mudkir, Yella Hubali, Yella Ahetti and Tarrihal Bassaya.

Accused was, thereupon, prosecuted for intentionally giving false evidence in a judicial proceeding under s. 193 of the Indian Penal Code (XLV of 1860).

The First Class Magistrate convicted him of this offence, and sentenced him to one month's rigorous imprisonment.

The District Magistrate, in revising the proceedings of the case, was of opinion that the sentence passed on the accused was wholly inadequate, considering the serious nature of the offence. He was also of opinion that as the accused had made contradictory statements, one to the police and the other to the Magistrate, he ought to have been charged in respect of both and convicted in the alternative. He had been convicted of giving false evidence, although no evidence was taken or recorded to show that his statement to the police was false. On these grounds the District Magistrate referred the case to the High Court under s. 438 of the Code of Criminal Procedure (Act X of 1882), recommending that the conviction and sentence should be quashed and a retrial ordered.

The case was heard by a Division Bench (Candy and Fulton, JJ.), who made the following reference to a Full Bench :—

"We agree with the District Magistrate that the evidence does not prove that the accused gave false evidence before the police, but that it establishes, *prima facie*, either that he gave false evidence in a stage of a judicial proceeding before Mr. Bonus, or [379] that he gave false evidence (punishable under the latter part of s. 193, Indian Penal Code) before the chief constable when holding an inquiry under Chap. XIV of the Criminal Procedure Code.

"Before, however, remanding the case for retrial we have to decide whether on the above facts a charge or charges can be framed which may lead to a conviction. If we accept the judgment in *Imperatrix* v. *Annya* (1), apparently this question must be answered in the negative; but as the remarks in this judgment are in the nature of *obiter dicta*, and appear

(1) Criminal Ruling No. 40 of 1890.

inconsistent with the decision in *Imperatrix* v. *Kabhai Ujam* (1) and with the tendency of the decision in *Imperatrix* v. *Kalidas Samal* (2), we are unable to accept it as a conclusive authority.

"Under the circumstances we think it desirable to refer to a Full Bench the question, whether an accused person can be convicted, in the alternative, of intentionally giving false evidence in a stage of a judicial proceeding before a Magistrate, or of intentionally giving false evidence before a police officer making an investigation under chap. XIV of the Code of Criminal Procedure (see *Reg.* v. *Mahammad* (3) ; *Queen-Empress* v. *Ramji* (4) ; *Queen-Empress* v. *Ismal* (5) ; *Queen-Empress* v. *Bharma* (6) ; *Imperatrix* v. *Kabhai Ujam* (1), *Imperatrix* v. *Kalidas Samal* (2) ; *Imperatrix* v. *Annya* (7) and if so, in what form the charge or charges should be framed, when the only available evidence is the fact that two contradictory statements have been made.

"Apparently in *Queen-Empress* v. *Ramji* (4) the possibility of charging in the manner adopted in the later case of *Kabhai Ujam* (1) was not considered."

This reference was heard by a Full Bench (Sargent, C. J., and Telang, Candy and Fulton, JJ.).

There was no appearance for the Crown or for the accused.

JUDGMENT.

PER CURIAM.—He cannot be charged and, therefore, still less convicted on an alternative charge, having regard to the ruling **[380]** in *Imperatrix* v. *Kabhai Ujam* (1) which, we think, should not be re-opened.

As to the propriety of framing separate charges where there is no other evidence before the Magistrate, but the contradictory statements made by the accused, the decision in *Imperatrix* v. *Kabhai Ujam* (1) and the opinion in *Imperatrix* v. *Annya* (7) are, we think, necessarily conflicting. After a careful consideration of the question we are of opinion that we ought to adopt the reasoning of the Court in the latter case, and must, therefore, hold that separate charges under the above circumstances cannot be framed.

The question, therefore, must be answered in the negative.

---

18 B. 380 (F.B.).

CRIMINAL REFERENCE—FULL BENCH.

Before Sir Charles Sargent, Kt., Chief Justice, Mr. Justice Telang, Mr. Justice Candy and Mr. Justice Fulton.

QUEEN-EMPRESS *v.* RAIJI DAJI.* [3rd July, 1893.]

Criminal Procedure Code (Act X of 1882), *s.* 487—*Magistrate competent to try an accused person for disobedience of a summons issued by him as Mamlatdar.*

A Magistrate is not debarred by s. 487 of the Code of Criminal Procedure (Act X of 1882) from trying an accused person under s. 174 of the Indian Penal Code (XLV of 1860) for disobedience of a summons issued by him in his capacity of Mamlatdar.

---

* Criminal Reference, No. 34 of 1893.

(1) Criminal Ruling No. 26 of 1887.
(2) Criminal Ruling No. 57 of 1889.
(3) 13 B.L.R. 324.
(4) 10 B. 124.
(5) 11 B. 659.
(6) 11 B. 702.
(7) Criminal Ruling No. 40 of 1890.

1893

JULY 3.

FULL BENCH.

18 B. 380 (F.B.).

In construing s. 487 of Act X of 1882, effect must be given to the words "as such Judge or Magistrate," and these words must be read in connection with all the three classes of offences previously referred to.

Queen-Empress v. *Sarat Chandra Rakhit* (1) followed.

[R., U.B.R. (1897—1901) 61 (*a*); D., Rat. Unr. Cr. Cas. 904.]

THIS was a reference to a Full Bench.

The accused was charged with the offence of not obeying a legal order to attend before the Mamlatdar of Vagra in accordance with a summons issued by the Mamlatdar under s. 189 of the Bombay Land Revenue Code (Act V of 1879).

[381] The Mamlatdar acting in his capacity as a Magistrate of the Second Class tried the accused on the above charge, convicted him under s. 174 of the Indian Penal Code, and sentenced him to the fine of Rs. 20.

Thereupon, the District Magistrate referred the case to the High Court under s. 438 of the Code of Criminal Procedure (Act X of 1882).

The District Magistrate was of opinion that the summons, which was disobeyed, having been issued by the trying Magistrate in his capacity as Mamlatdar, he was disqualified, under s. 487 of the Code of Criminal Procedure, from trying the accused for contempt of his own authority.

The District Magistrate was also of opinion that the prosecution was bad for want of the sanction or complaint required by s. 195 of the Code of Criminal Procedure.

On both these grounds the District Magistrate recommended that the conviction and sentence should be quashed and a retrial ordered.

This case came on for hearing before a Division Bench (Candy and Fulton, JJ.), who referred the following question to a Full Bench :—

"Whether a Second Class Magistrate is debarred by s. 487 of the Criminal Procedure Code (Act X of 1882) from trying a person under s. 174 of the Indian Penal Code for disobeying a summons issued by him in his capacity as Mamlatdar?"

The reference was heard by a Full Bench, consisting of Sargent, C.J., Telang, Candy and Fulton, JJ.

There was no appearance, either for the Crown or for the accused.

JUDGMENT.

PER CURIAM.—Following the decision of the Calcutta High Court in the case of the *Queeen-Empress* v. *Sarat Chandri Rakhit*(1), we think that in determining the construction of s. 487 of the Criminal Procedure Code, effect must be given to the words "as such Judge or Magistrate," and that as [382] those words must be read in connection with all the three classes of offences previously referred to, they preclude us from holding that a Magistrate is debarred by law from trying an accused person under s. 174 of the Indian Penal Code for disobedience of a summons issued by him in his capacity of Mamlatdar. This is, in our opinion, the correct construction of the section, although we are aware that it leads to a distinction between offences committed before him in his capacity as a Civil Judge and those committed before him as a Magistrate, for which there seems to be no sufficient reason.

(1) 16 C. 766.

18 B. 382.

1893
JULY 4.

APPELLATE CIVIL.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Telang.

18 B. 382.

VISHNU (*Original Plaintiff*), *Appellant v.* RANGO GANESH PURANDARE (*Original Defendant*), *Respondent.** [4th July, 1893.]

Easement—Right of way—Right of drainage—Mortgage—Mortgage of part of a house—Easement over the other part granted to the mortgagee by the mortgage-deed—Subsequent sale of parts of the house to different owners—Sale of mortgaged part subject to the mortgage—Mortgage paid off by purchaser—Purchaser's right to easement—License—Grant of right of way in a mortgage of part of property of mortgagor—Reservation by mortgagor of similar right in respect of other property not mortgaged by him—Vendor and purchaser—Sale of land subject to a mortgage giving a right of way—Mortgage paid off by purchaser—Mortgagee not a party to conveyance—Receipt for mortgage money endorsed on conveyance.

V, the owner of a house, mortgaged the east portion of it to M, in 1878. The mortgage-deed gave to the mortgagee the use of a certain privy situated in another part of the house and the right of way to it through a certain *bol* or passage. V, subsequently sold the whole house to C., and C., in 1880, mortgaged the western part of it to R., who got a decree, and in execution the part mortgaged to him (*i.e.*, the west) was sold in 1885, and the defendant became the purchaser. In 1887 C. sold the east part to the plaintiff, who paid off the mortgage to M., and obtained M.'s endorsement of payment on his deed of conveyance. The plaintiff subsequently sued to restrain the defendant from interfering with his use of the passage and of the privy. The defendant alleged that both were comprised in the property purchased by him at the Court sale in 1885, and that the right given by the mortgage of 1878 was merely a license to the mortgagee and not an easement.

Held, that the use of the passage and of the privy was a privilege granted by the very instrument which created the mortgage, and should be regarded as a privilege **[383]** ancillary to the use of the part of the house mortgaged to M. in 1879. The defendant's purchase in 1885 was subject to the easement acquired by M. (the mortgagee), and the plaintiff had purchased the mortgagee's interest in the house, which included her right by way of easement. The plaintiff was, therefore, entitled to the use of the privy and the passage.

In the mortgage-deed of 1880, by which the west part of the house was mortgaged by C. to R., the following clause was contained :—"You are to have the use of the drain for passing water as it has continued from old times."

Held, that these words should be understood as intended to reserve to C. (the mortgagor), in respect of the part of the house not included in the mortgage, a right to use the drain similar to the right given to the mortgagee. The right so reserved by C. was afterwards sold by C. to the plaintiff along with the east part of the house in 1887, and the plaintiff was, therefore, entitled to the use of the drain.

The plaintiff purchased a part of the house which the vendor had previously mortgaged to M. The mortgage deed gave to the mortgagee the use of a certain privy and the right of going to it through a passage situated at the rear of the mortgaged part of the house. M. was not a party to the conveyance to the plaintiff, but at the time of the purchase the plaintiff paid off M.'s mortgage, and M. signed a receipt for the mortgage money endorsed on the conveyance.

Held, that the plaintiff must be taken to have purchased the mortgagee's interest in the house including the right by way of easement over the passage.

SECOND appeal from the decision of L. G. Fernandez, First Class Subordinate Judge of Poona, with appellate powers.

The plaintiff was the owner of a house adjoining the defendant's house and situated to the east of it.

These houses were originally one house, facing eastwards. It belonged to one Vithu bin Sayaji, who on the 4th December, 1878, mortgaged the

* Second Appeal, No. 335 of 1890.

1893
JULY 4.
APPELLATE CIVIL.
18 B. 382.

front (*i. e.*, east) portion of it to one Mathura. The mortgage-deed gave to the mortgagee the use of a certain privy, with the right of going to it through a certain *bol* or passage at the rear of the mortgaged part of the house. The clause in the deed was as follows:—

"And there is to the west of my (mortgagor's) rear *sopa* (veranda), a passage (*bol*) as far as the privy. This has been left joint for your user and enjoyment, because you have the *vahivat* (management) of the northern privy in the rear."

In the following year (*viz.*, 12th June, 1879) Vithu sold the whole house to one Chimnaji, and Chimnaji on the 5th June, 1880, mortgaged with possession the rear *i.e.*, the western part of the [384] house to one Ravji Lakshman, the mortgage-deed in this case providing that the mortgagee was "to have the use of the drain for passing water as it has continued from old times." This drain passed under the above-named *bol* or passage.

In 1882, Ravji sued Chimnaji on the mortgage and got a decree, in execution of which the west or rear part of the house mortgaged in 1880 was sold in 1885, and the defendant purchased it and took possession.

On the 14th July, 1887, Chimnaji sold to the plaintiff the front or east part of the house, which had been mortgaged in 1878 to Mathura. The plaintiff redeemed the mortgage, and Mathura made an endorsement on the deed of conveyance to the effect that the mortgage was paid off.

On the 16th December, 1887, the plaintiff filed this suit, praying for an injunction restraining the defendant from obstructing his (plaintiff's) right of using the passage and the privy and the drain under the passage. The plaintiff alleged that the passage, the privy and the drain under the passage belonged to him.

The defendant contended that he had purchased the passage (*bol*), the privy and the drain when he purchased the house at the Court sale in 1885.

The Subordinate Judge found that the privy belonged to the plaintiff; that the passage (*bol*) with the drain underneath belonged to the defendant, but that the plaintiff had a right to use the passage (*bol*) and to discharge the water from his premises through the drain. He, therefore, partially allowed the plaintiff's claim.

The defendant appealed and the plaintiff presented cross objections under s. 561 of the Civil Procedure Code (Act XIV of 1882). The appellate Court reversed the decree and dismissed the suit, holding that the plaintiff had not proved his right to the passage (*bol*) leading to the privy, that the privy did not belong to the plaintiff, and that he had no right to discharge his water through the drain.

The plaintiff preferred a second appeal.

[385] *Shivram v. Bhandarkar*, for the appellant (plaintiff).—When the plaintiff purchased the front portion of the house it was under mortgage to Mathura, to whom it had been mortgaged in 1878. After his purchase the plaintiff paid off the mortgage, and the mortgagee (Mathura) endorsed the payment on the plaintiff's deed of conveyance. The plaintiff, therefore, is entitled to Mathura's rights under the mortgage-deed. That deed gave Mathura the use of the privy and of the passage to it. The defendant's purchase was subsequent to Mathura's mortgage, and was, therefore, subject to any rights which Mathura had acquired under her mortgage. The right of passage over the *bol* is an easement of necessity for the use of the privy—*Watts* v. *Kelson* (1); *Morris* v. *Edgington* (2); *Purushottam Sakharam* v. *Dargoji Tukaram* (3). As to the drain, the defendant only

(1) L. R. 6 Ch. 166. (2) Taunton's Rep. 31. (3) 14 B. 452.

takes the right given to Ravji by Chimnaji under the mortgage of 1880. By that mortgage Chimnaji merely gave the use of the drain to Ravji, while also reserving a right of user to himself. This reserved right now belongs to the plaintiff, who purchased from Chimnaji.

Mahadev Chimnaji Apte, for the respondent (defendant).—The plaintiff can only lay claim to that portion of the house which he purchased from Chimnaji and nothing more. He cannot lay claim to the privy and the right of passage over the *bol* simply on the ground that the mortgagee Mathura was entitled to them. In order that an easement should be apparent and continuous, the person claiming a right to the easement should have a right to compel his opponent to submit to the easement. There is no reservation made in the plaintiff's sale-deed with respect to use of the privy and the *bol*. If the owner of a property conveys a portion of it to another, the vendee cannot by implication get any right of easement over the other portion of the property—*Suffield* v. *Brown* (1). An apparent and continuous easement may pass to the grantee, only under certain circumstances—*Wheeldon* v. *Burrows* (2); *Russell* v. *Watts* (3). In both these cases *Suffield* v. *Brown* (1) was followed.

[386] Next we contend that the appellant plaintiff cannot claim those rights which Mathura had under her mortgage, because there was no assignment of the mortgage to him. The use of the privy and the *bol* was not an easement, but a mere license conferred on Mathura by the mortgage. Under the mortgage-deed the mortgagor allowed Mathura to use the privy and for this purpose the *bol* was kept in the joint use of the mortgagor and Mathura. This was merely a personal privilege—*Prosonna Coomar Singha* v. *Ram Coomar Ghose* (4) ; *Wood* v. *Leadbitter* (5).

JUDGMENT.

SARGENT, C. J.—Both the Courts below have found that the *bol* in question belonged to the defendant, but the lower Court of appeal, differing from the Subordinate Judge, has held that plaintiff has failed in establishing a right to the use of the northern privy and a passage along the *bol* for that purpose, and also to have the water from his house allowed to pass by the drain running down the *bol*.

It has been contended for the plaintiff that, as regards the use of the privy, it was granted by the mortgage of 1878 to Mathura, which was paid off by plaintiff on the occasion of his purchase in 1887,—that it, therefore, passed to the plaintiff by his purchase, and the defendant holds the *bol* subject to that easement. For the defendant it was contended that it was only a license and not an easement which was conferred by the mortgage to Mathura, and *Prosonna Coomar Singha* v. *Ram Coomar Ghose* (4) was referred to. Here, however, the privilege was granted by the very instrument which created the mortgage, and must be regarded by the very terms of the provision as a privilege ancillary to the use of the house—to use the language of Martin, B., in *Hill* v. *Tupper* (6). It is plain, therefore, that the defendant acquired the *bol* subject to the easement which the mortgagee Mathura had over it.

It was contended, however, that it did not pass to the plaintiff, because there is no express assignment of Mathura's mortgage. It is true that Mathura was not made a party to the conveyance to the plaintiff as would be done in England; but she signed a **[387]** receipt for the mortgage

(1) 10 Jurist, 111. (2) 12 Ch. Div. 31. (3) 25 Ch. Div. 559.
(4) 16 C. 640. (5) 13 M. and W. 838. (6) 32 L. J. Exch. 217.

1893
JULY 4.
APPEL
LATE
CIVIL.
18 B. 382.

money endorsed on the conveyance, and the plaintiff must, therefore, be taken to have purchased the mortgagee's interest in the house, which would include the right by way of easement over the defendant's *bol*. We think, therefore, that the plaintiff has established his right to the use of the northern privy and a way to it along the *bol*.

As to the rights of draining the water of his house by the drain running down the *bol*, we think that the words of the mortgage by Chimnaji to Ravji Lakshman, through whom defendant derives his title,—"you are to have the use of the drain for passing water as it has continued from old times"—must be understood as intended to reserve to Chimnaji the right in respect of the house still retained by him of using the drain whilst conferring an equal right on Ravji Lakshman of using it for the enjoyment of the mortgaged house.

We must, therefore, vary the decree of the Court below by granting plaintiff an injunction to restrain defendant from interfering with or obstructing the right of way of himself and other inmates of the house through the *bol* to the northern privy and the use of the same and also his right to have the water from his house conveyed by the drain in the *bol*. The plaintiff to have his costs of this appeal. Parties to pay their own costs in the lower Court of appeal.

Decree varied.

---

18 B. 387.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Telang.

SAVLARAM AND OTHERS (*Original Defendants Nos.* 2, 3 *and* 7), *Appellants v.* GENU AND OTHERS (*Original Plaintiffs*), *Respondents.**

[6th July, 1893.]

Limitation Act (*XV of* 1877), *art.* 134, *sch.* II—*Mortgage—Sub-mortgage—Redemption.*

In 1864 Ramji mortgaged the property in dispute with possession to Raghu. Raghu and his widow after his death sub-mortgaged various portions of it to Savlaram (defendant No. 3) in 1864, 1866 and 1870. After the death of the mortgagor, Ramji, his grandsons (plaintiffs Nos. 1, 2 and 3) sold their equity of redemption to plaintiffs Nos. 4 and 5 and in 1891 the five plaintiffs sued defendants Nos. 1 and **[388]** 2, the heirs of Raghu (original mortgagee) and the sub-mortgagee (defendant No. 3) for redemption and possession. The defendants contended that the suit was barred by the Limitation Act (XV of 1877), sch. II, art. 134.

Held, that art. 134 did not apply, as the language of the sub-mortgage-deed showed that the transaction was merely a mortgage of the mortgage-interest of Raghu and not of the entire property in the land.

Daivakhan Daudkhan v. *Bhiku Sazba* (1) and *Yesu Ramji* v. *Balkrishna* (2), referred to.

APPEAL from an order of remand passed by Rao Bahadur Chunilal M., First Class Subordinate Judge of Poona, with appellate powers.

The plaintiffs in 1891 sued to redeem and recover possession of certain lands from the defendants. The lands originally belonged to Ramji, the grandfather of plaintiffs Nos. 1, 2 and 3. In 1864 he mortgaged

---

* Appeal No. 1 of 1893 from order.

(1) 9 B. 475. (2) 15 B. 583.

them with possession to Raghu. In 1864, 1866 and 1870 Raghu and after his death his widow sub-mortgaged them to Savlaram (defendant No. 3). After Ramji's death his heirs (plaintiffs Nos. 1, 2 and 3) sold the equity of redemption to plaintiffs Nos. 4 and 5. The five plaintiffs now sued the mortgagees and sub-mortgagees for redemption.

The defendants pleaded limitation, and relied on art. 134 of sch. II of the Limitation Act (XV of 1877) (1).

The Subordinate Judge found that art. 134, sch. II of the Limitation Act (XV of 1877), was applicable to the case, and on the authority of *Yesu Ramji* v. *Balkrishna* (2) dismissed the suit as time-barred.

On appeal by the plaintiffs the Judge reversed the decree and remanded the case for a fresh decision.

He found it proved that the original mortgagee Raghu and his widow after his death had sub-mortgaged the property to defendant No. 3, and he held that art. 134 of sch. II of the Limitation Act did not apply in a case in which "a person **[389]** purchases from another with full knowledge that his vendor or mortgagor, as the case may be, is himself a mortgagee."

Defendants Nos. 2, 3 and 7 appealed.

Ghanasham N. Nadkarni, appeared for the appellants (original defendants Nos. 2, 3 and 7). He relied upon *Baivakhan Daudkhan* v. *Bhiku Sazba* (3) and *Yesu Ramji* v. *Balkrishna* (2).

Daji Abaji Khare, appeared for the respondents (original plaintiffs).

JUDGMENT.

SARGENT, C.J.—In this case the lower appeal Court has held that art. 134, Limitation Act (XV of 1877), did not apply, on the ground that the defendant had notice that his mortgagor Visaji was only a mortgagee of the land in question. Whether notice, as such, as showing want of good faith would be sufficient to deprive the appellants of the benefit of the above article of the Act of Limitation cannot perhaps be regarded as having been distinctly decided by any Division Bench of this Court having regard to the language of the Court in *Baivakhan Daudkhan* v. *Bhiku Sazba* (3) and *Yesu Ramji* v. *Balkrishna* (2). But here it is sufficient to say that art. 134 does not apply, as the language of the mortgage-deed, under which the defendants claim in this case, shows that it was only a mortgage of the mortgage-interest of Raghuji Visaji, and not of the entire property in the land. We must, therefore, confirm the decree of the Court below with costs.

Decree confirmed.

(1) Article 134 of sch. II to the Limitation Act (XV of 1877) gives as the period of limitation twelve years from "the date of the purchase" for a suit to recover possession of immoveable property conveyed or bequeathed in trust or mortgaged, and afterwards purchased from the trustee or mortgagee, for a valuable consideration.

(2) 15 B. 583.

(3) 9 B. 475.

1893
JULY 6.

APPEL-
LATE
CIVIL.

18 B. 389.

18 B. 389.

APPELLATE CIVIL.

Before Mr. Justice Telang and Mr. Justice Fulton.

RAMACHARYA (*Original Plaintiff*), *Appellant v.* ANANTACHARYA AND OTHERS (*Original Defendants*), *Respondents.**

[6th July, 1893.]

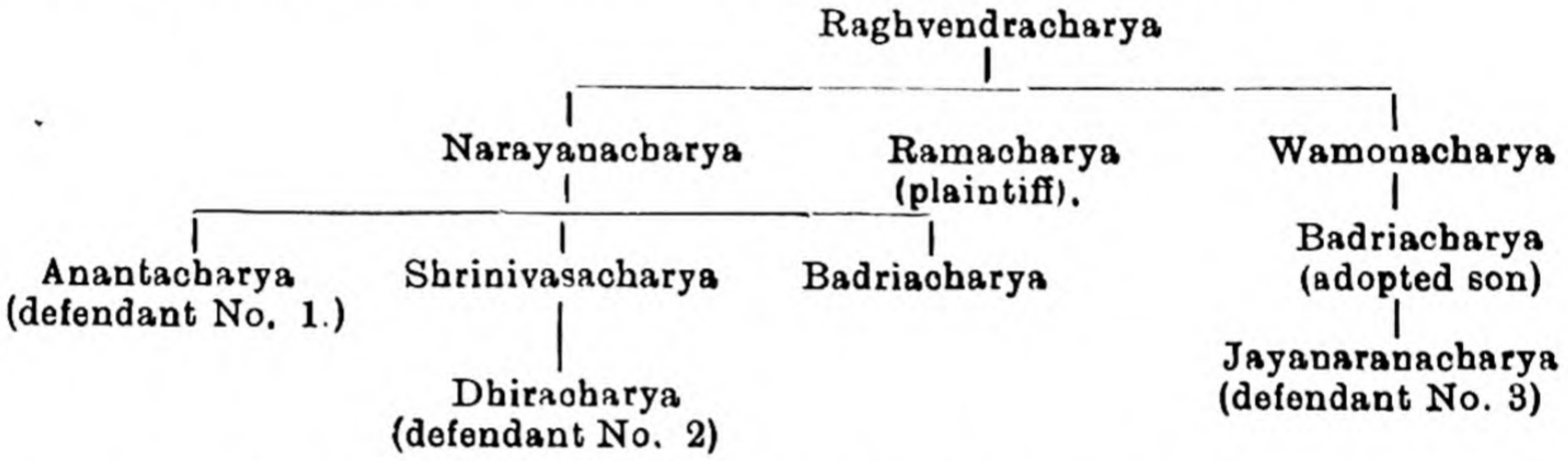
Hindu law—Partition—Partition of joint property situate in British India without taking into account other joint property situate outside British India.

A Court can grant partition of property belonging to a joint Hindu family situated in British India without taking into account other property belonging to the family situated outside British India.

[R., 23 B. 597 (600).]

[390] THIS was an appeal from the decision of Rao Babadur Jayasatya Bodharao Tirmalrao, First Class Subordinate Judge of Satara, in suit No. 14 of 1885.

Plaintiff sued for a partition of certain family property. The relationship of the parties is shown by the following pedigree:—



The defendants pleaded (*inter alia*) that the plaintiff was in possession of certain ancestral property at Gwalior consisting of houses, &c., which should be brought into hotchpot, and that until this was done, the suit would not lie.

The Subordinate Judge declined to raise any issue as to the property in plaintiff's possession at Gwalior holding that he had no jurisdiction over property situate oustide British India, and that it was not necessary to include such property in the present suit. He passed a decree, declaring that the plaintiff was entitled to a third share in certain of the properties mentioned in the plaint and to a half-share in the remainder.

Against this decree the plaintiff appealed to the High Court.

Jardine (with him *Mahadev Chimnaje Apte*), for respondents (defendants).—This suit cannot be maintained, unless the plaintiff brings into hotchpot the property which he holds at Gwalior. In a partition-suit the plaintiff must bring into hotchpot the whole of the joint property. Even assuming that the Court has jurisdiction to order a partial partition, a Court of Equity will not grant relief until the plaintiff submits to partition the whole estate—*Hari Narayan* v. *Ganpatrav Daji* (1); *Ram Lochun Pattuck* v. *Rughoobur Dyal* (2); *Ruttun Monee Dutt* v. *Brojo Mohun Dutt* (3); *Mayne's* Hindu law, s. 452.

---

* Appeal No. 132 of 1890.

(1) 7 B. 272. (2) 15 W. R. 111. (3) 22 W. R. 333.

1893
JULY 6.
APPELLATE CIVIL.
18 B. 389.

[391] *Lang* (Acting Advocate General) (with him *Vasudev R. Joglekar*), for the appellant.—The lower Court had no jurisdiction to deal with any property situate outside British India. It could not order that property to be divided. It is, therefore, not necessary to include it in the present suit. The defendant cannot complain of any injustice or hardship if the property in suit is divided without taking into account the Gwalior property. It is open to him to demand partition of that property in the Courts at Gwalior.

JUDGMENT.

TELANG, J.—Of the points argued before us, one relates to the adoption of Jayanarain by the widow of Badri. On the evidence I have come to the conclusion that that adoption is proved. It is unnecessary to go in detail into the evidence, as it has been set out by the Subordinate Judge.

The other important point relates to the argument urged on behalf of the defendants before us, to the effect that this suit is not maintainable, as the plaintiff has not brought into hotchpot certain property situated in the Gwalior territories which the defendants alleged to be family property. Now, there can be no doubt that this objection, if in itself sustainable, does not prevent the suit being maintained. It can only lead to a partition being made by the Court on the basis of the property in question being included therein. But the question here arises, whether the Court can make such a partition in the present case. Here the property alleged to be family property lies outside the jurisdiction of this Court and indeed outside British India. It is plain that the Court has no jurisdiction and no machinery for partitioning that property. Such jurisdiction and machinery are wanting in exactly the same way whether the suit is one like Dada Naik's case, whether the plaintiff, in the first instance, claimed partition of property outside the jurisdiction, or whether it is like the present case where the defendant asks that property should be brought into hotchpot for purposes of division although it lies outside the jurisdiction. It must, therefore, be futile to call on the plaintiff to bring that property into hotchpot for purposes of partition.

It may be said, no doubt, that the result of this will be that the plaintiff will have his full share of the property in British India **[392]** and will at the same time retain the entire property in Gwalior. But the remedy for this is in the hands of the defendants themselves. They must obtain their share of the Gwalior property by resorting to proper proceedings in the tribunals which have local jurisdiction over that property. Again, it may be said that this result is inconsistent with the general rule that partition takes place only once. But I am not aware that that rule has been enforced in such a case as the present, where partition cannot, by any means, be effected in one jurisdiction. In *Hari Narayan* v. *Ganpatrav Daji* (1) the point was left open, and in other cases the property was not outside British India, and, therefore, under the Civil Procedure Code, it has always been possible by resorting to the appropriate procedure to give a single Court jurisdiction over the whole of the family property.

But it is said that although the Court cannot make partition of property in a foreign jurisdiction it may nevertheless take such property into its calculation and award to the plaintiff in possession so much only of the property in British India as will equalize the shares of the plaintiff and

(1) 7 B. 272.

1893
JULY 6.

APPEL
LATE
CIVIL

18 B. 389.

defendant. In the first place, this is doing indirectly that which the law says may not be done directly. Secondly, it excludes a plaintiff who has property in a Native State, for no fault of his own, from what ordinarily would be his proper share in properties in British territory. And thirdly, in the event of the property in British territories being less than that in the Native State, it will exclude him from all share or benefit out of the former property. It appears to me that these results are much more inequitable than the results of refusing to entertain jurisdiction in any way, direct or indirect, in relation to the property in Native States. In fact, the very principle which underlies the rule that "once is partition of inheritance made," *viz.*, that thus alone can all the mutual rights of the parties be equitably adjusted, also requires that the Court should not attempt to deal with property outside its jurisdiction, because such a complete adjustment is outside its powers.

On the whole, therefore, I have come to the conclusion that the Subordinate Judge was right in refusing to deal with the property **[393]** in the Gwalior jurisdiction, and that his decree cannot be disturbed on that ground.

FULTON, J. (after referring to the question of adoption, continued :—) The next question to consider is whether the Subordinate Judge was right in refusing to take into account the Gwalior property. It is admittedly in the hands of the plaintiff, who says it is not family property. For the defendants it is contended that, without deciding whether it is family property or not and without taking it into account if it is joint, it is impossible to make an equitable partition of the property in British India.

It was, I think, not disputed that, before granting partition of joint property in the hands of a defendant, account must be taken of any such property in the possession of the plaintiff in British India. *Ballal Krishna* v. *Govinda* (1) and *Parbatsing* v. *Motibhai* (2) may be referred to in support of this proposition, which seems obvious. A plaintiff is entitled to his share in the whole family property, but he is not entitled to a share in any specified portion of the property apart from the rest. See *Nanabhai* v. *Nathabhai* (3). If he has family property in his possession, he cannot insist on a decree which will leave him in possession of more than his share of the whole. When, however, we come to apply this principle to property held by a plaintiff in a Native State, a doubt arises. If it be admitted that such property is joint, it would at first sight seem inequitable to grant partition of the property in British India without taking it into account, for the effect of such a decree would be at once to place the plaintiff in possession of an admittedly larger share of the family estate than he was entitled to, but the point does not appear to have been ever expressly decided in any reported case. In *Ramchandra Dada Naik* v. *Dada Mahadev Naik* (4) the Supreme Court held that it had no jurisdiction to enforce partition of immoveable property in the territories of an independent Chief, but in the subsequent case between the members of the same family—*Lakshman Dada Naik* v. *Ramchandra Dada Naik* (5)—a house in Shahapur in the Sangli State was taken into consideration **[394]** in a decree for partition. No objection, however, appears to have been taken, and possibly the fact that it was not situated in British territory was not brought to the notice of the Court. In *Hari Narayan* v. *Ganpatrav Daji* (6) Mr. Justice Kemball inclined to the view that property in a Native

(1) P.J. (1877), p. 124.
(2) P.J. (1889), p. 108.
(3) 7 B.H.C.R. A.C.J. 46.
(4) 1 B.H.C.R. App. lxxvi.
(5) 1 B. 561.
(6) 7 B. 272.

State should be considered when granting partition, but the question was not decided. A good deal may be said on both sides, but the arguments used by my learned colleague seem to me conclusive, and I, therefore, concur in the decision at which he has arrived.

As regards the details of the moveable property liable to partition, no sufficient reasons were shown for interfering with the judgment of the Subordinate Judge.

We must, therefore, confirm the decree of the Subordinate Judge, and direct that the costs of this appeal be paid by appellant, excepting the costs of the cross-objections, which must be borne by the respondent.

Decree confirmed.

1893 JULY 6. APPELLATE CIVIL. 18 B. 389.

---

18 B. 394.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt. Chief Justice, and Mr. Justice Telang.

RANCHORDAS NATHUBHAI AND OTHERS (*Original Plaintiffs*), *Applicants v.* BHAGUBHAI PARMANANDAS AND OTHERS (*Original Defendants*), *Opponents.** [11th July, 1893.]

Succession Certificate Act (*VII of* 1889)—*Landlord and tenant*—*Suit for rent.*

A certain firm mortgaged with possession its immoveable property to two other firms trading jointly, who let out the property to the mortgagor firm. Afterwards some of the partners of the mortgagee firms having died, the surviving partners and the sons of the deceased brought a suit against the mortgagor firm to recover rent which accrued due after the deaths of the deceased partners. The Judge held that the plaintiffs could not proceed with the suit without a certificate under the Succession Certificate Act (VII of 1889).

Held, reversing the order, that as the rent sued upon became due after the deaths of the deceased partners, it formed no part of their estates at the time of their respective deaths, and no certificate was, therefore, necessary under the Succession Certificate Act (VII of 1889).

[R., 36 C. 936 (942) = 16 C.L.J. 180 = 13 C.W.N. 966.]

[395] APPLICATION under the High Court's extraordinary jurisdiction (s. 622 of the Civil Procedure Code, Act XIV of 1882) against the decision of Rao Bahadur M. N. Nanavati, First Class Subordinate Judge of Surat.

Suit to recover arrears of rent.

In 1885 the defendants' firm through its manager mortgaged certain premises to two firms which traded together in partnership. Of these two firms, Chunilal Dwarkadas and Fatechand Hirachand were the proprietors. On the day of the mortgage the mortgagee firms leased the mortgaged property to the mortgagor firm, agreeing to take rent by two instalments per year. Fatechand died on the 5th January, 1888, and Chunilal on the 1st January, 1889. In the year 1892 the plaintiffs, who were then the partners of the mortgagee firm, and the sons of the deceased Chunilal and Fatechand brought a suit against the proprietors of the mortgagor firm to recover rent which was due from April, 1889.

The Subordinate Judge held that the plaintiffs could not proceed with the suit without a certificate under the Succession Certificate Act (VII of

* Application No. 224 of 1892 under extraordinary jurisdiction.

1893
JULY 11.

APPELLATE CIVIL.

18 B 394.

1889), on the ground that the partnership of the plaintiffs was a partnership by contract and not a family partnership, and directed them to produce the certificate within a particular time.

The plaintiffs applied under the extraordinary jurisdiction, and obtained a *rule nisi* calling on the defendants to show cause why the order of the Subordinate Judge should not be set aside on the ground that he was wrong in holding that a certificate under the Succession Certificate Act was necessary for the maintenance of the suit.

Kalabhai Lallubhai appeared for the plaintiffs in support of the rule.—On the deaths of Chunilal and Fatechand their interest in the mortgaged property survived to their sons, and, therefore, no succession certificate was necessary. Further, our claim is in respect of rent, which accrued due after the deaths of Chunilal and Fatechand. We do not seek to recover rent which became due during their lifetime, and if we had done so, a succession certificate would have been necessary.

[396] There was no appearance for the opponents (defendants) to show cause.

ORDER.

SARGENT, C.J.—As the rent sued upon became due after the deaths of Chunilal and Fatechand it formed no part of their estates at the time of their respective deaths, and, therefore, no certificate was necessary under the Act of 1889. We must, therefore, make the rule absolute and reverse the decree of the Court below and send back the case for trial.

Order reversed and case sent back.

---

18 B. 396.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Telang.

SHRIDHAR BALLAL KELKAR (*Original Plaintiff*), *Appellant v.* CHINTAMAN SADASHIV MEHENDALE AND ANOTHER (*Original Defendants*), *Respondents.** [12th July, 1893.]

Registration—Registration Act (III of 1877), s. 17, cl. (h)—Sale—Construction—Document creating a right to obtain another document.

By an unregistered writing, dated 17th April, 1889, A. agreed to sell to B. certain landed property on his (B's.) paying off the mortgage-debt due upon it and a further sum of Rs. 1,500. The agreement also stated that B. had on that day paid A. the Rs. 1,500 and might pay off the mortgage-debt at any time he liked, and that A. would execute a valid deed of sale. In a suit brought by A. upon the agreement the lower Court held that the agreement was an agreement of the equity of redemption and required registration, and that being unregistered, the plaintiff's claim based on it could not be maintained. On second appeal,

Held, following *Chunilal Panalal* v. *Bomanji* (1) that the agreement did not require registration.

SECOND appeal from the decision of A. D. Pollen, District Judge of Poona.

The plaintiff sued for a declaration that a deed of sale, dated the 28th January, 1890, of two houses in Poona executed by defendant No. 1 to

* Second Appeal, No. 43 of 1892.

(1) 7 B. 310.

defendant No. 2 was fraudulent and invalid. He alleged that defendant No. 2 had previously agreed to sell the property to him by an unregistered agreement, dated the 17th April, 1889, under which he had paid the defendant No. 1 a sum of Rs. 1,500. The property was mortgaged, and by the agreement the plaintiff was to pay off the mortgage.

[397] The following is the material part of the agreement passed by defendant No. 1 to the plaintiff, on which the latter relied :—

"At present I have mortgaged the said properties to Rajashri Shankarrao Krishna Limaye, minor, by his guardian and administrator (of the property)—as owner—Krishnaji Vishnu Limaye, under a mortgage-deed for Rs. 5,000. I have agreed to sell the above-mentioned properties to you on your paying the whole amount, (that is to say), on your paying directly to the mortgagee, in respect of his mortgage right to the said properties, the amount that may be found due to him after deducting the payments, &c., made to him, and paying me this day a further sum of Rs. 1,500, namely, fifteen hundred. You have accordingly paid me this day fifteen hundred rupees. Now you should pay off directly the amount due to the mortgagee on (making account), without waiting for me. You may pay off the same at any time from this day you like. I will execute a proper and valid deed of sale in respect of the above-mentioned properties, together with their appurtenances and rights after taking upon me the responsibility of removing obstructions and obstacles caused, if any, to the above properties, and will get the same registered. You should take into your possession the above-mentioned properties which are in the possession of the mortgagee after paying him the amount due to him."

Defendant No. 1 alleged that a second agreement had been executed on the same day, which provided that, if he (defendant No. 1) repaid the plaintiff the sum of Rs. 1,500 within a year, the first agreement for sale should be null and void. He contended that the plaintiff might claim the Rs. 1,500 and interest, but not the property itself, which he admitted he had subsequently sold to defendant No. 2 under a duly registered sale deed.

The following is the material part of the second agreement relied on by the defendant. It purported to be passed by the plaintiff to the defendant No. 1 :—

"I entered into an agreement for the purchase from you of your house No. 489 * * * and paid you Rs. 1,500, fifteen hundred, out of the price of the same which was due to you ; and I have this day taken from you an agreement in writing for having a purchase deed of the said properties executed (to me). But it has been stipulated between you and me that should you within six months from this day repay (pay ?) to me the interest on the Rs. 1,500 paid to you this day which at the rate of rupees one and a half per cent. per month comes to Rs. 135, (one hundred and thirty-five), and (repay) the remaining rupees fifteen hundred within the further period of six months which at the said rate of interest comes to rupees one hundred and thirty-five, then only the agreement which I have this day taken from you in writing for having a purchase-deed executed by you to me will be null and void. If any of the instalments be not paid within the fixed periods as mentioned above, this agreement will be null and void immediately on the failure of payment of the instalment. This agreement is duly given in writing."

[398] Defendant No. 2 pleaded that he had purchased the property *bona fide* from defendant No. 1, and that he had no notice of the previous transaction with the plaintiff.

1893
JULY 12.

APPELLATE CIVIL.

8 B. 396.

The Subordinate Judge found that the later sale by defendant No. 1 to defendant No. 2 was colourable and collusive, and passed a decree declaring that it was void as against the plaintiff.

On appeal by the defendants the Judge reversed the decree and rejected the plaintiff's claim on the ground that the agreement of sale relied on by him needed registration, but was not registered :—

"Now this agreement (relied on by the plaintiff) by its terms really assigns to the plaintiff the equity of redemption to be exercised at any moment for the consideration of Rs. 1,500 actually received. It is thus more than a mere contract to execute a conveyance: it evidences a complete transaction in itself. * * * * * *

Now it seems to me that the above agreement really operated as a transfer of an interest in immoveable property exceeding Rs. 100 in value, and that it needed registration, and that it does not fall under the exception (*b*) to s. 17 of the Registration Act.

"The counter agreement executed by plaintiff to defendant No. 1 on the same day, namely, 17th April, 1889, provides that if defendant No. 1 repaid Rs. 1,500 with interest within one year, the previous agreement should thereupon be considered as cancelled. Defendant No. 1 contends that the two agreements taken together were only intended to be an assurance that the loan of Rs. 1,500 would be repaid. The Subordinate Judge also regards the two agreements read together as amounting to a mortgage; but even then the agreement would require to be registered. It seems to me that the two agreements when read together constitute a conditional assignment of the equity of redemption to become void on the occurrence of a specified contingency, and as such they require registration, and should not be admitted in evidence being unregistered; and that plaintiff's claim founded on such agreements cannot be maintained."

The plaintiff filed a second appeal.

[399] *Mahadeo B. Chavbal*, for the appellant (plaintiff).—The agreement we rely on, is not a conveyance of the equity of redemption. It is merely an agreement and nothing more. It contemplates the execution of another document, and, therefore, its registration is not necessary. It is the conveyance which requires registration—*Jusab Haji Jafar* v. *Haji Gul Muhammad* (1); *Burjorji* v. *Muncherji* (2); *Chunilal Panalal* v. *Bomanji Mancherji* (3). We are entitled to specific performance of our contract—*Kadar* v. *Ismail* (4); *Adakkalam* v. *Theethan* (5).

Nagindas T. Marphatia, for respondent 1 (defendant 1).—We contend that the agreement requires registration because it effected a complete sale of the equity of redemption—*Ahmedbhoy Hubibhoy* v. *Vulleebhoy Cassumbhoy* (6). Although the agreement in question contemplates the execution of a formal document, still the intention of the parties is to be gathered from the agreement itself, and the intention being to convey an interest in immoveable property, the agreement requires registration—*Purmanandas Jiwandas* v. *Dharsey Virji* (7).

JUDGMENT.

SARGENT, C.J.—We think the document passed by defendant No. 1 to the plaintiff was not, as the lower Court of appeal has held, merely,

(1) 12 B.H.C.R. 175. (2) 5 B. 143. (3) 7 B. 310. (4) 9 M. 119.
(5) 12 M. 505. (6) 8 B. 323. (7) 10 B. 101.

an assignment of the equity of redemption, but was an agreement for the sale to the plaintiff of the entire interest in the properties therein mentioned for Rs. 1,500 and the sum due on the mortgage to Limaye, with a further agreement by the defendant to execute a formal deed of conveyance as soon as the above sums were paid. The defendant No. 1 says: " I have agreed to sell the above-mentioned properties to you on your paying the whole amount (that is to say), on your paying directly to the mortgagee in respect of his mortgage right the amount that may be found due to him and paying me the further sum of Rs. 1,500." There is no sale in terms of the equity of redemption as such, but an agreement to sell complete ownership in the property after the mortgage has been paid off, and the mere fact that the Rs. 1,500 is recited as having been paid, cannot affect the plain meaning of the language of the instrument.

[400] Such being the nature of the document according to its terms, the question is, whether it required registration, having regard to sub-cl. (*h*) of S. 17 of the Registration Act. This was decided, and in our opinion rightly decided, in the negative with respect to a similar document by Birdwood, J., in *Chunilal Panalal* v. *Bomanji Mancherji* (1). We must, therefore, hold that the agreements referred to in the judgment of the Court below do not require registration, and must reverse the decree of the Court below and send back the case for a fresh decision. Costs to abide the result.

Decree reversed and case sent back.

---

18 B. 400.

CRIMINAL REFERENCE.

Before Mr. Justice Candy and Mr. Justice Fulton.

In Re LAKMIA.* [13th July, 1893.]

Bombay District Municipal Act (VI of 1873), s. 84—Non-payment of taxes—Liability to penalty—Offence—Penal Code (XLV of 1860), s. 40—Penalty—Imprisonment in default of payment of penalty.

There is no distinction between the word " penalty " as used in the Bombay District Municipal Act (VI of 1873) and the word "fine" as used in s. 64 of the Indian Penal Code (XLV of 1860). Imprisonment can, therefore, be awarded in default of any penalty inflicted under s. 84 of the Municipal Act.

THIS was a reference by J. Davidson, Esquire, District Magistrate of Kanara, under s. 438 of the Code of Criminal Procedure (Act X of 1882).

One Lakmia was prosecuted by the Municipality of Haliyal for not having paid wheel tax alleged to be due.

The Third Class Magistrate, acting under s. 84 of the Bombay District Municipal Act (VI of 1873) as amended by s. 49, cl. (1) of Bombay Act II of 1884, ordered Lakmia to pay the arrears of the tax, together with a penalty of annas 4 or in default to undergo three days' simple imprisonment.

The District Magistrate, on examining the record of this case, entertained considerable doubts as to the legality of the order of imprisonment

---

* Criminal Reference, No. 76 of 1893.

(1) 7 B. 310.

1893
JULY 13.

CRIMINAL REFERENCE.

18 B. 400.

in default of payment of the arrears and penalty. He, therefore, referred the case to the High Court. His reasons were as follow:—

[401] "I do not think that it was intended by the Legislature to render a municipal defaulter liable to imprisonment in a criminal jail. I think that a distinction exists between an offender sentenced to a *fine* and a municipal defaulter, though also legally an offender, ordered to pay, in addition to his dues, a penalty, and that the order of imprisonment on default is *ultra vires*."

The reference was heard by a Division Bench (CANDY and FULTON, JJ.)

There was no appearance for the Crown or for the accused.

---

18 B. 401.

ORIGINAL CIVIL.

Before Mr. Justice Farran.

ADVOCATE-GENERAL OF BOMBAY (*Plaintiff*) *v.* MOULVI ABDUL KADIR JITAKER AND OTHERS (*Defendants*).* [12th, 13th, 15th and 20th February and 6th, 8th, 9th, 10th, 12th and 20th March, 1894.]

Mahomedan law—Mosque—Charity—Suit against directors or Mushavirs of a mosque—Liability of directors—Board of directors not properly constituted under the rules of the mosque Liability of directors for acts done by Board not properly constituted—Appointment of officers—Management of property—Liability of provisional committee assuming authority to act—Trustees—Limitation—Kazi—Act II of 1864 and Bombay Act IV of 1864—Nazir of mosque, liability of—Parties to suit against trustees of mosque—Practice.

A certain Mahomedan mosque in Bombay, known as the Juma Masjid, was possessed of considerable property. The administration of the mosque and its property was [402] carried on under rules which had been drawn and approved in the year 1834 at a special general meeting of the jamat convened for the purpose in the course of a suit which had been filed in the Supreme Court against the then mushavirs of the mosque. That suit was referred to the Master to make certain enquiries, and in his report these rules were set out in full. His report was confirmed by the Court. The rules provided that the mosque and its property should be managed by the Kazi of Bombay and ten mushavirs, and that a nazir should be appointed by them, and be subject to their control. The rules also prescribed the various duties of the kazi, mushavirs and nazir, and declared that the power of filling up vacancies should be exercised by the kazi and mushavirs collectively or by the kazi and an absolute majority of the mushavirs.

In 1834 and for many years subsequently there was, as there had always been, a "Kazi of Bombay" appointed under a sanad from Government. He held the appointment for life, and the office was not hereditary. In 1866 the then Kazi of Bombay died, but in consequence of the provisions of Act II of 1864 and Bombay Act IV of 1864 the Government made no new appointment, and the office lapsed. One Mahomed Husain Murgay, however, assumed the office and was generally accepted by the community as Kazi of Bombay. He died in 1878, and upon his death, rival claimants sought the office of Kazi of Bombay.

The mushavirs were then advised that they could not select one of the rival kazis to fill the office of Kazi of Bombay under the rules, and they, therefore, continued to manage the mosque without a kazi in violation of the rules of 1834. Two of the mushavirs (now relators) were of opinion that one of the rival applicants for the position should be appointed kazi, and as their wishes were not acceded to, they ceased to attend the board, and as far as possible, while retaining their offices, they thwarted the action of the other mushavirs. Subsequently in 1878 other vacancies occurred in the board. In 1888 the number of mushavirs was reduced to six,

---

* Suit No. 656 of 1891.

and two of them (the relators) as above stated took no part in the administration, so that the management was left in the hands of the first four defendants. In 1891 four new mushavirs (defendants Nos. 6 to 9) were elected, and in that year the Advocate-General at the relation of the two dissatisfied mushavirs filed this suit against the mushavirs. The former nazir of the masjid was also made a defendant (No. 5). He had held the office of nazir from 1879 to 1891 when he resigned. The plaint set forth the irregularities which had taken place in the management in 1878, and prayed for the removal of the defendants (other than defendant No. 5) from the position of directors or mushavirs and for an account against all the defendants, and for a scheme, &c. The following were the principal charges made against the defendants in the plaint and at the hearing: –

(1) The neglect to take steps to supply the place of the kazi and the failure to keep up the proper number of the mushavirs.

Held, as to this, that subsequently to 1878 the mushavirs had no authority under the rules of 1834 to fill up vacancies as they occurred or to carry on the government of the masjid. Since that year the mushavirs were a provisional committee of management kept up from time to time by co-optation tacitly permitted by the jamat to manage the affairs of the masjid until the original constitution could be restored or legally changed, that original constitution being for the time in abeyance.

[403] 2. The improper appointment, in 1879, of one Mahomed Cassum Curtay (defendant No. 5) as nazir.

Held, that the mushavirs incurred no liability and deserved no censure for so doing.

3 The neglect to call for an annual account of the income and expenditure of the mosque under Rule 6.

Held, that this charge was not proved.

4 The neglect to purchase properties with the surplus income of the mosque as required by Rule 4.

Upon this point it was contended that the defendants should be charged with interest on the uninvested funds, so as to make up for the loss of rents which would have been recovered if properties had been purchased. In answer to this claim it was argued (Ist) that, under the circumstances, the mushavirs had no power to expend the funds of the mosque in purchasing property, and (2) that the claim was barred by limitation.

Held, that the claim fell within art. 120 of the schedule to the Limitation Act (XV of 1877), and was barred except as to six years prior to the filing of the suit, but even as to this period the Court refused to order accounts to be taken against the defendants. There had been no dishonesty or improper dealing with the funds of the mosque. The highest at which the case could be put was that there had been error of judgment. In this the community had acquiesced. Moreover, the position of the parties had changed. Some of the mushavirs were dead, others had resigned and were not defendants to the suit, and it would be difficult to enforce contribution against them. The Court was further of opinion that, in any case, it was very doubtful whether a provisional committee like the mushavirs would have been justified in assuming the power of purchasing property. Had the property fallen in value, the purchase might perhaps have been repudiated.

5. Their neglect in not detecting sums appropriated by the bill-collectors of the mosque and getting in the same.

Held, that as a provisional committee who had assumed the management of the masjid, the defendants were bound to protect its interests. Of the money which they actually received, or which was paid into their account, they were actual trustees, but in addition to this they were officers of the masjid charged with the specific duty of superintending the nazir and his accounts, and if the masjid had suffered loss by their neglect of duty, they were answerable for it. They neglected to examine the books, a cursory audit of which would have detected the defalcations of the bill-collectors. The Court, therefore, directed an account against them of the rents actually received, or which, but for their wilful default or neglect they might have received from the bill-collectors.

6. Their neglect in allowing arrears of rent to accumulate and to be lost to the masjid.

Held, that it was not the duty of the mushavirs to look into the account of each individual tenant. Under the rules the nazir, and not the mushavirs, was

1894
MARCH 20.
ORIGINAL CIVIL.
18 B 401.

entrusted with the collection of rents, and it was his duty to see that the rents were not allowed to fall unduly into arrear. It was not shown that, except at an exceptional time when [404] the nazir was ill, the rents were so much in arrear as to call for the active interference of the mushavirs, or that the masjid had suffered undue loss under this head. The Court, therefore, refused relief on this charge.

7. The non-payment into the Bank of sums in the hands of the nazir when they exceeded Rs. 500.

Held, that the spirit of the rules had been complied with, and no loss had been shown.

Defendant No. 5, as above stated, had acted as nazir of the masjid from 1879 to July, 1891, when he resigned. Under the rules (see Rules 2 and 7) he was appointed by the directors and was under their orders and was removable at their pleasure. It was contended at the hearing that he was not a proper party to the suit, being merely the agent or servant of the directors and not a trustee.

Held, that he was properly made a defendant. Both under Mahomedan law and under the rules the nazir was a public officer in charge of the mosque, and as such liable to account to the community.

SUIT to remove the defendants from the position of directors of the Mahomedan mosque in Bombay known as the Juma Masjid and of the charitable property connected therewith, and for an account against them; for a scheme and the appointment of new officials; for the administration of the mosque, &c.

OPINION.

PER CURIAM.—As non-payment of municipal taxes entails liability to a penalty, it appears to be an offence as defined by s. 40 of the Indian Penal Code. We are unable to draw a distinction between the word "penalty" in the Bombay District Municipal Act and the word "fine" in s. 64 of the Indian Penal Code. The word "penalty" is used in many places in the Municipal Act as equivalent to a fine or pecuniary punishment for an offence (*vide* ss. 64 and 74). In *Reg.* v. *Gulalchand* (1), it was held that imprisonment could be awarded in default of fines imposed under this Act.

The order of the Third Class Magistrate is, therefore, correct.

The suit was filed in December, 1891, by the Advocate-General at the relation of five persons, two of whom, *viz.*, Mahomed Husain Churgay and Haji Sheriff, were then and had been for many years directors of the masjid.

The plaint stated that in the year 1834 A.D. certain rules for the management of the Juma Masjid and of the charitable properties connected with it had been framed and adopted, and had received the sanction of the then Supreme Court of Bombay. These rules were the result of certain litigation which had been instituted in the Supreme Court. The rules referred to were as follows :—

"Whereas at a general meeting of the Kazi Chougla and the members of the Jamat or Mahomedan community of Bombay held at the Juma Masjid on the twenty-eighth day of October, 1834, two certain decrees of His Majesty's Supreme Court of Judicature at Bombay have been read, bearing date respectively the 8th day of March, 1833, and the 8th day of September, 1834, which said decrees were made in a certain suit on the Equity Side of the said Court wherein Kazi Kutbudin Saheb bin Shaik Abdula Mahimker, the Kazi of Bombay, Haji Ebrahim Jitaker, Mahomed Ally Rogay, Mahomed Ebrahim Muckba, Shumsudin Kisay, and

(1) B.H.C. Cr. Rul. dated 21st June, 1875.

Mahomed Syed Palloba were the complainants and Nur Mahomed bin Ebrahim Patell was the defendant.

[406] "And whereas in and by the first of the said decrees it was declared that the said complainant Kutbudin Saheb bin Shaik Abdula Mahimker, the Kazi of Bombay, Haji Ebrahim Jitaker, the Chougla of the Mahomedans residing in Bombay, Mahomed Ally Rogay, Mahomed Ebrahim Muckba, Shumsudin Kisay, and Mahomed Syed Palloba, the principal members of the jamat of the Mahomedans of Bombay on behalf of themselves and the rest of the Mahomedans of Bombay, were entitled to an account from the said defendant Nur Mahomed bin Ebrahim Patell as executor of his said father Ebrahim Ismail Patell, of all sums of moneys received by him either for donations, bequests, or otherwise for or on account of the Juma Masjid in the pleadings mentioned, and for the rents and profits of the ground in the pleadings also mentioned and of the chawls and buildings thereon erected from the time of the death of Nathu Patell in the pleadings mentioned until the tenth day of May, 1814, and also of all sums received by the said defendant in his own right since the said tenth day of May, 1814, on the same account; and whereas by the other decree it was decreed that the said defendant should be forthwith removed from his situation as manager or superintendent of the said Juma Masjid and chawls, now thereupon the following rules and regulations for the future management of the affairs and concerns of the said Juma Masjid and the chawls above mentioned, having been taken into consideration by the said meeting, the same are hereby and in and by the said meeting unanimously confirmed and agreed to.

Rule 1*st*.

"The late superintendent having been removed by the last mentioned decree of the Supreme Court from his said situation as manager of the Juma Masjid and the chawls belonging thereto, the said Juma Masjid and chawls shall henceforth (subject to any order or decree of the Supreme Court to the contrary in the suit pending therein in which the above-mentioned decrees were made) be placed under the Government and control of the Kazi of Bombay for the time being, and ten directors to be appointed in the manner hereinafter mentioned.

Rule 2nd.

"Subject as aforesaid, a superintendent of the said masjid and chawls shall be appointed in the manner hereinafter proposed, such superintendent to be at all times subject to the control of the kazi and directors, and in all respects to obey their orders; the duties of such superintendent to consist in the collection of the rents of the aforesaid chawls and of any other property dedicated to the mosque, and that such superintendent shall thereout defray all expenses incurred on account of the masjid and the ceremonies performed therein or of its appropriated property in necessary repairs or otherwise.

Rule 3rd.

"The superintendent shall not expend any sum exceeding rupees one hundred in amount in the repairs of the masjid or chawls, or any sum exceeding rupees fifty beyond the ordinary monthly expenses of the mosque or chawls without an order in writing signed by the kazi, and the directors or by the kazi and a majority of the directors for that purpose first had and obtained to sanction such payment, and such superintendent

1894
MARCH 20

ORIGINAL CIVIL.

18 B 401

shall not at any time retain in his hands funds belonging to [406] the said masjid exceeding in amount the sum of rupees five hundred, and all surplus funds arising from the rents of the chawls or otherwise belonging to the said masjid exceeding the aforesaid amount shall from time to time be paid by the superintendent as the same shall be received by him into the hands of the kazi, who shall forthwith deposit the same in the Bombay Treasury in the names of himself and the two senior directors for the time being.

Rule 4th.

"As often as the funds standing to the credit of the kazi and the two senior directors shall amount to the sum of rupees five thousand or upwards, then and so often the kazi and the directors or the kazi and a majority of them shall therewith purchase other property to be added to the then appropriated property belonging to the said masjid, and the deed of sale thereof shall be made out to and in the name of the kazi and ten directors for the time being and their successors and assigns in trust for the kazi and jamat of Bombay for and on behalf and for the sustentation and repairs and other expenses of the said Juma Masjid, and of its appropriated property.

Rule 5th.

"The superintendent shall on the 1st day of Rujab, on the 1st day of Shawal, on the 1st day of Mohurrum, and on the 1st day of Rubussani in each year make a report in writing to the kazi and directors exhibiting what sums of money he has received on account of the rents of the chawls or otherwise and of his application thereof, and in such report such superintendent shall state the condition of the masjid and chawls and other property belonging to the said masjid, and what, if any, repairs are in his opinion required, and generally any matters connected with his duties as superintendent, and the said kazi and directors shall within fifteen days after the receipt of such report meet for the purpose of taking such report into consideration.

Rule 6th.

"The superintendent shall keep proper books of account, wherein he shall duly enter all sums received by him as rents of the chawls or otherwise on account of the masjid, and in like manner he shall enter all sums expended by him on account of the said mosque or chawls or other property; he shall make up, sign, and render to the kazi and directors annual accounts in duplicate of his receipts and disbursements, and such accounts shall not be allowed and considered as correct until they shall have been audited and signed by the kazi and the directors, or by the kazi and the directors, or by the kazi and a majority of the directors, and when so audited and signed one copy thereof shall be deposited and kept in the office of the kazi and another copy shall be lodged in the Juma Masjid.

Rule 7th.

"The superintendent shall hold his office at the will of the kazi and directors, and shall be removeable by them or by the kazi and the majority of the directors by notice signified in writing; such superintendent on being appointed by the Supreme Court and all future superintendents upon being appointed shall execute and deliver to the kazi and the directors for the time being a bond in a penalty [407] of ten thousand rupees,

conditioned to be void upon the due observance and performance by such superintendent of the rules thus made, or which shall hereafter be made by the kazi and the directors, or by any general meeting of the kazi, chouglas, and jamat convened for the purpose, and nothing in these rules contained shall prevent any superintendent from resigning his situation as such, but in every such case he shall give to the kazi and directors two calendar months' previous notice of his intended resignation.

Rule 8th.

"Inasmuch as the Master in Equity of the said Supreme Court is directed by the aforesaid decree to inquire and state to the Court who should be a fit person for the future superintendent, the complainants in the said suit are requested to propose that Haji Mahomed Sueed Saheb Rogay be appointed under and subject to the preceding rules as a fit and proper person to be appointed future superintendent.

Rule 9th.

"The persons following, that is to say:—Mahomed Ally Saheb Rogay, Mahomed Ebrahim Saheb Muckba, Haji Ebrahim Saheb Jitaker, Fucki Mahomed Mirasaheb Arai, Shumsudin Saheb Kisay, Shabudin Saheb Ghuttay, Mahomed Sueed Saheb Palloba, Mahomed Yusuf Saheb Murgay, Mahomed Shumsudin Saheb Palloker and Zeyawudin Saheb Narker are hereby appointed directors of the said Juma Masjid and chawls, and upon the death or resignation of any of the above-named directors the vacancy occasioned by such death or resignation shall be supplied by the election of another director or directors in the place of the director or directors dying or retiring, such election to be made by the kazi and the remaining or continuing directors, or by the kazi and the majority of the remaining or continuing directors.

Rule 10th.

"Every future director, superintendent, and every other officer connected with the said masjid, with the exception of the kazi, shall be elected by the kazi and directors, or by the kazi and the majority of the directors for the time being, who are hereby authorized to fix the scale of remuneration of the several officers, with the exception of the kazi, the directors, and superintendent, whose respective offices as connected with the said masjid shall be and are hereby declared to be honorary.

Rule 11th.

"The kazi and directors shall be empowered to frame and make from time to time rules and regulations for the management of the Juma Masjid and chawls and the general concerns thereof, provided such rules and regulations are not contrary to the Mahomedan law.

Rule 12th.

"The several powers and authorities conferred upon the kazi and the directors by the preceding rules shall be exercised by them collectively or by the kazi and a majority of the directors."

[408] The plaint stated that by the above rules the Juma Masjid and the properties appertaining to it were to be managed by the kazi of Bombay and ten directors, &c.; that by the said rules a superintendent should be appointed by the kazi and directors, &c. It also referred to various other provisions made by the above rules for the administration

1894
MARCH 20

ORIGINAL CIVIL

18 B. 401.

of the funds of the mosque. It then set forth that at the beginning of the year 1878 the governing body of the mosque consisted of ten directors presided over by Kazi Mahomed Husain Murgay. The first two relators in the present suit (Mahomed Husain Churgay and Mahomed Husain Londay) were then directors, as also were the first three defendants, *viz.*, Moulvi Abdul Kadir Jitaker, Shaik Ahmad Saheb Muckba and Shaik Mahomed Curtay. In January, 1878, however, the kazi died, and from that time there had been no kazi as president, as contemplated by the rules. The community was divided as to the person to be appointed kazi, and the result was that no appointment was made.

Subsequently to the death of the kazi, but in the same year, one of the then directors (Gulam Mohidin Delvi) died, and the fourth defendant (Munshi Shaik Ahmed Delvi) took his place. The plaint stated that the validity of the new appointment was doubtful having regard to the rules, as there was then no kazi and no quorum of directors.

In 1888 another director (Munshi Mahomed Unday) died and no successor to him was appointed. Three others of the directors, who held office in 1878 subsequently resigned, and their places were not filled up. The result was that instead of having a governing body consisting of a kazi and ten directors as provided by the rules, there were only six directors, and the validity of the appointment of one of these six was doubtful. Of these six directors, two were relators and the others were the first four defendants. Munshi Shaik Ahmed Delvi, whose appointment was doubtful, was the fourth defendant.

In 1891 the first four defendants appointed four additional directors (defendants Nos. 6, 7, 8, 9) in spite of the remonstrance of the other two directors (the first two relators). The defendants also appointed the first defendant to be president.

[409] The fifth defendant to this suit had been nazir or superintendent of the mosque from 1879 until July, 1891, when he resigned. The plaint (at the relation of the said relators) complained that, having regard to the rules, there had been no validly appointed superintendent; that the fifth defendant, who was not a fit person for the office, had got himself appointed and had acted as superintendent; that the directors (defendants) had exercised no proper supervision over him, and the plaint charged that the properties and funds of the mosque had been greatly mismanaged and that the rules with regard thereto had been disregarded.

The plaint further complained that the provisions of rules 3 and 4 had been disregarded by the defendants to the great detriment of the masjid. With regard to rule 4, it alleged that for many years no property had been purchased for the masjid, and that the funds had been allowed to lie idle in the Bank, bringing in no income: that these funds at the date of suit amounted to two lakhs of rupees, and that, if the same had been duly invested as directed, the charity would have been much benefited.

The plaint also complained that rules 5 and 6 had been disregarded, and further alleged that all the moneys received from tenants of the charity were not credited to the masjid.

The plaint prayed for a declaration that the defendants were not entitled to carry on the management of the Juma Masjid and its property, or that if entitled, the defendants might be removed from their position as directors; that an account should be taken of moneys received by the defendants, and that defendants should make good such sums as but for their wilful default they might have received, &c.; that a kazi, directors

and superintendent be appointed to manage the charity and a scheme settled, &c., &c.

The first four defendants filed a written statement, stating that they had always been desirous of having the Kazi of Bombay as their president, but that there was not and had not been for years any such officer in existence; that each section of the Mahomedans recognised as kazi any person they pleased; they denied the [410] charges of mismanagement, neglect and misconduct, and alleged they had performed their duties to the best of their ability under the circumstances in which they were placed. They prayed that the rules should be amended and the affairs of the mosque put on a proper footing under the direction of the Court.

At the hearing, issues were raised as to the validity of the various appointments since the death of the kazi in 1878; as to the liability of the directors in respect of the alleged violation of the rules in administering the affairs of the mosque, &c. As above mentioned, two of the relators were directors of the mosque. At the hearing, Mahomed Husain Churgay, the survivor of them (the other was then dead), was made a defendant.

Lang (Advocate General) and *Jardine*, for the plaintiff.

Badrudin Tyebji, *Inverarity* and *Vicaji*, for defendants Nos. 1, 2, 3, 4.

Kirkpatrick and *Slater*, for defendant No. 5.

Scott and *Lowndes*, for defendants Nos, 6, 7 and 8.

At the close of the examination of the first witness Mahomed Husain Churgay, the relator, counsel for the fifth defendant (the nazir or superintendent) raised an issue whether the fifth defendant was a proper party to the suit.

Kirkpatrick:—The superintendent or nazir is not a proper party, and the suit ought at once to be dismissed as against him. Under the rules, and from the evidence just given, it appears that he was merely the servant of the directors and was accountable to them only—*Attorney General* v. *Earl of Chesterfield* (1); Tudor on Charities, (3rd ed.), pp. 327, 310; Indian Contract Act (IX of 1872), s. 192; Lewin on Trusts, (9th ed.), pp. 201, 723. He ceased to be nazir before suit brought. Moreover, he cannot be charged with fraud or default, as the plaint contains no specific instances —*Ganga Narain Gupta* v. *Tilukram* (2); *Krishnaji* v. *Wamnaji* (3); Lewin on Trusts (9th Ed.), p. 1034.

Badrudin Tyabji, for first four defendants:—We object to the fifth defendant being dismissed from this suit. He is a [411] proper party. The nazir or superintendent of a masjid is the mutawali and is the real trustee and the person responsible for the administration of the property —Tagore Law Lectures, 1884, p. 264. The rules of this mosque recognise the general principles of Mahomedan law. Other defendants who are directors are the mushavirs or merely supervisors, and represent the general community.

Jardine, for plaintiff on the same side.

FARRAN, J.—I cannot dismiss the fifth defendant from the suit. He was the nazir of the mosque, or, as he is called in the rules, the superintendent. I think that both under the Mahomedan law and under the rules, the nazir of this mosque was a public officer in charge of the mosque and of its property, and as such liable to account to the community in this Court.

The hearing of the suit then proceeded.

---

(1) 18 Beav. 596. (2) 15 C. 533. (3) 18 B. 144.

1894

MARCH 20.

ORIGINAL CIVIL.

18 B. 401.

Jardine (with *Lang*, Advocate General).—The directors were bound by the rules The kazi died in 1878 and there has been no attempt to fill his place. The board of management has never since been legally constituted. Only three of the present directors have been legally appointed. The others have been appointed by an imperfectly constituted board, and their appointment is invalid and illegal. But they are all equally liable for their acts—*Rackham* v. *Siddal*(1); *Pearce* v. *Pearce*(2). Their acts since 1878 have caused heavy loss to the masjid, and the relators were right in causing this suit to be instituted. Even without a kazi the directors might have properly collected and invested the funds of the mosque. They should have superintended the nazir. There has been much rent lost through negligence and fraud. He referred to *In re Cape Breton Co.*(3); Seton, s. 3, ch. 41, p. 982 (5th Ed.), Lewin on Trusts, (9th Ed.) p. 1017-1035; *In re Symons* (4); *Sculthorpe* v. *Tipper* (5); *Devaynes* v. *Robinson* (6).

Badrudin Tyabji with *Inverarity* and *Vicaji*, for defendants Nos. 1, 2, 3, 4.—The plaint states that the directors have violated the rules by acting without a kazi. But the kazi mentioned in **[412]** the rules of 1834 was the Kazi of Bombay. There was then an official who bore this title, which was conferred by Government. But Government ceased to appoint: see Act II of 1864; Bombay Act IV of 1864: *Muhammad Yussub* v. *Sayad Ahmed* (7). See also Regulation XXVI of 1827, which related to the mofussil. The directors had no power to appoint a kazi and are not responsible for acting as best they could without one. In 1888 the number of directors was reduced to six. When their numbers were further reduced, they could do nothing, as there was not a majority, the full number under the rules being ten. Reference was made to *Attorney General* v. *Corporation of Exeter*(8); *Wyatt* v. *Wallis*(9): Tagore Law Lectures, 1884, p. 248; *Saroda Pershad* v. *Brojo Nath* (10); *Kathiawar Trading Company* v. *Virchand*(11).

Kirkpatrick and *Slater*, for defendant No. 5.—The fifth defendant acted as nazir or superintendent from 1879 to July, 1891, without remuneration. He was entirely subordinate to the directors who might have dismissed him at any time. He continued the system of management which existed previously, and for which he was not responsible. The bill-collectors under him were not appointed by him or removeable by him. They were his fellow servants. Not receiving any remuneration, he was obliged to earn his living, and in doing so was frequently absent from Bombay with the knowledge and sanction of his masters the directors. The director (Churgay), who as relator has caused this suit to be instituted, has wholly neglected his duties as director for twelve years. He refused to attend meetings or sign papers. He instigated the tenants not to pay the rents. He is more responsible for any loss than the other directors—Lewin on Trusts (9th Ed.), 217, 777, 994; *Attorney General* v. *Stamford* (12). This suit is a vindictive suit and unnecessary. It has not been sanctioned by the community. All the defendants desire a new scheme. The nazir is willing to account. He is only responsible for money come to his hands.—Williams on Executors, p. 1674. No account for wilful default

(1) 16 Sim. 297 (305); 1 Mac. and G. 607. (2) 22 Beav. 248.
(3) 26 Ch. D. 221. (4) 21 Ch. D. 757. (5) L R. 13 Eq. 232.
(6) 24 Beav. 86. (7) 1 B.H.C.R. Ap. xviii.
(8) 2 Russell, 45. (9) 8 Jurist 117. (10) 5 C. 910.
(11) 18 B. 119. (12) 1 Phillips 737.

can be directed, as no particulars **[413]** were given in the pleadings—*Krishnaji* v. *Wamnaji* (1); Lewin on Trusts, (9th ed.), 1004.

Scott and *Lowndes*, for defendants Nos. 6, 7, 8.—Nothing has been alleged or proved against these defendants. If any liability has been incurred, it rests on the other defendants.

JUDGMENT.

20*th March*, 1894. FARRAN, J.—A short resume of the facts which preceded the filing of this suit is necessary to explain the present state of the governing body of the Juma Masjid and to enable me to make the conclusions at which I have arrived readily intelligible. The jurisdiction of the Court to intervene in its affairs at the instance of the Advocate General arises from the fact that the masjid and the properties belonging to it constitute a public charity.

On the 8th September, 1834, the late Supreme Court in a suit brought by certain members of the Mahomedan community against the then mushavirs of the Juma Masjid, referred it to the Master to enquire who were fit and proper persons, or a fit and proper person, to be appointed the future managers or manager, superintendents or superintendent, mutawalis or mutawali of the Juma Masjid, and to inquire whether such person or persons so to be appointed should be required to give any and what security to account for the moneys which they or he might receive. I take this recital from the plaint in suit No. 28 of 1871, as I cannot find the decree itself or the report of the Master amongst the proceedings.

The Master reported on the 31st November, 1834, that a special general meeting of the jamat had been convened for the purpose of framing rules for the future management of the affiairs and concerns of the Juma Masjid, and that several rules were submitted for the consideration of the meeting and were unanimously approved and signed. These rules in English, or a translation of them, the Master set out in full in his report. The report of the Master was confirmed by the Court. I have not been able to ascertain, from the materials before me, whether the rules signed at the meeting were in Persian or English. In the **[414]** circumstances under which they were adopted, it appears to me that they derive their efficacy and force from the will of the community, and not from the decree of the Court; and that, therefore, the original rules passed at the meeting and signed, and not the copy or translation of them, which the Master set out in his report, are the rules which determine the constitution of the governing body of the masjid. It is not, however, very important, as the difference between them is merely a difference of phraseology.

In one instance, however, this difference of phraseology has a bearing upon a most important question in the suit. A print of the rules in Persian, Urdu and English has been put in evidence by the Advocate-General. It affords some internal evidence that the original rules were in Persian. The rules provide that the Juma Masjid and its chawls shall be placed under the Government and control of the Kazi of Bombay for the time being and ten mushavirs (I advisedly use the Persian expression), and that a nazir of the masjid and chawls should be appointed subject to the control of the kazi and mushavirs. The rules then specify the various duties assigned to the kazi, mushavirs and nazir respectively. At present it will be sufficient to note that the nazir

(1) 18 B. 144.

1894

MARCH 20.

ORIGINAL CIVIL.

18 B. 401.

had the general executive control of the masjid subject to the directions of the mushavirs, and that the several powers and authorities conferred upon the kazi and the mushavirs, including the power of filling up vacancies, were to be exercised by them collectively or by the kazi and an absolute majority of the mushavirs.

At the time when the rules were framed there was, and had always been, a "Kazi of Bombay" holding office under a *sanad* from Government, a public local functionary who held the appointment for life and whose office was not hereditary. One Kutubudin Saheb Mahimker was then the Kazi of Bombay. He died in 1837 and Mahomed Yusuf Murgay was, on his death, appointed to the office. The latter died in 1866. In consequence of the passing of Act II of 1864 and Bombay Act IV of 1864 no appointment to the office of kazi was made upon his death by Government. The office lapsed.

The case of *Muhammad Yussub* v. *Sayad Ahmed* (1) establishes **[415]** that the appointment of kazi is by Mahomedan law vested in the chief officer of State and has never rested with the Mahomedan community at large. Kazi Mahomed Husain Murgay, however, assumed the office, and was generally accepted by the community as Kazi of Bombay. No difficulty occurred in his lifetime. He died in 1878. Upon his death, rival claimants to the office of kazi of Bombay sprang up. A minority of the Konkani Mussulmans, who appear to lead public Mahomedan opinion in Bombay, recognized his son Shaik Mahomed Murgay as kazi. A large majority were in favour of Kazi Abdul Latif Londay, and now recognize his son Mahomed Salay Londay as their kazi.

It is admitted on both sides that the Kazi of Bombay contemplated by the rules of 1834 was the official kazi appointed by *sanad*, and that consequently since 1866, or, at all events, since 1878, there has been no Kazi of Bombay within the meaning of the rules. My own view is in accord with that admission. This difficulty was felt in 1871, and in that year the Advocate General taking advantage of a suit, which he felt himself obliged to file against the then kazi and certain of the mushavirs to recover funds of the masjid in their hands and for the removal of the latter, urged upon the Court the necessity of amending the rules, and the Court by its decree declared that the system of management of the Juma Masjid was unsatisfactory and ought to be amended, and ordered that certain revised rules, which it approved, should be laid before the community for their consideration and adoption. The main object of the revised rules was to obviate the difficulty which had arisen from the lapse of the office of Kazi of Bombay. The revised rules were twice laid before the community for their adoption. They were explained and pressed upon the meeting by Mahomed Ally Rogay and others, but an anonymous handbill had been circulated misrepresenting their tenor. Certain persons opposed them, including the present relator Mahomed Husain Churgay, and they were rejected, and on the 28th February, 1876, the Court ordered the decree in the suit to be drawn up, stating that the revised rules mentioned in the decree had not been adopted. The Court was evidently of opinion either that it had no inherent power **[416]** itself to revise the rules, or that it could not do so on a plaint which did not specifically ask for such relief. The Advocate-General took no further steps, and left the Juma Masjid to be managed under a constitution which had become unworkable.

(1) 1 B. H. C. R. (App.) 18.

1894
MARCH 20.
ORIGINAL CIVIL.
18 B. 401.

When Kazi Mahomed Hussein Murgay died in 1878, the mushavirs of the masjid were Mahomed Ali Rogay, the defendants Moulvi Abdul Kadir Jitaker, Shaik Mahomed Curtay and Shaik Ahmed Muckba; relators Mahomed Hussein Churgay and Mahomed Hussein Londay, and some others (Gulam M. Delvi, Kutubudin Tomgekar, Mahomed I. Unday, Shaik H. Rogay), who have since died or resigned. Mahomed Ali Rogay, to whose ancestors' expenditure and exertions the present prosperity of the Juma Masjid may be traced, was the leading spirit amongst the majority of the mushavirs. On the death of Kazi Mahomed H. Murgay the difficulty which had been felt throughout the proceedings in suit No. 28 of 1871 at once arose. There was then certainly no Kazi of Bombay within the meaning of the rules. The constitution of the board thus became defective, and the powers and authorities which the mushavirs derived from having been elected under the rules of 1834, which could only be exercised in conjunction with the Kazi of Bombay, ceased to be exerciseable. They had no longer any powers under the rules.

A meeting of the mushavirs was called on the 28th January, 1878, when it was resolved to take counsels' opinion—those of Mr. Mayhew and Mr. B. Tyebji. Mr. Mayhew was of opinion that the mushavirs could not select one of the rival kazis to fill the office of Kazi of Bombay under the rules, in which opinion he was, in my judgment, right, but that they could act without him under the rules, in which opinion he was, for the reasons which I have above assigned, in my judgment, wrong. Mr. B. Tyebji's opinion has not been put in evidence, being, it is said, lost. He appears to have advised that the constitution of the board became defective by the death of the Kazi of Bombay. These opinions were considered at a meeting held on the 1st March, 1878, when it was resolved that the opinion of Mr. Mayhew should be acted on, and that the mushavirs as before should only manage the affairs of the masjid as long as no kazi was **[417]** appointed, and that Mahomed Ali Rogay should be president. The relators M. H. Churgay and M. H. Londay did not, though summoned, attend that meeting. Their view was that the mushavirs should call upon Kazi Abdul Latif Londay to co-operate with them on the board. Consequently they would not attend, and they have ever since kept aloof from the board, and, as far as they could, thwarted their action. They did not, however, resign office, and have now put the Advocate-General in motion to put forward a new scheme for the government of the mosque, being at last convinced that the old scheme cannot be worked in the way which they have until lately advocated.

The rival kazis and their respective adherents from time to time put forward claims for a kazi to sit on the board of the Juma Masjid, but the majority of the mushavirs have never felt themselves in a position to allow either of them to occupy that position. In this course they were, as I have said, in my judgment, justified.

In 1879, Gulam M. Delvi died, and the majority of the mushavirs then appointed the defendant S. A. Delvi to fill his place.

In the same year, Kutubudin Tomgekar resigned and Mahomed Sayad Ranki was in like manner appointed to act. The latter and Mahomed Ismael Unday died before or in 1888. The majority of the mushavirs made efforts to fill the vacancies, but without success.

Mahomed Ali Rogay and Shaik Husain Rogay resigned in 1888, thus leaving the defendants Nos. 1, 2, 3 and 4 and the relators Nos. 1 and 2 the only remaining mushavirs. Though the defendants Nos. 1—4 made

1894
MARCH 20.
ORIGINAL CIVIL.
18 B. 401

some attempts to fill the vacancies, they could not do so, and the mushavirs continued to be only six in number until the election of defendants Nos. 6, 7, 8 and 9, in 1891. The ninth defendant, however, did not agree to act. The board is at present thus constituted, except that the relator M. H. Londay has died since this suit.

From what I have already said it will be seen that I consider that the majority of the mushavirs have had since 1878 no authority, under the rules of 1834, to fill up vacancies as they occurred [418] or to carry on the government of the masjid. What, then, has been the legal position of the mushavirs generally since that time? They appear to me to have been a provisional committee of management kept up from time to time by co-operation, tacitly permitted by the jamat, to manage the affairs of the masjid until the original constitution could be restored or legally changed, that original constitution being for the time in abevance. After the unsuccessful effort which was made from 1871 to 1876 to amend the constitution it was not, I think, incumbent on them to take further legal proceedings, which they could only have done at the risk of costs. It is not, therefore, I think, by their default that their provisional management has lasted unduly long. The election of the defendants Nos. 6, 7, 8 and 9 in 1891 shows, I think, that they have been acting with the tacit consent of the community, as many of its influential members took part in that election. It does not, I think, alter their position, that the relators Churgay and Londay individually objected to their proceedings, as they did not suggest any legal means for the mushavirs to adopt.

These persons, assuming then the position of mushavirs of the masjid, were, I think, bound to carry on the administration of its affairs according to its established rules so far as they could do so, and are liable for neglect or misconduct in their office to the same extent as if they had been validly appointed. I am unable to find any direct authority for that proposition, but it appears to me that it must be so. Mr. Jardine has referred me to Lewin on Trusts, chap. 30, s. 3, p. 1035; but that passage and the cases there referred to are not, I think, quite analogous to the present case. That of an executor *de son tort* is the nearest analogy which occurs to me.

Various charges are made in the plaint against the mushavirs since they began to act in 1878. The plaint itself is so vague and general in its terms that it is difficult to specify exactly what the Advocate-General complains of. I shall indicate the points which were mainly relied upon in counsel's reply:—

(1) The neglect to take steps to supply the place of the kazi, thereby depriving the charity of the assistance of the mushavir [419] relators and the failure to keep up the proper number of the mushavirs.

(2) The improper appointment of the defendant Mahomed Cassum Curtay as nazir of the masjid.

(3) The neglect to call for an annual account of the income and expenditure of the mosque and to audit the same as required by rule 6.

(4) The neglect to purchase immoveable properties with the surplus income of the mosque as required by rule 4.

(5) The neglect in not detecting sums appropriated by the bill-collectors, and getting in the same.

(6) The neglect in allowing arrears of rent to accumulate and to be lost to the masjid.

(7) The non-payment into the Bank of sums in the hands of the nazir when they exceeded Rs. 500.

1894
MARCH 20.
ORIGINAL CIVIL.
18 B. 401.

As to the first charge, I have already stated my opinion. There were several courses, which I could indicate, open to the mushavirs when the kazi died in 1878. They adopted the course which their senior counsel advised. I cannot say that they were wrong in this, though possibly some other course might have been more politic. It was the action of the present relators and their adherents with regard to the suit of 1871 which caused the principal difficulty.

(2) I do not think the mushavirs incurred any liability or laid themselves open to censure in appointing the defendant Mahomed Cassum Curtay to act as nazir in 1879. In considering this question it is important to bear in mind what the duties of the nazir then were. Whatever may have been the case in 1834, it was manifestly impossible, when the properties of the masjid had increased and were producing an income of about Rs. 3,000 per month, for the nazir personally to collect the rents or carry out the monthly repairs and keep the accounts. The kazi and the mushavirs had, therefore, established a nazir's office and employed in it two methas to keep the accounts, a munshi to do the Persian and Urdu writing, and two bill-collectors to collect the rents and see after the repairs. The quarterly and annual statements **[420]** of accounts were also prepared in this office. All these duties the rules 2, 5 and 6 impose upon the nazir. He would now perform them with the assistance of the office establishment. His duty, therefore, really was to superintend and check this office. This was carried out thus. Bill forms were kept for the collection of the rent. These (when filled up in the office) the nazir used to sign about the beginning of the month and send to the bill-collectors, taking their signatures for them. The amount received each day the collectors would bring to office and get the methas to credit them in the cash book to the different tenants. The nazir in the evening would see from the cash book what amount had been collected each day and would receive that amount and lock it up, initialling the cash book. So far the duties would be merely routine duties. To make the system and check complete, he should at the close of each month ascertain from the inspection of the bills and the bill book what bills had been paid and what remained unrecovered, and see that the cash received during the month corresponded with the amount of the bills recovered. He would also have to receive the reports of the bill-collectors as to the repairs required and give his sanction to them, or, when they exceeded Rs. 100, obtain the sanction of the mushavirs for them. A short time spent in the office each day and a few hours' labour each month would enable him to keep the whole system in exact working order. Intelligence rather than the expenditure of much time was what would be required for the nazir. *Prima facie*, a responsible clerk in a solicitor's office would be an excellent man for the post. Nazir Curtay was a clerk in the office of Messrs. Tyebji and Sayani. He was a man of good family and had interested himself in the affairs of the masjid. The mushavirs offered the post to the defendant Jitaker, but he declined it. They then selected Curtay to act. No one ever objected to the appointment, and I see no reason why the mushavirs should not have appointed him. It has transpired during the proceedings that he was in need of money, if not in debt, soon after his appointment, but there is nothing to show that the mushavirs knew of it. Until 1888 at all events he appears to have carried out the duties of his nazir-ship with seeming regularity.

[421] (3) The defendant Curtay says that quarterly statements of accounts as required by rule 5 were always made out and laid before the

1894
MARCH 20.
ORIGINAL CIVIL.
18 B. 401.

mushavirs, and I see no reason to doubt his statement. The accounts are forthcoming. He also says that the annual accounts were prepared down to 1888 and that notice was sent to the mushavirs when they were ready. I think this was probably done. Down to 1884 he says that the directors examined and passed them regularly, but that from 1884 to 1888 they did not do so, as there was no quorum or majority of mushavirs to act during the absence of Mahomed Ali Rogay in Europe. In 1888 the accounts down to that year were adjusted by the mushavirs and passed. They were also printed and circulated. No error has been pointed out in them. Mr. Jardine suggests that the defalcations of the bill-collectors, presently to be referred to, began before 1888, but he has not shown it. Even if some small defalcations did take place prior to 1888, and have not been detected, I could not upon the evidence hold the mushavirs responsible for them. The rules do not provide for a paid audit, and an audit by ten gentlemen like the mushavirs, none of whom are accountants, with the best intentions must necessarily be to a certain extent formal. Until an official auditor is appointed by Government to examine charity accounts, I do not see how there can ever be a really effective audit. I, therefore, consider that in respect of the accounts down to 1888 the rules have been substantially complied with. Since 1888 the annual accounts have not been audited or passed by the mushavirs. How far they are liable for not having done so, I shall consider when I deal with the appropriations of the bill collectors.

(4) This is the most important question in the case, so far as the mushavirs are concerned. No purchases have been made by the mushavirs since 1878. The balance in the Bank, when after the death of the kazi the account was transferred to the name of Mahomed Ali Rogay and Kutubudin Tomgekar, was Rs. 30,204-15-8. The balance at the end of 1888 was Rs. 1,83,592-11-10. These sums include the moneys belonging to some subordinate charities, the accounts of which were kept in the Juma Masjid books; and deductions have to be made for them on that account. They are sufficiently near the mark to [422] enable me to consider the question of principle. In 1888 they stood in the names of Mahomed Ali Rogay and the defendant Moulvi Abdul Kadir Jitaker in the books of the Bank of Bombay. The rule regarding the power or duty of the kazi and the mushavirs to purchase property is the fourth. In the English form it runs thus.—"As often as the funds standing to the credit of the kazi and the two senior directors shall amount to the sum of Rs. 5,000 or upwards, then and so often the kazi and the directors or the kazi and a majority of them *shall* therewith *purchase* other property, to be added to the then appropriated property belonging to the said masjid, and the deed of sale thereof shall be made out to and in the name of the kazi and ten directors for the time being and their successors and assigns in trust for the kazi and jamat of Bombay for and on behalf and for the sustentation and repairs and other expenses of the said Juma Masjid and of its appropriated property." In the Persian and Urdu forms the expression "shall purchase" is rendered by a word which rather means "may purchase" than "shall purchase," which confers an authority rather than indicates a command, and the addition of the "or upwards" in the English form rather points in the same direction. The plaintiff has not shown whether the vernacular or English form of the rule is authoritative. In either form, however, I apprehend that the rule imposed on the kazi and the mushavirs the duty of purchasing property with the surplus funds, but

the vernacular form gave them a wider discretion as to the time when they shall purchase than did the English form. The rule certainly seems to have been throughout understood in that sense, for we find in the time of the kazi that the fund was allowed to reach the sum of over Rs. 30,000. I myself feel much doubt whether the power or duty of purchasing property for the masjid was one which the provisional committee like the mushavirs would have been justified in assuming. Had they purchased property with the masjid funds, and had property fallen in value, it appears to me that the Advocate-General, in the absence of special circumstances, acquiescence or the like, could have called upon them to restore the masjid funds and repudiated the purchase as made without authority. This power of purchasing property is a peculiar power requiring judgment to render the purchase a suitable addition to **[423]** the other appropriated property of the masjid, and is not like lending money on mortgage or investing it in stock. It is not a mere question of routine like most of the other duties of the mushavirs. A doubt, as to their powers, must have, I think, been the principal reason why the mushavirs did not purchase property. They made inquiries as to suitable purchases and employed brokers with the same object, but always stopped short of actual purchase. The property of Sonabai adjoining the mosque they seemed to be particularly anxious to acquire. This absence of power on the part of the mushavirs to make purchases, I think, must have been generally felt ; for I do not find in the case any evidence even of a suggestion made by any one (except the relator Churgay) to Mahomed Ali Rogay and his colleagues that they should lay out the masjid funds. This, however, is not the case that the defendants Nos. 1—4 put forward. They have not themselves been examined, but the evidence afforded by the record of the masjid and that of the brokers which they have adduced, points rather to their defence being that the money was retained for the purpose of enlarging and improving the masjid and that it was not possible to find suitable investments at reasonable prices, than to their having entertained a well-founded doubt as to their power of purchase. Mr. Tyabji, however, did put forward this want of power in the mushavirs as an absolute defence.

The accounts which the mushavirs published prior to 1888 and those which they published in 1888 for the last preceding seven years show clearly that there were large uninvested funds of the masjid, and that no purchases had up to that date been made. These accounts were distributed amongst the leaders of the community, and no objection was taken to them. The Advocate-General, however, now seeks to re-open them by making the mushavirs, the defendants Nos. 1, 2, 3 and 4, liable for not purchasing property. He suggests that they should be charged interest on the uninvested funds, such as would have been received in the shape of rents had properties been from time to time purchased under the provisions of rule 4.

The first question which arises on that contention is whether the claim is within time. I think that it is clear that s. 10 of the Limitation Act (XV of 1877) has no application to this **[424]** case. This claim is not one to follow property which has become vested in the mushavirs for a specific purpose. They never had in their hands the interest with which it is sought to make them liable, nor did they use or misuse the principal moneys. It is really a claim against them as officers of the masjid for neglecting the duty to purchase landed estate. I cannot hold that they are agents so as to bring the case within art. 90, which applies to suits by principals against

1894
MARCH 20.
ORIGINAL CIVIL.
18 B. 401.

agents for neglect. The claim must, therefore,fall within art. 120 of the Limitation Act XV of 1877, and must be enforced within six years from the cause of action arising. The plea of limitation, therefore, only protects the defendants Nos. 1 to 4 in respect of neglect to invest arising before the 10th December, 1885. Ought I, however, to allow the Advocate-General to open the accounts adjusted and published in 1888 for the purpose of enforcing the liability of the defendants Nos. 1—4, which, to say the least, is extremely doubtful? I think not. The case is not, of course, so strong in point of time as that of the *Kathiawar Trading Company* v. *Virchand*(1), but the equities in the present case are far stronger. Dishonesty or improper dealing with the funds in this case there has been none. The highest at which the case can be put is that there has been an error of judgment. In this the community has acquiesced. The two Rogays are not defendants, and it would be difficult now for defendants, Nos. 1—4 to enforce any contribution against them. Other mushavirs are dead. The position of parties is changed. Moreover, my own opinion is that the mushavirs have never had since 1878 power or authority to invest these funds, though I prefer to trust my decision on the other grounds. Since 1888 the position is different. The number of acting mushavirs was then reduced to four. They tried to fill the vacancies, but without success. They had not even a working majority of six mushavirs, and the funds stood in the joint names of Mahomed Ali Rogay and the defendant Jitaker and could not be operated on by reason of the insanity of the former. It was then quite impossible for defendants Nos. 1—4 to make any purchase, even if the community would have permitted them to do so. I cannot hold them liable for not purchasing land during this period. The new directors were, as to the old funds, **[425]** under similar difficulties. As to the new, there was not time allowed for them to act. The filing of the suit and the nature of the relief sought therein precluded them from moving in this matter after its inception. I must, therefore, decline to make any reference to the Commissioner under this head of charge.

5. After the retirement of the Rogays in 1888 the affairs of the masjid appear to have been neglected. The nazir, to the knowledge of the defendants Nos. 1—4, had to leave Bombay on business, and after that, until he retired in July, 1891, only superintended the nazir's office from time to time in the most spasmodic manner. The annual accounts were not checked by the defendants Nos. 1—4 or audited. It does not appear that they were even made out. No meetings of mushavirs were called. Nothing was done. The reason of this apathy apparently was that the four remaining mushavirs did not consider that they could act for want of a quorum or majority of six. The unfortunate opinion which had been obtained in 1878, misled them. As a provisional committee who had assumed the management of the masjid they were bound to protect its interests. Of the money which they actually received, or which was paid into their account, they were, I think, actual trustees, as the kazi and two senior mushavirs had been, when the funds were received by the kazi and lodged in their names: but in addition to this they were officers of the masjid, charged with the specific duty of superintending the nazir and his accounts; and, if the masjid has suffered loss by their neglect of duty, I think they are answerable for it. It is practically admitted that the bill-collectors have collected since 1888 rents from tenants of the masjid which have not been credited in the books, and it is proved that

(1) 13 B. 119.

a cursory audit even, at the end of each year, would have detected these defalcations. If the mushavirs had examined and audited the accounts and failed to discover these defalcations. I do not say that they would have been liable; but that they have not done. They have neglected to examine them altogether. I think that a case is made out here for directing an account of the rents actually recovered which they have received since the date of the last account published, or which but for their wilful default or neglect they might have received.

[426] 6. The sixth head is not a very important one. The nazir and not the mushavirs is, under the rules, entrusted with the collection of the rents, and it is his duty to see that the rents are not allowed to fall unduly into arrear. It is not shown that, except at an exceptional time when the nazir was ill, the rents were so unduly in arrear as to call for the active interference of the mushavirs, or that the masjid has suffered undue loss under this head. The new mushavirs have put things to right on this score. As to the rents due by the servants of the masjid and the friends of the nazir, which have not been recovered, I do not think I should direct any special inquiry as to them It was not the duty of the mushavirs to look into the account of each individual tenant and to stop his rent from his pay if he were a servant of the masjid. I consider that I have gone as far as it is possible to go in the direction I have already given.

7. As to the payment into the Bank of the moneys when they amounted to Rs. 500, I think that the spirit of the rules has been complied with, and no loss to the masjid has been suggested from its not having been observed to the letter.

I have lastly to consider the case of the nazir defendant. Although I am not altogether satisfied with his explanation of Exs. 1—4 with reference to his borrowing from the bill-collectors, and some other charges made against him; yet I think that on the whole, notwithstanding his embarrassed circumstances, it has not been proved that he has not kept his hands fairly clean. I do not think the statements of the bill-collectors made behind his back ought to have been entered upon my notes. Servants detected in defalcations are always ready to make their immediate superior a participator in the default. Their statements, though not evidence against him, the defendant No. 5, has met with an unqualified denial, which as the bill-collectors have not been called, I see no reason for not accepting. He ought, however, to have resigned his office in 1888, if not before. He is of course in a higher degree than defendants Nos. 1—4 answerable for his neglect in allowing the defalcations of the bill-collectors, and in not rendering his accounts since the adjusted accounts in 1888, and he must be charged with wilful default in the same respect and with not [427] having recovered his own rent. If pressed to do so, I might be induced to add the rents of the servants of the masjid whose rents have been lost, but it seems hardly worth while to have the last-mentioned special direction.

I have nothing but praise to assign to the conduct of the defendants Nos. 6, 7 and 8. The want of discrimination in the drafting of the plaint is much to be regretted.

Declare that the defendants, the mushavirs, are not authorized under the rules of 1834 to carry on the management of the masjid, and that they have not been validly appointed under these rules. Direct that they continue to carry on the management of the affairs of the masjid until the scheme hereafter provided for shall come into operation. Direct that

1894

MARCH 20

ORIGINAL CIVIL.

18 B. 401.

a revised scheme for the future management of the affairs of the Juma Masjid and its appropriated properties be prepared by the Advocate-General and approved by the sitting Judge in Chambers and, when so approved, be laid before the jamat of the Juma Masjid for their approval and adoption. Direct that the defendants do bring in an account of the rents, profits and income of the Juma Masjid received by them respectively since the last adjusted and published accounts, and in taking such account let the defendants Nos. 1—4 account for the rents actually recovered and received by them, or which but for their wilful default or neglect they might have received, and let defendant No. 5 be similarly charged, and also with rent due by himself (if any) which he ought to have recovered, and pay such sum (if any) as upon the taking of such accounts may be found due from them respectively.

The Advocate-General and the defendants other than defendant No. 5 to have their costs taxed as between attorney and client out of the funds, including costs of rule. Two counsel allowed to defendants Nos. 1—4. Costs of defendant No. 5 reserved. Further directions and further costs reserved. Liberty to apply.

Attorneys for plaintiff: Messrs. *Ardesir, Hormasji and Dinsha.*

Attorneys for the defendants: Messrs. *Nanu and Hormasji*, and Mr. *K. D. Shroff.*

---

18 B. 428.

[428] CRIMINAL REFERENCE.

Before Mr. Justice Candy and Mr. Justice Fulton.

QUEEN-EMPRESS *v.* PIRIO KALIO.* [17th July, 1893.]

Abkari Act (Bombay Act V of 1878), s. 3, cl. 11, and 43, cl. (f)—Drawing toddy is not manufacturing liquor.

Drawing toddy is not 'manufacturing liquor' as defined in cl. 11 (1) of s. 3 of the Bombay Abkari Act (V of 1878).

The mere possession of implements for the purpose of drawing toddy is not an offence punishable under cl. (*f*) of s. 43 (2) of the Act.

---

* Criminal Reference No. 54 of 1893.

(1) Bombay Act V of 1878, s. 3, cl 11 :—

(11) "Manufacture" includes every process, whether natural or artificial, by which any spirituous, fermented or intoxicating liquor or intoxicating drug is prepared, and also every process for the rectification of liquor ;

admixing is a process within the meaning of this definition.

(2) Section 43 :—

Whoever in contravention of this Act, or of any rule or order made under this Act, or of any license, permit or pass obtained under this Act,

(*a*) imports or exports liquor or any intoxicating drug into or out of any part of the Presidency of Bombay, or

(*b*) transports or removes liquor or any intoxicating drug from one place to another, or

(*c*) manufactures liquor or any intoxicating drug, or

(*d*) draws toddy from any tree, or

(*e*) constructs or works any distillery or brewery, or

(*f*) uses, keeps, or has in his possession any material, still, utensil, implement, or apparatus whatsoever for the purpose of manufacturing liquor or any intoxicating drug, or

(*g*) sells liquor or any intoxicating drug,

shall be punished for each such offence with fine which may extend to one thousand rupees, or with imprisonment for a term which may extend to six months, or with both.

1893
JULY 17.

CRIMINAL REFERENCE.

18 B. 428.

THIS was a reference under s. 438 of the Code of Criminal Procedure (Act X of 1882) by F. S. P. Lely, Esq., District Magistrate of Surat.

The accused was charged with the offence of keeping in his possession implements for the purpose of drawing toddy, and convicted by the Second Class Magistrate of Olpad under [429] s. 43, cl. (*f*) of the Bombay Abkari Act (V of 1878) and sentenced to a fine of Rs. 8.

The District Magistrate on examining the record of the case was of opinion that mere possession of implements for the purpose of drawing toddy was not an offence punishable under s. 43, cl. (*f*) of the Abkari Act. He, therefore, referred the case for the orders of the High Court under s. 438 of the Criminal Procedure Code (X of 1882).

This reference was heard by a Division Bench (CANDY and FULTON, JJ.).

Rao Saheb *Vasudev J. Kirtikar*, Government Pleader, for the Crown.
Manekshah Jehangirshah, for accused.

JUDGMENT.

PER CURIAM.—We do not think that drawing toddy is manufacturing liquor as defined in cl. 11 of s. 3 of Bombay Act V of 1878, for it will be observed that in s. 43 of the Act the drawing of toddy and the manufacture of liquor are treated separately. We concur, therefore, with the District Magistrate that the mere possession of implements for the purpose of drawing toddy is not an offence punishable under cl. (*f*) of s. 43 of Bombay Act V of 1878. We accordingly reverse the conviction and sentence, and direct the fine, if paid, to be refunded.

Conviction and sentence reversed.

---

18 B. 429.

APPELLATE CIVIL.

Before Mr. Justice Candy and Mr. Justice Fulton.

HAJRAT AKRAMNISSA BEGAM (*Original Defendant No.* 14), *Applicant* *v.* VALIULNISSA BEGAM (*Original Defendant No.* 2), *Opponent.**
[18th July, 1893.]

Civil Procedure Code (Act XIV of 1882), *s.* 647 *as amended by Act VI of* 1892, *s.* 4 *—Execution of decree—Application for execution dismissed for default—Power of the Court to restore such application to the file—Construction of Statutes.*

[430] There is nothing in the Code of Civil Procedure (Act XIV of 1882) as amended by Act VI of 1892, which authorizes a Court to apply to execution proceedings any of the procedure enacted in chap. VII of the Code.

Accordingly a Court cannot under s. 103 restore to the file an application for execution which has been dismissed for default.

Alterations in forms of procedure are retrospective in effect, and apply to pending proceedings.

[F., 18 M. 131 (133) ; 7 Ind. Cas. 11 (15) ; 139 P. L. R. 1905 ; R., 13 C.L.J. 532=11 Ind. Cas. 385 ; 2 C.W.N 606 (607) ; 153 P.L.R. 1901.]

THIS was an application under s. 622 of the Code of Civil Procedure (Act XIV of 1882).

---

* Application No. 113 of 1893 under Extraordinary Jurisdiction.

1893
JULY 18.

APPELLATE CIVIL.

18 B. 429.

One Amtulnissa Begam filed a suit (No. 76 of 1886) in the Court of the First Class Subordinate Judge of Surat for a partition of three *jaghir* villages.

On the 29th October, 1890, the Subordinate Judge passed a decree directing the villages to be divided among the parties to the suit according to their respective shares under the Mahomedan law.

On 15th April, 1891, defendant No. 2 presented a *darkhast* for execution of the decree.

On the 27th July, 1892, the Subordinate Judge dismissed the *darkhast* for default of appearance of the applicant's pleader in support of the *darkhast*.

On the 29th July, 1892, the pleader made an application to the Court to restore the *darkhast* to the file. This application was granted on 27th August, 1892.

Thereupon defendant No. 14 moved the High Court under its extraordinary jurisdiction, and obtained a *rule nisi* calling upon defendant No. 2 to show cause why the Subordinate Judge's order restoring the *darkhast* to the file should not be set aside.

Ganpat Sadashiv Rao, for the applicant :—The lower Court had no jurisdiction to restore the *darkhast* to the file. There is no provision in the Code of Civil Procedure empowering the Court to restore an application for execution which has been dismissed for default. Under s. 4 of Act VI of 1892, the provisions of s. 647 of the Civil Procedure Code are no longer applicable to applications for execution of decrees. That being the case, **[431]** s. 103 of the Code, under which the lower Court's order purports to have been passed, has no application to the present case—*Dhonkal Singh* v. *Phakkar Singh* (1).

Motilal M. Munshi, for the opponent.—The *darkhast* was dismissed for default on the 27th July, 1892. The application for its restoration to the file was made on the 29th July, 1892,—that is, before Act VI of 1892 came into force. Section 4 of that Act does not, therefore, apply to the present proceeding. That being so, the provisions of chap. VII of the Code of Civil Procedure relating to suits are applicable also to execution proceedings under s. 647 of the Code.

Ganpat Sadashiv Rao, in reply :—Act VI of 1892, relating as it does to procedure, applies to all pending proceedings, and, therefore, governs the present case— *Sha Jasraj Himaraj* v. *Chudasama Vakhatsang* (2) ; *Javanmal Jitmal* v. *Muktabai* (3).

JUDGMENT.

FULTON, J.—As by s. 4 of Act VI of 1892 it is declared that s. 647, Civil Procedure Code (XIV of 1882), is inapplicable to applications for execution which are proceedings in suits, it seems impossible to rely on this latter section as justifying the use of s. 103 for the purpose of restoring to the file an application for execution. We, therefore, concur in the opinion of the learned Chief Justice of Allahabad expressed in *Dhonkal Singh* v. *Phakkar Singh* (1), that there is nothing in the Code of Civil Procedure as now amended which authorizes a Court to apply to an application for execution any of the procedure enacted in chap. VII of the Code.

But the question remains whether, apart from the provisions of s. 103, a Court can restore to the file an application for execution dismissed in

(1) 15 A. 84. (2) P.J. (1891), p. 294. (3) 14 B. 516.

the absence of the applicant. This question, we think, must be anwered in the negative. The decision of the Judicial Committee of the Privy Council in the *Delhi and London Bank* v. *Orchard* (1) is an authority for holding that such a dismissal, not being an adjudication that the decree is not to be executed, is not a bar to a subsequent application for execution, for it shows that an order refusing execution on a particular [432] application does not prevent a second application when such order is based on some ground peculiar to the first and not on any decision as to the right of the applicant to enforce the decree. And the judgment in *Ram Kirpal Shukul* v. *Mussamat Rup Kuari* (2) shows that, in the absence of statutory provision, a Court, when it has once passed an interlocutory judgment or order in a suit, cannot alter that order. As, however, there is, as above pointed out, no statutory authority for restoring to the file an application for execution which has been dismissed for default, it follows that the Court cannot, without departing from the principles laid down in the last-mentioned case, set aside the order of dismissal, and place the parties in the position they occupied before it was passed. So far as the order is ineffectual to bar a subsequent application for execution it is innocuous; but in so far as it may be accompanied by any order as to costs or otherwise places one party in a position of advantage over the other, it appears to be an order in a suit which cannot subsequentiy be changed by the Court which made it, excepting possibly on review. It was not suggested in argument that the application granted on the 27th August, 1892, could be treated as an application for review, and it is clear that it could not be so treated, as notices were not served on all the parties liable to be affected as required by s. 626, proviso (*a*). We must, therefore, hold that, assuming the proceeding to be governed by Act VI of 1892, the Court had no jurisdiction to pass the order of the 27th August, 1892.

Next it was contended that Act VI of 1892 did not apply to this proceeding, because the application for restoration to the file was presented on the 29th July before the Act came into force. Whether, considering that the Act came into force on the 29th July, any application presented on that day could be treated as made before it came into force, is a point which we need not consider; for even if the application were pending when the law was enacted, the case would be governed by the general principle, that alterations in forms of procedure are retrospective in effect and apply to pending proceedings—*Sha Jasraj Himaraj* v. *Chudasama Vakahtsang* (3). Section 5 does not seem to have [433] any reference to applications for execution, and merely deals with appeals and applications for review.

We set aside the Subordinate Judge's order of the 27th August, 1892, but, under the circumstances, we think it fair to direct that the parties severally pay their own costs in both Courts.

Order reversed.

(1) 4 I.A. 127. (2) 11 I. A. 37. (3) P.J. (1891), p. 294.

1893
AUG. 8.

APPEL-
LATE
CIVIL.

18 B. 433.

18 B. 433.

APPELLATE CIVIL.

Before Mr. Justice Candy and Mr. Justice Fulton.

RAMCHANDRA NARAYAN MANTRI AND OTHERS (*Original Defendants*), *Appellants v.* ANANT AND OTHERS (*Original Plaintiffs, &c.*), *Respondents.** [8th August, 1893.]

Landlord and tenant—Permanent tenancy—Bombay Land Revenue Code (Bombay Act V of 1879), s. 83.

The mere fact that a tenancy has commenced subsequently to the commencement of the landlord's tenure, does not prevent the application of s. 83 (1) of the Bombay Land Revenue Code (Bombay Act V of 1879), in cases where by reason of the antiquity of the tenancy no satisfactory evidence of its commencement is forthcoming.

G. held certain lands as a tenant under M. an inamdar. The lands continued in G.'s family for nearly 80 years. It was found that owing to this antiquity of the tenancy, its commencement or duration could not be satisfactorily established by evidence.

Held that, in the absence of any local usage to the contrary, G.'s tenancy must be presumed to be permanent.

THESE were appeals from the decree of Rao Bahadur R. S. Tipnis, Acting Assistant Judge of Ratnagiri, in appeal No. 349 of 1889.

The plaintiffs sought to recover possession of the lands mentioned in the plaint, alleging that they belonged originally to a family named Mantri, who were jaghirdars in the district of **[434]** Satara; that they were let on a permanent lease to one Ganesh Savant; that Ganesh's rights were purchased by the plaintiffs at a Court sale; that plaintiffs were in possession until 1881, when they were wrongfully dispossessed by defendants Nos. 1 to 9.

Defendants Nos. 1 to 9 pleaded (*inter alia*) that Ganesh was only a yearly, and not a permanent, tenant, and that the plaintiffs' alleged purchase had given them nothing. Defendants Nos. 10 to 15 pleaded that they were tenants of defendants Nos. 1 to 9, and were not liable to the plaintiffs' suit.

The Court of first instance found that Ganesh's tenancy was yearly tenancy, although it had continued in his family for over fifty years, and the plaintiffs were not entitled to recover. It, therefore, rejected the claim with costs.

On appeal, the Assistant Judge found that Ganesh's tenancy "though it admittedly arose at the hands of the Mantris, was of a very ancient date—certainly not less than eighty years, and that by reason of this antiquity of the tenancy its commencement or duration could not be satisfactorily established by evidence." He further found that there was no evidence of local usage as to the duration of such tenancy. In the

---

* Second Appeals Nos. 682 and 759 of 1891.

(1) Section 83, Bombay Act V of 1879:—

And where by reason of the antiquity of a tenancy, no satisfactory evidence of its commencement is forthcoming and there is not any such evidence of the period of its intended duration, if any, agreed upon between the landlord and tenant, or those under whom they respectively claim title, or any usage of the locality as to duration of such tenancy, it shall, as against the immediate landlord of the tenant, be presumed to be co-extensive with the duration of the tenure of such landlord and of those who derive title under him.

absence of any local usage, he held that under s. 83 of the Bombay Land Revenue Code (Act V of 1879) Ganesh's tenure must be presumed to have been co-extensive with that of the landlord's, and that the permanent tenancy of the plaintiffs as assignees of Ganesh must be held proved. He, therefore, awarded the plaintiffs' claim.

Against this decision the defendants preferred these appeals to the High Court.

In appeal No. 682—

Ghanasham Nilkant, appeared for appellants (defendants Nos. 5, 6, 7, 9 and 17).

Manekshah Jehangirshah, for respondents (Nos. 1—3).

In appeal No. 758—

Messrs. *Chitnis*, *Motilal and Malvi*, for appellants (defendants Nos. 1 to 4).

Manekshah Jahangirshah, for respondents Nos. 1—3.

[435] *V. G. Bhandarkar*, for respondents Nos. 4, 5, 8 and 9.

Ghanasham Nilkant, for appellants (defendants).—The interest purchased by the plaintiffs was not a permanent tenancy. It is admitted that the original tenant (Ganesh) came in under the defendants' ancestors (the Mantris) subsequently to the commencement of their tenure. That being so, s. 83 of the Land Revenue Code does not apply. Mere length of possession at an invariable rent cannot establish a perpetual tenancy—*Narayanbhat* v. *Daulata* (1) ; *Gangabai* v. *Kalapa* (2) *Ramabai* v. *Babaji* (3) ; *Kalidas* v. *Bhaijai* (4) ; *Lakshman* v. *Vithu* (5).

Manekshah Jehangirshah, for respondents (plaintiffs) ;—It is found that the tenancy in question is ancient. It is also found that by reason of its antiquity the commencement and duration of the tenancy cannot be established by satisfactory evidence. The case, therefore, falls within s. 83 of Bombay Act V of 1872. *Daulata* v. *Sakharam* (6) is conclusive on the point.

JUDGMENT.

CANDY, J.—The preliminary and main argument in these appeals relates to the applicability of s. 83 of the Land Revenue Code. The Subordinate Judge found as a fact that the *thikan* had continued in the family of Ganesh Savant for nearly three generations for a period of over fifty years, but that the tenancy was simply an annual tenancy, and such tenancy by any lapse of time could not be converted into a permanent tenancy. On appeal the Assistant Judge found as follows :—" The tenancy, though it admittedly arose at the hands of some Mantri " (the *thikan* is the inam property of the Mantris, who are jaghirdars in the Satara Collectorate) " is of a very ancient date, certainly not less than eighty years. It is on account of this antiquity that the commencement or period of duration of the tenant (tenancy ?) cannot be satisfactorily established by evidence. . . . On the whole, then, it seems to me that by reason of the antiquity of the tenancy its commencement or duration cannot be satisfactorily established by evidence . . . . When this case was decided by the **[436]** Subordinate Judge he had not before him the rulings in *Daulata* v. *Sakharam* (6) and *Jaikrishna* v. *Lukshmanrav* (7). These cases were decided with reference to s. 83 of the Bombay Act V

(1) 15 B. 647. (2) 9 B. 419.
(3) P. J. for (1891), p. 97 ; 15 B. 704. (4) 16 B. 646.
(5) P. J. for (1893), p, 111 ; see 18 B. 221.
(6) 14 B. 392. (7) P. J. for (1890), p. 179.

1893
AUG. 8.
APPELLATE CIVIL.
18 B. 133.

of 1879, and they govern the present case. It must be presumed that the duration of Ganesh's tenancy is co-extensive with the duration of the tenure of the Mantris."

Thus the question arises whether the Assistant Judge was right in applying s. 83 of the Land Revenue Code, he having taken it as admitted that the tenancy of Ganesh Savant arose at the hands of the landlord (Mantri). If the Assistant Judge was right, then I concur in holding that the finding of the Assistant Judge as to the tenancy being at least eighty years old is a finding of fact with which this Court cannot interfere, and that the decree of the District Court on the main point must be confirmed.

It is to be noted that neither before the Subordinate Judge nor before the Assistant Judge does the applicability of s. 83 appear to have been raised. It is possible that, apart from that section, the plaintiffs may be able to establish the permanent tenancy of Ganesh, whose rights they have purchased. But the Assistant Judge evidently considered the case to be governed by s. 83: hence the importance of the question whether that section can be applied.

Taking the words of the section in their plain grammatical sense, I am of opinion that the fact taken as admitted in the present case, that the tenancy commenced subsequent to the origin of the landlord's tenure, does not prevent s. 83 of the Land Revenue Code being applied. The following are the conditions which must exist before the presumption can be drawn under the section:—

(1) By reason of the antiquity of the tenancy, no satisfactory evidence of its commencement is forthcoming.

(2) There is nosatisfactory evidence of the period of its intended duration.

(3) There is no usage of the locality as to duration of such tenancy.

[437] When all these three conditions exist, it shall be presumed that the tenancy (or the duration of the tenancy. I take it that there is no practical difference, whether we refer "it" to "tenancy" or "duration of such tenancy,") shall be presumed to be co-extensive with the duration of the tenure of the landlord.

In the present case there is no dispute about the second and third conditions. We are concerned solely with the first. The question is, when we are satisfied that the tenancy commenced subsequently to the tenure of the landlord, can it be said that there is no satisfactory evidence of the commencement of the tenancy? In my opinion it can. If the Legislature had intended to say 'where by reason of the antiquity of a tenancy there is no satisfactory evidence that it commenced subsequent to the landlord's tenure," it would have used plain words to that effect. The words simply mean, there is nothing to show satisfactorily the origin of the tenancy, *i. e.*, the terms under which the tenant commenced to hold.

When the Bill was introduced, which afterwards became Bombay Act V of 1879, it was not asserted that the section now under consideration (s. 134 in the Bill) merely enunciated the law as established by a series of decisions. On the contrary it seems to have been understood that a new tenant law was being enacted. In the Statement of Objects and Reasons it was remarked:—

"In s. 134 some provisions have been introduced with a view of facilitating the determination of the status of tenants and their liability to the payment of rent. The principles therein laid down will, it is believed,

1893
AUG. 8.

APPELLATE CIVIL.

18 B. 433.

tend to the settlement upon an equitable basis of all questions arising between landlords and tenants when, owing to the antiquity of the tenancy, no satisfactory evidence can be produced with regard to its origin."

It is of no use, therefore, to refer to decisions passed before Bombay Act V of 1879 became law, such as the case of *Kalu* v. *Hari* (1) where the tenancy must have commenced subsequent to the origin of the landlord's tenure, and this was taken to be one of the reasons (not the sole reason) why the tenancy was not perpetual. [438] So, too, in the case of *Daulata* v. *Sakharam* (2), which was quoted by the Assistant Judge. No doubt in the judgment of this Court it was remarked that if the defendants could prove that their tenancy was in existence previously to the grant of the *sanad* under which the plaintiff claimed, then undoubtedly that tenancy would be of the nature claimed by defendants. But that was apart from the statute. After showing, that in the absence of evidence to the contrary, defendants' possession could be referred back to a time not later than the date on which the plaintiff's tenure commenced, the judgment proceeds (p. 394) :—

"It is not, however, necessary to cite cases on this point. The second clause of s. 83 of the Bombay Land Revenue Code lays down the law on the subject, and distinctly applies to the present case. No satisfactory evidence of the commencement of this tenancy appears on the record, and there can be no doubt that this is by reason of the antiquity of that tenancy. There is no such other evidence as is referred to in the section. In such a state of things the Assistant Judge ought to have presumed the defendants' tenancy to be, as against the plaintiff, co-extensive with the duration of the tenure of the plaintiff, and thrown upon the plaintiff the burden of proving the reverse."

The above enunciation of the law is applicable to the present case, and there is no suggestion in the judgment just quoted that the applicability of s. 83 depends upon whether the landlord is unable to show that the tenant's tenancy commenced subsequent to the time when his own tenure began.

For these reasons I would confirm the decree of the Assistant Judge with costs.

FULTON, J.—Whether antiquity of tenancy has been proved, and whether it is by reason of such antiquity that no satisfactory evidence of the commencement of such tenancy is forthcoming, are questions of fact which it was within the competency of the Assistant Judge to decide; and looking to the evidence of Ganesh Baba Savant, I am unable to say that it was not open to him to draw the inference that the tenancy is of a very ancient date [439] certainly not less than eighty years. Though the Judge rejected the witnesses' statement as to the existence of a lease, he was entitled, if he thought proper, to rely on other parts of his deposition relating to the reputed antiquity of tenure. He noted that there was no evidence to show how rent was paid by Ganesh, whether at an uniform rent or otherwise; and if notwithstanding this circumstance he still considered that the present tenancy was of very ancient date, there was nothing illegal in his doing so. Mr. Ghanasham referred us to the decision of this Court in Special Appeal No. 242 of 1871, *Bechar Nathu* v. *Bai Hari* (3) and those in *Narayanbhat* v. *Davlata* (4), *Ramabai* v. *Babaji* (5), *Kalidas* v. *Bhaiji* (6) and *Lakshman Vithu* (7), and further quoted the case of *Gangabai* v. *Kalapa* (8) in which

(1) P. J. (1874), p. 191.
(2) 14 B. 392.
(3) P. J. (1871), p. 194.
(4) 15 B. 647.
(5) P. J. (1891), p. 97.
(6) 16 B. 646.
(7) P. J. (1893), p. 111; *ante* 18 B. 221.
(8) 9 B. 419.

1893
AUG. 8.
APPELLATE CIVIL.
18 B. 433.

a tenant was held not to be a mirasdar though he and his predecessors had held for over a century. But this last-named case is really inapplicable, as the tenancy commenced with a lease on the construction of which the decision depended; and looking to the other decisions above referred to, as also to those in *Babaji* and *Nanaji* v. *Narayan* (1) and *Daulata* v. *Sakharam* (2), I think that, finding as the Assistant Judge did that the tenancy had lasted for at least eighty years and that its commencement could not be ascertained, he was entitled to hold that it was by reason of antiquity that no satisfactory evidence of the origin of the tenancy was forthcoming and to apply s. 83 of the Land Revenue Code.

As regards the mesne profits, it was contended that allowance should have been made for the plaintiff's rents for two years. But I think the Assistant Judge was right in holding that as the Mantris had not proved what rent they were entitled to, no deduction could be made on account of it. It was their duty to give evidence as to the amount of rent due, and as they failed to do so, such rent could not be taken into account.

The point taken in the memorandum of appeal, that the Court should have considered whether the purchase by the plaintiffs, **[440]** who were agents of the inamdars, was or was not for the inamdars, was not pressed in argument.

Under these circumstances, I think we must confirm the decree of the lower Court and direct the appellan s in appeals Nos. 682 and 758 respectively to pay all costs of such appeals.

Decree confirmed.

---

18 B. 440.

CRIMINAL REVISION.

Before Mr. Justice Candy and Mr. Justice Fulton.

QUEEN-EMPRESS *v.* KUTRAPA.* [14th August, 1893.]

Railway Act (IX of 1890), *s.* 113—*Excess charge and fare recoverable as a fine—Magistrate not competent to impose imprisonment in default—Fine—Imprisonment.*

Section 113, sub-s. (4) (3) of the Indian Railway Act (IX of 1890), which directs that on failure to pay on demand excess charge and fare when due, the amount shall on application be recovered by a Magistrate as if it were a fine, does not authorize the Magistrate to impose imprisonment in default. The excess charge and fare referred to in the section is not a fine, though it may be recovered as such.

[F., 20 M. 385 (386); 1 Bom. L.R. 126; 4 Ind. Cas. 236=5 N.L.R. 151 (152); **R.,** 21 C. 979 (985); 11 Cr. L.J. 577=8 Ind. Cas. 190=35 P.W.R. 1910 (Cr).**]**

---

* Criminal Review No. 179 of 1893.

(1) 3 B. 340. (2) 14 B. 392.

(3) Section 113, sub-s. (4) of Act IX of 1890, provides as follows:—"If a passenger liable to pay the excess charge and fare mentioned in sub-s. (1) or the excess charge and any difference of fare mentioned in sub-s. (2) fails or refuses to pay the same on demand being made therefor under one or other of those sub-sections, as the case may be, the sum payable by him shall, on application made to any Magistrate by any railway servant appointed by the railway administration in this behalf, be recovered by the Magistrate from the passenger as if it were a fine imposed on the passenger by the Magistrate, and shall, as it is recovered, be paid to the railway administration.

THE accused was prosecuted before the First Class Magistrate of Poona under s. 113 of the Indian Railway Act (IX of 1890) for travelling in a railway without a ticket.

The Magistrate ordered the accused to pay the Railway Company Rs. 2-1 on account of railway fare, and Re. 1 as excess charge, or in default to undergo three days' simple imprisonment.

The High Court in the exercise of its revisional jurisdiction sent for the record of the case.

[441] There was no appearance either for the Crown or for the accused.

JUDGMENT.

Per Curiam.—We do not think that the provision in s. 113 of the Railway Act, which directs that on failure to pay on demand excess charge and fare when due, the amount shall on application be recovered by a Magistrate as if it were a fine, authorized the Magistrate to impose imprisonment in default. Section 64 of the Indian Penal Code applies to all fines imposed for offences. And by s. 5 of the General Clauses Act (I of 1868) ss. 63 to 67 of the Indian Penal Code and 63 of the Criminal Procedure Code (now s. 386) apply to all fines imposed under the authority of any Act hereinafter to be passed. But we cannot say that the excess charge and fare referred to in s. 113 of Act IX of 1890 is a fine, though it may be recovered as such. The provisions of s. 64 of the Indian Penal Code provide imprisonment as a punishment for the offender, and not merely as a means of recovering the fine, which can be recovered under s. 386 of the Criminal Procedure Code (X of 1882). It is true that in s. 560 of the Criminal Procedure Code (as in the old s. 250) it seems to be assumed that the expression "recoverable as a fine" includes the power of imprisonment in default of payment, but the language of s. 552 suggests a contrary inference. We think, then, that we cannot safely determine the construction of s. 113 of the Railway Act by any analogy based on the wording of either s. 552 or 560 of the Criminal Procedure Code, but must be guided by the general principle that imprisonment cannot be ordered except in cases in which it is expressly prescribed.

1893
AUG. 14.

CRIMINAL REVISION.

18 B. 440.

---

18 B. 442.

[442] REVISIONAL CRIMINAL.

Before Mr. Justice Candy and Mr. Justice Fulton.

QUEEN-EMPRESS *v.* PHEROZSHA PESTONJI.* [17th August, 1893.]

Judge—Disqualification of a Judge—Personal interest—Crim. Pro. Code (Act X of 1882), s. 555—Bombay District Municipal Act (VI of 1873), s. 84—Municipal offence.

The mere fact that a Magistrate is the vice-president of a district municipality and chairman of the managing committee does not disqualify him from trying a charge of an offence brought by the municipality under Bombay Act VI of 1873. But if he has taken any part in promoting the prosecution, as, for instance, by concurring in sanctioning it at a meeting of the managing committee or otherwise, he will be disqualified by reason of the existence of a personal interest over and above what may be supposed to be felt by every municipal commissioner in the affairs of the municipality.

[R., 23 C. 44 (47) ; U.B.R. (1897—1901) 133 Cr.]

THIS was an application under s. 435 of the Code of Criminal Procedure (Act X of 1882).

* Criminal Revision Application No. 163 of 1892.

1893
AUG. 17.
REVISIONAL CRIMINAL.
18 B. 442.

The accused was prosecuted by the Municipality of Broach for allowing sullage water from his house to flow into a public street.

The trying Magistrate was vice-president of the municipality and chairman of the managing committee. He convicted the accused and sentenced him to pay a fine of annas two under s. 54 of the Bombay District Municipal Act (VI of 1873).

Against this conviction and sentence the accused applied to the High Court under its revisional jurisdiction.

Manekshah Jehangirshah, for accused:—This was a prosecution by the Municipality of Broach. The trying Magistrate was vice-president of the municipality and chairman of the managing committee. As such, he was not competent to try the case. There was a likelihood of his being biassed against the accused. He ought not, therefore, to have taken cognizance of the case. Refers to *Nobin Krishna* v. *The Chairman of the Suburban Municipality* (1); *Kharak Chand Pal* v. *Tarak Chunder Gupta* (2).

There was no appearance for the Crown.

JUDGMENT.

[443] FULTON, J.—Having regard to s. 84 of the Bombay District Municipal Act and the explanation to s. 555 of the Criminal Procedure Code, we do not think that the mere fact that the Magistrate was vice-president of the municipality and chairman of the managing committee disqualified him from trying this case. It cannot be said that as chairman of the managing committee or as vice-president he was necessarily a party to the prosecution any more than any municipal commissioner was a party, and any disqualification on the ground of his being a municipal commissioner is removed by the sections above referred to. But if it were shown that he had taken any part in promoting the prosecution, as, for instance, by concurring in sanctioning it at a meeting of the managing committee or otherwise, he would doubtless be disqualified by reason of the existence of a personal interest over and above what may be supposed to be felt by every municipal commissioner in the affairs of the municipality. This has been ruled in England in *The Queen* v. *Lee* and others (3), in reference to a provision in the Public Health Act, 1875, which provides that "except as expressly otherwise provided, any person shall not be disqualified or disabled to act as justice of the peace, coroner, juror or otherwise in any matter arising under or in relation to this Act by reason of his being a rate-payer in the borough or liable to any payments under this Act or a member of the Council or any committee thereof." In *The Queen* v. *Handsley* (4) it was held under this section that it was not sufficient, in order to establish the disqualification of a justice, to prove that he was a member of the town council, but that it must be shown that he had a substantial interest in the results of the trial, such as to make it likely that he had a real bias in the matter.

In the present case it is not alleged that the complaint was instituted at the instance of the managing committee. Our attention has been drawn to the cases reported in I. L. R., 15 Mad., 50 and I. L. R., 10 Calc., 194 and 1030, but they do not appear in any way inconsistent with the principles above laid down.

We must dismiss the application.

---

(1) 10 C. 194.
(2) 10 C. 1030.
(3) 9 Q. B. D. 394.
(4) 8 Q.B. D. 383.

18 B. 444.

1893
AUG. 17.

APPELLATE CIVIL.

[444] APPELLATE CIVIL.

Before Mr. Justice Candy and Mr. Justice Fulton.

BALMAKUNDAS ATMARAM (*Original Defendant No.* 2), *Appellant v.* MOTI NARAYAN AND OTHERS (*Original Plaintiffs*), *Respondents.**

[17th August, 1893.]

Mortgage—Priority—Registration—Notice—Possession of title deeds—Mortgagor allowed by first mortgagee to retain title-deeds—Subsequent mortgage to second mortgagee and title-deeds transferred—Plea by second mortgagee of no notice of first mortgage—Registration of first mortgage equivalent to notice.

A. mortgaged land to B. by a mortgage duly registered. A. subsequently got back the title-deeds, and handed them to C., to whom he mortgaged the same property. B. sued C. (the second mortgagee) for a declaration of priority. The lower Court found that B. had not been guilty of fraud or negligence in parting with the title-deeds.

Held, that B., as first mortgagee, was entitled to priority. The registration of his mortgage was notice to C., and there was no misrepresentation by B. which would relieve C., as subsequent mortgagee, of the duty of inquiry, or destroy the effect of such constructive notice.

[F., 6 Bom. L.R. 1043 (1050); **R.**, 31 M. 7=17 M.L.J. 499 (502)=3 M.L.T. 87.]

APPEAL under s. 15 of the Amended Letters Patent, 1865, against the decree of Telang, J., dismissing, under s. 551 (cl. 1) of the Code of Civil Procedure (Act XIV of 1882), a second appeal from the decision of J. B. Alcock, District Judge of Surat.

One Ghelabhai Nandram mortgaged certain property to the plaintiff for Rs. 499 by a registered mortgage-bond dated 11th November, 1884. Subsequently to the mortgage the title-deeds got back into the hands of the mortgagor, but the record did not show the circumstances under which they did so.

On the 9th July, 1886, Ghelabhai mortgaged the same property to defendant No. 2 and gave him the title-deeds.

On the 6th August, 1890, defendant No. 2 obtained a decree upon his mortgage for sale of the property mortgaged. In the execution proceedings plaintiff applied to the Court that the property should be sold subject to his mortgage lien. The Court refused this application.

Thereupon the plaintiff filed the present suit to enforce his mortgage lien against the property in dispute, and also for a declaration that his mortgage was entitled to priority over the mortgage to defendant No. 2.

[445] Defendant No. 1 (the mortgagor) did not contest the plaintiff's claim.

Defendant No. 2 (the second mortgagee) pleaded that he had no notice of the plaintiff's mortgage; that plaintiff had fraudulently restored the title-deeds of the property to the mortgagor, and thereby led him (defendant No. 2) to believe that the property was unincumbered, and that acting on such belief he (the defendant No. 2) had made advances to the mortgagor on the security of the same property under a mortgage-bond dated 9th July, 1886. Defendant No. 2, therefore, contended that his mortgage was entitled to priority over plaintiff's.

---

* Appeal No. 12 of 1893 under cl. 15 of the Letters Patent, 1865.

1893
AUG. 17.
APPELLATE CIVIL.
18 B. 444.

The Court of first instance held, on the authority of *The Madras Hindu Union Bank* v. *C. Venkatrangiah* (1) and *Madras Building Company* v. *Rowlandson* (2), that as the plaintiff had parted with the title-deeds, and as they were now in the possession of defendant No. 2, he (defendant No. 2) had priority. The Court, therefore, passed a decree directing the plaintiff to recover his mortgage-debt from the mortgagor (defendant No. 1) personally, and dismissed the suit as against defendant No. 2.

On appeal the District Judge was of opinion that the registration of the plaintiff's mortgage was a sufficient notice of it to defendant No. 2, and that his possession of title-deeds did not give defendant No. 2 a claim to priority. He further held that there was nothing to show that plaintiff (the first mortgagee) was guilty of negligence or fraud with respect to the title-deeds. He, therefore, reversed the decree of the first Court and awarded the plaintiff's claim.

Against this decision the second defendant preferred a second appeal to the High Court. The appeal was dismissed by Telang, J., under s. 551, cl. 1 of the Code of Civil Procedure (Act XIV of 1882).

Against this decree the present appeal was made under the Letters Patent. The appeal came on for hearing before a Division Bench (Candy and Fulton, JJ.).

Kalabhai Lallubhai, for appellant (defendant No. 2):—The plaintiff is a prior mortgagee. He has negligently allowed the **[446]** title-deeds of the property in dispute to remain with the mortgagor. He has thereby put it in the power of the mortgagor to raise fresh loans from others on the security of the same property, as if it was unincumbered. He has thus assisted in or connived at the fraud practised by the mortgagor. He cannot take advantage of his own wrong. Equity will postpone his rights to those of a puisne mortgagee. Refers to *Northern Counties of England Fire Insurance Company* v. *Whipp* (3). The plaintiff's mortgage is no doubt registered. But registration is not equivalent to a notice in a case of fraud—*Agarchand* v. *Rakhma* (4)

There was no appearance for the respondent.

JUDGMENT.

FULTON, J.—I think this appeal should be rejected. Even assuming that the conduct of the prior mortgagee in allowing the *sanad* to pass into the hands of a mortgagee after he had once been given possession of it would, in the absence of notice to the puisne mortgagee, have amounted to gross negligence such as would have justified the Court in concluding that he was "an accomplice" in the mortgagor's fraud (5), no question of assistance in fraud here arises, inasmuch as in this Presidency registration is held to be equivalent to notice. It is not alleged that there was any actual misrepresentation on the part of the prior mortgagee. If there had been such misrepresentation, doubtless the doctrine of constructive notice would not have applied. "If a man is induced to enter into a contract by a false representation, it is not a sufficient answer to him to say, 'If you had used due diligence you would have found out that the statement was untrue. You had the means afforded you of discovering the falsity and did not choose to avail yourself of them'" (per Jessel, M. R., in *Redgrave* v. *Hurd* (6). But in a case like the present, in which it is not

(1) 12 M. 424.
(2) 13 M. 383.
(3) 26 Ch. D. 482.
(4) 12 B. 678.
(5) *Vide* Kerr on Fraud, 2nd Ed., p. 113.
(6) 20 Ch. D. 1 (13.)

suggested that there was any misrepresentation by the prior mortgagee of a kind to relieve the subsequent mortgagee of the duty of inquiry, we cannot hold, consistently with the doctrine recognized in this Presidency that registration gives notice, that the latter was misled by the conduct of the prior mortgagee and induced thereby to lend money on the property. In the case [447] of the *Northern Counties of England Fire Insurance Company* v. *Whipp*(1) relied on by Mr. Kalabhai, the authorities summarised were held to lead to the conclusion that the Court would postpone the prior legal estate to the subsequent equitable estate where the owner of the legal estate had assisted in or connived at the fraud which had led to the creation of a subsequent equitable estate, *without notice of the prior legal estate.* But no decision was shown to us in which it had been held that the surrender of a title-deed by the holder of a prior estate could postpone his rights to those of a subsequent encumbrancer who had notice of the prior mortgage when he accepted the later one.

Mr. Kalabhai referred us to the case of *Agarchand* v. *Rakhma* (2) as throwing doubt on the doctrine that registration is equivalent to notice. I do not think, however, that it has that effect. I understand it simply to mean that a mortgagee who puts up property to sale in execution of a money decree, and makes no mention of his prior mortgage, necessarily leads the purchaser to believe that no such prior mortgage exists and thereby relieves him of the duty of inquiry, and that he is, therefore, subsequently estopped from alleging such mortgage. The principle is more fully explained in *Hari* v. *Lakshman* (3) and is no way in conflict with the decision in *Lakshmandas* v. *Dasrat* (4).

We have referred to the decision in *Shan Maun Mull* v. *Madras Building Company* (5); but as the Courts in the Madras Presidency do not recognize the principle that registration is equivalent to notice, it cannot be treated as an authority to govern the case now under consideration.

In the above remarks I have assumed that the prior mortgagee's conduct might, in the absence of notice, have amounted to connivance at fraud, but I am very doubtful whether, having regard to the usages in the mofussil of this Presidency, in which I do not think that there is any settled practice about the custody of title-deeds, it would, in the absence of clear proof of fraudulent intention, be safe to hold that the omission by a mortgagee to obtain or keep the title-deeds was *prima facie* evidence [448] of assistance in or connivance at fraud. Whether it would constitute gross neglect under s. 78 of the Transfer of Property Act, IV of 1882, is a point which need not be considered, as the transactions which gave rise to this suit occurred before that Act came into force.

CANDY, J.—I concur in holding that this appeal should be dismissed under s. 551 of the Civil Procedure Code.

The District Judge was mistaken in saying that no issue about negligence or fraud was raised in the lower Court. The second issue ran,—"Is the second defendant's mortgage, though subsequent to the plaintiff's, entitled or not to priority over the plaintiff's for the reasons given in his written statement"? The plea in the written statement was that plaintiff had parted with the title-deeds of the property and so his conduct was fraudulent, and he could not take advantage of his own fraud. Turning to the proceedings of the Court of first instance in this and in the companion case, wich was tried with it, it is at once apparent that the only allegation

---

(1) 26 Ch. D. 482. (2) 12 B. 678. (3) 5 B. 614.
(4) 6 B. 168. (5) 15 M. 268.

1893
AUG. 17.
APPELLATE CIVIL.
18 B. 444.

of fraud was that plaintiff had lost the title-deed (*sanad*), and so allowed the document to go into the possession of the mortgagor. This, on the very authority relied on by Mr. Kalabhai, *Northern Counties of England Fire Insurance Company* v. *Whipp* (1), would not postpone the plaintiff's prior title.

The Madras authorities quoted by the Subordinate Judge are clearly not applicable in this Presidency. In *Shan Maun Mull* v. *Madras Building Company* (2), where the authorities are all reviewed, the judgment of the Court proceeds (p. 277) on the assumption that the subsequent mortgagee had no notice of the prior mortgage, and then it is shown that in Madras Presidency it has not yet been held that registration is notice, while in Bombay the contrary is the rule. The Full Bench decision of this Court given so long ago as 1880 in *Lakshmandas* v. *Dasrat* (3) must of course govern the present case, and thus there is no reason for questioning the District Judge's decision. The present appeal should be dismissed.

Appeal dismissed.

---

18 B. 449.

[449] APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Telang.

NATHEKHA VALAD BHEKHANKHA (*Applicant*) *v.* ABDUL ALLI, *Opponent.** [19th August, 1893.]

Mamlatdars' Act Bombay Act (III of 1876), s. 15, cl. (a) sub-cl. (1) and sub-cl. (2)† ; s. 18‡—Possessory suit—Execution of decree—Actual possession—Execution of decree against a third party—Want of jurisdiction—Exercise of the extraordinary jurisdiction discretionary.

A third party cannot be ousted from possession of property in the execution of a decree for possession made by a Mamlatdar against a defendant under Bombay

---

* Application No. 175 of 1892 under extraordinary jurisdiction.

† Mamlatdars' Act. s. 15, cl. (*a*), sub-cl. (1), sub-cl. (2)—

15. On the day appointed, the Mamlatdar shall proceed to hear all the evidence that is then and there before him and try the following issues, *viz.* :—

(*a*) If the plaintiff avers that he has been unlawfully dispossessed of any property or deprived of any use :—

(1) Whether the plaintiff or any person on his behalf or though whom he claims was in possession or enjoyment of the property or use claimed up to any time within six months before the suit was filed.

(2) Whether the defendant is in possession at the time of the suit and if so whether he obtained possession otherwise than by due course of law.

‡ Mamlatdar's Act, s. 18—

18. The party to whom the Mamlatdar shall give immediate possession, or restore a use, or in whose favour an injunction has been granted, shall continue in possession or use until ousted by a decree or order of a Civil Court :

Provided that nothing in this section shall prevent the party against whom the Mamlatdar's decision is passed from recovering by a suit in the Civil Court mesne profits for the time he may be kept out of possession of any property, or out of enjoyment of any use:

Provided further that in any subsequent suit or other proceeding in the ordinary Civil Courts between the same parties or other persons claiming under them, the Mamlatdar's decision respecting the possession of any property, or the enjoyment of any use, shall not be held to be conclusive.

(1) L. R. 26 Ch. D. p. 482 ; see especially p. 494.

(2) 15 M. 268.

(3) 6 B. 168.

1893
AUG. 19.

APPELLATE CIVIL.

18 B. 449.

Act III of 1876, and it is beyond the power of Government by Resolution to give a Mamlatdar authority to oust a third party.

A. obtained an order in a Mamlatdar's Court against G. for possession of a house, and in execution N., who was found in possession of the house and who was reported by the village officers as holding possession for G., was evicted by order of the Mamlatdar. N. then applied to the High Court.

Held, that the Mamlatdar's order was, strictly speaking, beyond his authority, but that as N.'s petition to the High Court contained no distinct denial that he was **[450]** occupying merely on behalf of the defendant, the High Court would not interfere in its extraordinary jurisdiction.

[F., 21 B. 775 ; **R.**, 23 B. 761 (768) ; **D.**, 26 M. 176 (178) = 12 M. L. J. 264.**]**

APPLICATION under the extraordinary jurisdiction of the High Court (s. 622 of the Civil Procedure Code, Act XIV of 1882) against the order of the Mamlatdar of Bhusaval.

One Abdul Alli filed a possessory suit on a rent-note against Gulab in the Mamlatdar's Court and obtained a decree. When the patil and kulkarni of the village proceeded to execute the decree they found that the land was in the possession of one Nathekha (the opponent), who was not a party to the suit. They made a report to the Mamlatdar that Nathekha was in possession on behalf of the defendant Gulab. The Mamlatdar, thereupon, passed an order that Nathekha should forthwith give up possession. His order was as follows :—

"But even if Nathekha be living there, the plaintiff must get possession according to the order made (for the same). You should, therefore, take steps to make over possession of the same as soon as you receive the order. If Nathekha does not vacate the house, and make over the same by persuasion, he should be forced to vacate the same."

The Mamlatdar's order was apparently based on a Government Resolution No. 1673, dated the 11th March, 1882, from which the following is an extract :—

"The decision of the Mamlatdar is good, not only against the defendant, but the whole world ; and as the village officers are bound, under s. 17 of Bombay Act III of 1876, to give effect to the Mamlatdar's decision by putting the plaintiff in possession, any resistance or obstruction on the part of any person will render such person liable to punishment under the Indian Penal Code."

Nathekha being evicted in pursuance of the order of the Mamlatdar, he applied to the High Court under its extraordinary jurisdiction, and obtained a *rule nisi* calling upon the plaintiff Abdul Alli to show cause why the Mamlatdar's order for possession should not be set aside, contending that the Mamlatdar's decree could not be executed against him, as he was not a party to it, and that the Mamlatdar had no jurisdiction to pass the order.

[451] *Balkrishna N. Bhajekar* appeared to show cause for the opponent (Abdul Alli) :—The ruling in *Kasam Saheb* v. *Maruti* (1) is a conclusive authority in our favour. The applicant's remedy is a suit in a civil Court and not an application under the extraordinary jurisdiction—*Govinda Babaji* v. *Naiku Joti* (2). If the applicant is right, a judgment-debtor can always upset a Mamlatdar's decree by alleging that some other person is in possession. The Mamlatdar's order does not debar the applicant from bringing a regular suit.

Govardhanram M. Tripathi, *contra*, for the petitioner (Nathekha).

---

(1) 13 B. 552.

(2) 10 B. 78.

1893

AUG. 19.

APPELLATE CIVIL.

18 B. 449.

JUDGMENT.

SARGENT, C. J.—In this case the Mamlatdar passed a decree in favour of the opponent directing possession to be given to him by one Gulab. The patil kulkarni having reported that in proceeding to execute the decree he found that the applicant Nathekha had been occupying the place on behalf of the defendant Gulab, the Mamlatdar ordered that if the applicant "did not vacate the place and make over the place by persuasion, he should be forced to vacate the same." The applicant complains of this order as being beyond the jurisdiction of the Mamlatdar.

The Division Court in *Kasam Saheb* v. *Maruti* (1) remarks that "The Mamlatdars' Act does not seem to contemplate the case of a third party being ousted in the execution of an order for possession, for such order is only made on finding that the defendant himself is in possession." We agree in this view of the Act. It is to be remarked that the language in cl. (*a*), (sub-cl. 1) of s. 15 of the Act with respect to the "plaintiff's possession" differs materially from that used in sub-cl. (2) with regard to "defendant's possession," which standing alone, without any additional words to enlarge its meaning, must be understood as "actual" possession. Moreover, s. 18 shows that the only person who is contemplated as being affected by the Mamlatdar's giving possession to the plaintiff is the person against whom the decree is passed. This view of the Act may lead to a practical difficulty in the working of **[452]** it which it would be perhaps advisable to remove by legislation, but which is quite beyond the power of a Government Resolution to remedy, as was apparently attempted to be done by Resolution No. 1673 of 11th March, 1882. We think, therefore, that the Mamlatdar's order was, strictly speaking, beyond his authority, as the exercise of our extraordinary jurisdiction is one of discretion, and as the applicant's petition contains no distinct denial that he was occupying merely on behalf of Gulab, we must refuse to interfere in the matter. The applicant is not without his remedy by suit. See *Kasam Saheb* v. *Maruti* (1).

Rule discharged with costs.

---

18 B. 452.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Bayley.

YELLAWA AND OTHERS (*Original Defendants*), *Appellants v.* BHIMANGAVDA (*Original Plaintiff*), *Respondent.**

[21st August, 1893.]

Hindu law—Widow—Maintenance—Suit by heir to recover family property from widow—Provision for widow.

The Court will not allow the heir to recover family property from a widow entitled to be maintained out of it without first securing a proper maintenance for her.

Jamnabai v. *Raychand* (2) followed.

[R., 29 A.W.N. (1900) 135 (136) ; 11 C.P.L.R. 43 (44).**]**

---

* Second Appeal No. 142 of 1892.

(1) 13 B. 552.

(2) P. J. (1883), p. 48.

1893
AUG. 21.
APPELLATE CIVIL.
18 B 452.

SECOND appeal from the decision of T. Hamilton, District Judge of Dharwar.

The plaintiff sued to recover certain land from the defendant. He alleged that his deceased father was the undivided brother of Ratnapa, whose son was the husband (deceased) of Yellawa, the first defendant, and that on Ratnapa's death Yellawa had taken wrongful possession of the lands and got her name registered as owner in the revenue records. He also claimed Rs. 100 as mesne profits.

Yellawa (defendant No. 1) pleaded (*inter alia*) that a partition had been effected between her father-in-law Ratnapa and his [453] brother Pavdapa, the father of the plaintiff; that she was the heir of her father-in-law, and that she had sold one of the fields in question and mortgaged two of them to defendant No. 2.

Defendant No. 2, Maharudrapa bin Basapa, answered to the same effect.

The Subordinate Judge dismissed the suit.

On appeal by the plaintiff the Judge held that though there had been a partition between Pavdapa and Ratnapa, the plaintiff's claim to inherit Ratnapa's property was preferable to that of defendant Yellawa; that the suit with respect to the transfer of the lands to the plaintiff's name was maintainable in the Civil Court, and that the plaintiff was entitled to recover possession of the lands in dispute and also mesne profits, which the Judge found amounted to about Rs. 50 a year. He, therefore, reversed the decree and allowed the claim.

The defendants filed a second appeal.

Manekshah J. Taleyarkhan, for the appellants (defendants):—The Judge was wrong in making no provision for the maintenance of the defendant Yellawa who is a Hindu widow and is entitled to be maintained out of family property. This application for maintenance is no doubt made now for the first time in second appeal, but that can be done—*Jamnabai* v. *Raychand* (1). The order with respect to mesne profits is wrong. The Judge found the mesne profits amount to Rs. 50 per year, and that sum is barely sufficient for our maintenance.

Balaji Abaji Bhagavant, for the respondent (plaintiff):—We are at least entitled to recover mesne profits from the second defendant Maharudrapa, who is the alienee of the first defendant. The first defendant had no authority to make the alienations.

JUDGMENT.

SARGENT, C.J.—The decision in *Jamnabai* v. *Raychand* (1) shows that it is the settled practice of the Court not to allow the heir to recover the family property from a widow entitled to be maintained out of it without first securing a proper maintenance for her out of the property or by such other means as may be [454] deemed sufficient. The order for payment of mesne profits as against the widow, the amount of which did not exceed what was required for her maintenance, cannot, therefore, stand, and the decree must, therefore, be varied by reversing the order for mesne profits as against defendant No. 1, and a declaration must be added to the decree as was done in the above case to the effect that "the plaintiff takes the property awarded to him, subject to the obligation to provide a sufficient maintenance for the defendant; and we direct that when executing the

(1) P. J. (1883), p. 48.

1893
AUG. 21.
APPEL-
LATE
CIVIL.

decree in the plaintiff's favour, the Subordinate Judge do determine what is a proper and sufficient maintenance for the defendant, and do secure the same, either by directing an investment of a sufficient part of the estate in trust for that purpose or by such other means as he may deem sufficient."

The appellants to pay the cost of this appeal.

Decree varied.

18 B. 452.

---

18 B. 454.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Bayley.

COLLECTOR OF KANARA (*Applicant*) *v.* RAMBHAT BIN GANESHBHAT (*Opponent*).* [23rd August, 1893.]

Pauper—Suit in forma pauperis—*Costs of plaintiff—Court fees payable by plaintiff—Decree omitting to order plaintiff to pay Court fees when suit dismissed—Application by the Collector under the extraordinary jurisdiction of High Court—Practice—Procedure.*

The plaintiff's suit *in forma pauperis* was rejected by the Subordinate Judge. The decree, however, omitted to order the recovery from the plaintiff of the Court fees payable in the plaint. The Collector applied to the High Court under its extraordinary jurisdiction for the rectification of the decree. It was contended that, as the omission might have been remedied by an appeal or on review, the Collector could not apply under the extraordinary jurisdiction of the Court.

Held, on the authority of *The Collector of Ratnagiri* v. *Janardan* (1), that no appeal by Government would lie in the case, and that in the exercise of its extraordinary jurisdiction the High Court would rectify the decree by directing the plaintiff to pay the costs of Government.

[R., 27 B. 140 (143) = 4 Bom. L.R. 974.]

APPLICATION under the extraordinary jurisdiction of the High Court (s. 622 of the Civil Procedure Code, Act XIV of 1882) [455] against the decision of the Subordinate Judge of Sirsi in the Kanara District.

The plaintiff brought a suit *in forma pauperis* against Shrinivas Subhaya and three others to set aside a certain deed. The suit was valued at Rs. 4,450, and was, therefore, liable to a Court-fee of Rs. 250, which the plaintiff would have had to pay if he had not sued as pauper. The Subordinate Judge rejected the suit and ordered the parties to bear their own costs. The decree under the head of "Plaintiff's costs" set forth a sum of Rs. 250 as the amount of Court-fees payable on the plaint, but it contained no order for the recovery of that sum from the plaintiff permitted to sue as a pauper. The Collector of Kanara applied to the High Court under its extraordinary jurisdiction, alleging that the decree was imperfect and contrary to the provisions of the Civil Procedure Code, and he prayed that the decree might be rectified.

A *rule nisi* was issued calling on the plaintiff to show cause why the Collector's prayer should not be granted.

Narayan Ganesh Chandavarkar appeared for the plaintiff to show cause.—The Collector cannot apply under the extraordinary jurisdiction. He is not a party to the suit. The non-insertion of the provision in the decree as to the payment of the Court-fees by us was an omission which

---

*Application No. 6 of 1893 under extraordinary jurisdiction.

(1) 6 B. 590.

might have been remedied by an application for review, or an appeal might have been preferred to the District Court—*The Secretary of State for India* v. *Bhagawanti Bibi* (1).

1893
AUG. 23.
APPELLATE CIVIL.
18 B. 454.

Rao Saheb *Vasudeo J. Kirtikar*, Government Pleader, *contra*, for the Collector in support of the rule.—The Collector was not a party to the suit and could not appeal, but he can apply under the extraordinary jurisdiction. See *The Collector of Ratnagiri* v. *Janardan Vitthal* (2), *The Collector of Kanara* v. *Krishnapa Hedge* (3). Section 412 of the Civil Procedure Code imposes an obligation upon the Court to make a provision for the payment of Court fees by a pauper.

ORDER.

SARGENT, C. J.—The decision in *The Collector of Ratnagiri* v. *Janardan* (2) is an authority that no appeal by Government would [456] lie in this case, and we think it should be followed notwithstanding the doubts expressed in *The Secretary of State for India in Council* v. *Bhagwanti Bibi* (1). We must, therefore, in the exercise of our extraordinary jurisdiction rectify the decree of the Subordinate Judge by directing that plaintiff do pay the costs of Government and also the costs of this application.

Rule made absolute.

---

18 B. 456.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Bayley.

DATTATRAYA BIN ANNA BUBANE (*Applicant*) *v.* RAHIMTULLA NURMAHOMED KHOJA (*Opponent.*)* [29th August, 1893.]

Decree—Execution—Rateable distribution of assets realized in execution—Civil Procedure Code (XIV of 1882), s. 295.

R. obtained a decree against A. and another in the High Court under its original civil jurisdiction. In execution of that decree A.'s property was attached by the Second Class Subordinate Judge of Bijapur, and an order for sale was made. D. obtained a decree against A alone in the Court of the First Class Subordinate Judge of Sholapur and obtained from that Court an order for the attachment and sale of A's property which was already attached by the Second Class Subordinate Judge of Bijapur. He then applied to the Second Class Subordinate Judge of Bijapur for rateable distribution of the assets realized under s. 295 of the Civil Procedure Code (Act XIV of 1882). The Second Class Subordinate Judge of Bijapur rejected the application, and D., thereupon, applied to the High Court.

Held, following *Jetha* v. *Najeeralli* (4) and *Krishnashankar* v. *Chandrashankar* (5), that D. was not entitled to share in the assets.

[R., 11 C.L.J. 69 (77)=14 C.W.N. 396=3 Ind. Cas. 105 ; 6 Ind. Cas. 650=47 P. W. R. 1910.]

APPLICATION under the extraordinary jurisdiction of the High Court (s. 622 of the Civil Procedure Code, Act XIV of 1882) to set aside an order of the Second Class Subordinate Judge of Bijapur made in execution of a decree.

---

* Application No. 237 of 1892 under extraordinary jurisdiction.

(1) 13 A. 326. (2) 6 B. 590. (3) 15 B. 77. (4) 4 B. 472. (5) 5 B. 198.

1893
AUG. 29.
APPEL
LATE
CIVIL.
18 B. 456.

The opponent Rahimtulla Nurmahomed Khoja obtained a money decree against two persons, *viz.*, Anna Gangaram and another, in the High Court in its original civil jurisdiction. He obtained an order for execution from the Second Class Subordinate [457] Judge of Bijapur, who attached certain property belonging to the said Anna Gangaram and made an order for sale.

The applicant Dattatraya was the holder of a decree passed against the said Anna Gangaram alone by the First Class Subordinate Judge of Sholapur, the amount of the claim being more than Rs. 5,000, and, therefore, cognizable by that Court. In that Court he obtained an order for the attachment and sale of Anna Gangaram's property, which, as above stated, had been already attached by the Second Class Subordinate Judge of Bijapur. He then applied to the last-mentioned Court for a rateable distribution of the proceeds of the sale under s. 295 of the Civil Procedure Code (Act XIV of 1882). His application was rejected on the ground that as he held a decree against Anna Gangaram alone, he could not obtain a rateable distribution in the assets realized in execution of the opponent's decree against Anna Gangaram and another.

The applicant applied to the High Court to set aside the order of refusal, and obtained a rule.

Narayan G. Chandavarkar appeared for the opponent to show cause against the rule:—The application was rightly refused. The Second Class Subordinate Judge of Bijapur had no jurisdiction to entertain an application with respect to a decree passed by the Court of the First Class Subordinate Judge of Sholapur, because the decree had not been transferred to that Court for execution. Section 223 of the Civil Procedure Code (XIV of 1882) provides for the transfer of a decree to another Court for execution—*Jetha* v. *Najeeralli* (1); *Krishnashankar* v. *Chandrashankar* (2).

Govardhanram M. Tripathi appeared for the applicant in support of the rule.

ORDER.

SARGENT, C. J.—The decisions in *Jetha* v. *Najeeralli* (1) and *Krishnashankar* v. *Chandrashankar* (2) are conclusive on the question raised by the application. The rule must, therefore, be discharged with costs.

Rule discharged.

(1) 4 B. 472.

(2) 5 B. 198.

18 B. 458.

1893
AUG. 29.

APPELLATE CIVIL.

[458] APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Bayley.

PATEL NARANJI MORARJI (*Original Applicant*), *Applicant v.* HARIDAS NAVALRAM AND OTHERS (*Original Opponents*), *Opponents.**

[29th August, 1893.]

18 B. 458.

Decree—Execution—Civil Procedure Code (XIV of 1882), ss. 285, 295—Concurrent decrees—Distribution of assets among several decree-holders—Sale in execution by inferior Court of property while under an attachment issued by superior Court—Practice—Procedure.

On the 9th October, 1891, A. obtained a decree against B. in the Court of the First Class Subordinate Judge of Surat. On the 13th October, 1891, C. also obtained a decree against B in the Court of the Second Class Subordinate Judge of Surat and immediately, *viz.*, on the 16th October, 1891, applied for execution. B.'s property was consequently attached on the 18th October, 1891. On the 7th July, 1892, an order for sale was made, and the proclamation of sale was issued on the 9th July, 1892. The 17th August was fixed as the date of the auction sale.

On the 23rd July, 1892, A applied to the First Class Subordinate Judge for execution of his decree of the 9th October, 1891, and B.'s property (with respect to which the proclamation of sale had been already issued by the Second Class Subordinate Judge) was attached on the 14th August, 1892. Three days later, however, *viz.*, on the 17th August, 1892, the property was sold under the decree of the Second Class Subordinate Judge.

A. then applied to the Second Class Subordinate Judge to set aside the sale on the ground that it was invalid under s. 285 (1) of the Civil Procedure Code (Act XIV of 1882), having been made while the attachment levied by the First Class Subordinate Judge was pending, and on the Second Class Subordinate Judge's refusal to do so, A. applied to the High Court under its extraordinary jurisdiction.

Held, that the sale was good.

[F., 19 B. 127 (129) ; **R.**, 18 A. 348 (349) ; 22 B. 88 (93) ; 25 C. 46 (48) ; 13 C.P.L.R. 145 ; **Cons.**, 19 B. 539 (543).**]**

APPLICATION under extraordinary jurisdiction of the High Court s. 622 of the Civil Procedure Code, (Act XIV of 1882) against an order passed by the Second Class Subordinate Judge of Surat.

[459] On the 9th October, 1891, the applicant, Patel Naranji Morarji, obtained a decree against Bai Parvati in the Court of the First Class Subordinate Judge of Surat.

On the 13th October, 1891, the opponents obtained a decree against Bai Parvati in the Court of the Second Class Subordinate Judge of Surat, and immediately, *viz.*, on 16th October, 1891, applied for execution. Bai Parvati's property was consequently attached on the 18th October, 1891. On the 7th July, 1892, the Second Class Subordinate Judge made an order for sale in execution, and on the 9th July, 1892, the proclamation of sale was issued.

On the 9th January, 1892, the District Judge of Surat transferred the execution proceedings (probably at the instance of the applicant,

---

* Application No. 3 of 1893 under extraordinary jurisdiction.

(1) Section 285, Civil Procedure Code (XIV of 1882) :—

Where property not in the custody of any Court has been attached in execution of decrees of more Courts than one, the Court which shall receive or realize such property and shall determine any claim thereto and any objection to the attachment thereof shall be the Court of highest grade, or, where there is no difference in grade between such Courts, the Court under whose decree the property was first attached.

1893
AUG. 29.
APPELLATE CIVIL.
18 B. 458.

Naranji Morarji) from the Court of the Second Class Subordinate Judge to that of the First Class Subordinate Judge and again re-transferred the proceedings to the Second Class Subordinate Judge in the beginning of July, 1892.

On the 23rd July, 1892, the applicant applied to the First Class Subordinate Judge for the execution of his decree of the 9th October, 1891, by the attachment and sale of Bai Parvati's property (with respect to which, as above stated, the Second Class Subordinate Judge had already issued the proclamation of sale), and on the 14th August, 1892, he attached the property.

In the meanwhile, however, *viz.*, on the 12th August, 1892, the Second Class Subordinate Judge issued the necessary warrant for the sale of the property, and fixed the 17th August, 1892, as the date of the auction sale. On the 13th August, 1892, the applicant applied to the Second Class Subordinate Judge for the postponement of the sale, but his application was rejected, and the property was sold on the day fixed, that is the 17th August, and was purchased by Parabhulal Bechar, opponent No. 4.

The property being thus sold during the pendency of the attachment levied by the First Class Subordinate Judge, the applicant applied to the Second Class Subordinate Judge, to set aside the sale. The Subordinate Judge rejected this application also, holding that the sale was valid, and that s. 285 of the Civil Procedure Code (Act XIV of 1882) was not applicable, **[460]** because the attachment levied by the First Class Subordinate Judge was not subsisting at the time the sale was ordered.

The applicant, thereupon, applied to the High Court under its extraordinary jurisdiction, and obtained a *rule nisi* calling upon the opponents to show cause why the order of the Second Class Subordinate Judge refusing to set aside the sale should not be reversed.

Kalabhai Lallubhai appeared for the applicant in support of the rule:—The point now raised relates to the construction of s. 285 of the Civil Procedure Code (XIV of 1882). The question is whether after the attachment of the property by the Court of the First Class Subordinate Judge, which is a Court of higher grade than that of the Second Class Subordinate Judge, the latter is competent to proceed to sell it. It is admitted that at the time of the sale by the Second Class Subordinate Judge, the attachment levied by the First Class Subordinate Judge was subsisting, though it was not in existence on the day the Second Class Subordinate Judge passed the order for sale, or on the day of proclamation of sale. We contend that the sale is the realisation of the property, and under s. 285 it was the higher Court only which had the power to sell.

What is the effect of the attachment, the order of sale, and the issue of the proclamation? They are all steps in the realization of assets in execution proceedings, but they do not amount to realization. The attachment does not divest the ownership. The ownership continues in the judgment-debtor till sale. The mere order for sale followed by the proclamation of sale does not extinguish his ownership in the property. Section 285 deals with cases of attachments by Courts of either the same grade or of different grades. In one case it provides for the realization to be made by the Court of higher grade and in the other by the Court that first seized the property. In s. 285 as well as in s. 295 the word used is "realize," and as the realization cannot be effected without sale, we submit that the term means that in the case of simultaneous seizure the sale shall be made by the superior Court when the Courts are of different

grades, and in the case of those that are of the same grade, by the Court that first attached the property.

[461] Under the former Code (VIII of 1859) the first attaching creditor had the preference. He was entitled to be fully satisfied out of the property of the debtor, leaving only the balance, if any, for distribution among those that followed him. The main object of the two sections in the present order is to avoid confusion and undue preference. The difference between the two sections is that s. 295 requires an application for execution to the Court which realized the assets to entitle the creditor to share in the distribution, while s. 285 needs no such application. Section 285 contemplates applications for execution in different courts and realization of assets by such Courts at the same time. It does not require, as under s. 295, a repetition of the same process to enable the creditor to share in the distribution. It leaves the proceedings, so far as they have gone, unaffected, and the Court of superior grade by virtue of that grade in one case and the first attaching Court by virtue of priority in the other become cognizant of the proceedings so far as the common property is concerned to complete the process of realization and distribution of assets.

In the present case the effect of the confirmation of the sale by the Second Class Subordinate Judge will be that we shall not get anything out of the assets realized by him, although we hold a decree of a Court of superior grade and although we attached the property in execution of our decree before the actual sale took place. The opponent will thereby get the preference which the code seeks to prevent. The rulings of the Madras and Allahabad High Courts are in our favour. The point has been directly raised in those Courts. *In the matter of the Petition of Badri Prasad* v. *Saran Lal* (1) ; this ruling was followed in *Aghore Nath* v. *Shama Sundari* (2) ; *Muttukaruppan Chetti* v. *Mutturamalinga Chetti* (3) ; the Bombay High Court also in *Nimbaji Tulsiram* v. *Vadia Venkati* (4).

The rulings of the Calcutta High Court are apparently in conflict with the rulings of the Allahabad and Madras High Courts—*Dwarka Nath Dass* v. *Banku Behari Bose* (5) ; *Bykant Nath Shaha* v. *Rajendro Narain Rai* (6).

[462] *Anderson* with *Motilal M. Munshi*, appeared for opponents Nos. 1, 2 and 3 to show cause.

Govardhanram M. Tripathi, appeared for opponent No. 4, auction-purchaser Parabhulal Bechar.

ORDER.

SARGENT, C. J.—The question in this case turns on the proper application of s. 285 of the Civil Procedure Code, the practical importance of which arises from its necessary connexion with s. 295 of the Civil Procedure Code, which provides for the distribution of the assets realized in the execution of a decree amongst the several decree-holders who had, prior to such realization, applied to the Court by which such assets are held for execution of such decrees against the same judgment-debtor.

The decisions in *In the matter of the petition of Badri Prasad* v. *Saran Lal* (1) ; *Muttukaruppan Chetti* v. *Mutturamalinga Chetti* (3) ; *Bykant Nath Shaha* v. *Rajendro Narain Rai* (6), and *Dwarka Nath Dass* v. *Banku Behari Bose* (5) show that there is a difference of opinion as to the effect of s. 285 of the Civil Procedure Code, between the Allahabad and Madras High Courts

(1) 4 A. 359. (2) 5 A. 615. (3) 7 M. 47.
(4) 16 B. 683. (5) 19 C. 651. (6) 12 C. 333.

1893
AUG. 23.
APPELLATE CIVIL.
18 B. 458.

on the one side and the High Court of Calcutta on the other. In the cases before the Allahabad and Calcutta High Courts there were sales in both the Courts which had passed the decrees in pursuance of concurrent attachments in those Courts. The Allahabad High Court held that the sale under those circumstances by the wrong Court as determined by s. 285 was null and void. The latter Court held that such a sale by the Munsif's Court, not having been objected to, was not void, as "it was perfectly regular so far as the facts were known to the parties concerned" and also, as the High Court assumed, to the inferior Court itself which ordered the sale; but the Court suggested that the Subordinate Judge might have sent for the proceeds of the sale by the Munsif's Court.

In *Muttakaruppan Chetti* v. *Mutturamalinga Chetti* (1) the circumstances were the same as here: the inferior Court had ordered the sale and issued proclamation before the property was attached in the [463] superior Court; but the property having been subsequently sold by the Court, the High Court held, in deciding upon the claim of two rival purchasers, that the sale by the inferior Court was null and void. Without expressing any opinion on the effect of s. 285 under the circumstances in the cases before the Allahabad and Calcutta High Courts we think that neither the language of the section nor the object with which it may be supposed to have been introduced, *viz.*, to prevent confusion in execution proceedings, requires us or makes it convenient to hold that the effect of the section, under the circumstances of the present case, is to render the sale by the Second Class Subordinate Judge a nullity; it having been the result of an order of sale and proclamation which were perfectly valid when they were made by that Judge on the 7th and 9th July respectively. The District Judge, it is true, had transferred on the 9th January, 1892 (it is not clear on whose application) the execution proceedings from the Second Class Subordinate Judge to the First Class Subordinate Judge's Court as was done in *Krishna Velaji Marwadi* v. *Bhau Mansaram* (2) (Application No. 217 of 1892 in the extraordinary jurisdiction) which recently came under our consideration. But in the beginning of July, 1892, the proceedings were transferred by the District Court to the Second Class Subordinate Judge's Court. The result is that the applicant had no right to ask the Second Class Subordinate Judge to set aside the sale as made without jurisdiction, although possibly he might have applied to the District Judge to transfer the proceeds realized by the sale to the First Class Subordinate Judge's Court.

We must, therefore, discharge the rule with costs; but we think it right to take this opportunity of expressing our opinion that the Civil Procedure Code should be amended so as to remove all doubt as to the proper application of ss. 285 and 295 to the different cases which are constantly arising in practice in the execution of concurrent decrees.

Rule discharged.

(1) 7 M. 47.

(2) P. J. (1893), p. 258; 18 B. 61.

18 B. 464.

1893
OCT. 16.

APPELLATE CIVIL.

18 B. 464.

[464] APPELLATE CIVIL.

Before Mr. Justice Candy and Mr. Justice Fulton.

BAI CHANDABA AND ANOTHER (*Original Plaintiffs*), *Appellants v.* KUVER SAHEB BAPU SAHEB (*Original Defendants*), *Respondents.**

[16th October, 1893.]

Civil Procedure Code (Act XIV of 1882), *ss.* 412 *and* 414—*Costs—Appeal in* forma pauperis *—Withdrawal of appeal—Right of Government to costs—Agreement between the parties.*

The plaintiffs filed a suit in *forma pauperis* to recover possession of certain property. The Court of first instance dismissed the suit. Thereupon the plaintiffs preferred an appeal in *forma pauperis* to the High Court. Pending the appeal the parties entered into a compromise, under which it was agreed (*inter alia*) that the appeal should be withdrawn, and that the respondent should pay to Government the Court fees which the plaintiffs were liable to pay both in the first Court and in the Court of appeal. When the appeal came on for hearing, the appellants informed the Court of their intention to withdraw from the appeal. Thereupon the Government Pleader intervened, and applied for an order directing the respondent to pay, in accordance with the terms of the compromise, all the costs payable to Government on account of institution fees, &c., in the first Court as well as in the appellate Court. This application was opposed by both parties. The Government Pleader then moved the Court to dispauper the appellants under s. 414 of the Code of Civil Procedure (Act XIV of 1882).

Held, that the appeal having been withdrawn, no order could be made either under s. 412 or under s. 414 of the Code of Civil Procedure.

Held, also, that it was not open to the Court to order the respondent to pay any fees on the strength of any agreement between the parties.

[Overruled, 31 B. 10 (14)=8 Bom. L.R. 689 ; **R.**, 7 S.L.R. 52 ; **D.**, 29 B. 102=6 Bom. L. R. 1122 (1124). **]**

APPEAL in *forma pauperis* from the decision of Rao Bahadur Chunilal Maneklal, First Class Subordinate Judge of Ahmedabad, in suit No. 420 of 1888.

The plaintiffs filed a suit in *forma pauperis* to recover possession of the taluka of Sonipur belonging to their deceased husband, Thakor Amarsang Bahadursang.

The defendant pleaded that, according to the custom prevailing among the thakors and talukdars of the district, females were excluded from succession to a talukdar's estate ; that, in accordance with this custom, the plaintiffs had no right to inherit the property in dispute, and that the Government of Bombay had placed him in possession of the estate as the legal heir of the deceased thakor.

[465] The First Class Subordinate Judge, who tried this case, found the alleged custom proved, and dismissed the suit, ordering the plaintiffs "to pay all the costs which they would have incurred had they not been allowed to sue in *forma pauperis*."

Against this decision the plaintiffs preferred an appeal (No. 82 of 1889) in *forma pauperis* to the High Court.

The respondent (defendant) applied to the Court for an order to dispauper the appellants, on the ground that they had sufficient means to pay the Court fees leviable on the memorandum of appeal.

Pending the disposal of this application, the parties entered into a compromise, under which it was arranged that the appellants should receive the income of certain villages during their lifetime in lieu of

* Appeal No. 82 of 1889.

1893
OCT. 16.
APPELLATE CIVIL
18 B. 464.

maintenance; that the appeal pending in the High Court should be withdrawn; and that the respondent should pay to Government all the Court fees which the appellants would have had to pay both in the Court of first instance and in the Court of appeal, if they had not been allowed either to sue, or to appeal, in *forma pauperis*.

The appeal came on for hearing on 20th April, 1893. On that day the appellants informed the Court of their intention to withdraw the appeal.

Thereupon the Government Pleader intervened, and applied for an order, directing the respondent to pay, in accordance with the terms of the compromise, the Court fees which the appellants were liable to pay both in the Court of first instance and in the Court of appeal. This application was opposed by both parties.

The Government Pleader then applied on behalf of the Collector to have the appellant dispaupered under s. 414, cls. (*b*) and (*c*) of the Code of Civil Procedure (Act XIV of 1882).

Rao Saheb *Vasudev J. Kirtikar* (Government Pleader), for the Crown.—I contend, in the first place, that the appellants have sufficient means to pay the necessary Court fees. There cannot be better evidence of this fact than the affidavits and documents which the respondent has himself filed in support of his application to dispauper the appellants. The appellants should not, [466] therefore, be allowed to proceed with the appeal in *forma pauperis*. I contend further that, under the compromise effected between the parties, the appellants have allowed other persons to obtain an interest in the subject-matter of this suit. They should, therefore, be dispaupered under s. 414 of the Code of Civil Procedure.

V. K. Bhatavdekar, for the appellants (plaintiffs).—The appeal having been already withdrawn, the present application under s. 414 of the Code will not lie. We do not wish to continue the appeal any further. Clause (*b*) of the section does not, therefore, apply, even assuming that we had sufficient means to pay the Court fees, as alleged by the Collector. Nor does cl. (*c*) apply, as the agreement referred to therein should be of the nature of a champertous or maintenance agreement. The compromise between the parties is not of this character.

Ganpat Sadashiv Rao, for the respondent (defendant).—The Collector is not entitled to recover the costs of this appeal from the respondent. The appeal is withdrawn, and not dismissed, under s. 97 or 98 of the Code of Civil Procedure. Section 412 of the Code does not, therefore, apply—*The Collector of Kanara* v. *Krishnapa* (1).

JUDGMENT.

CANDY, J.—The suit in this case was brought in *forma pauperis*, and was dismissed by the First Class Subordinate Judge, who ordered that plaintiffs do pay all the costs which they would have incurred had they not been allowed to sue in *forma pauperis*. Plaintiffs then filed First Appeal No. 82 of 1889, and this was also in *forma pauperis*. Respondent (defendant) then objected that appellants (plaintiffs) had sufficient means to pay the Court fees. Subsequently at the request of the parties the appeal and application stood over, and eventually the case was compromised.

Appellants then applied to withdraw their appeal, and respondent agreed, not wishing any order as to costs, and not pressing the application

(1) 15 B. 77.

1893
OCT. 16.
APPELLATE CIVIL.
18 B. 464.

above mentioned. Then the Government Pleader intervened, applying for an order from this Court that the amount of Court fees payable by the original plaintiffs in the Court of first instance and also in this Court of appeal be paid **[467]** by the respondent, one of the terms of the settlement between the parties being that respondent-defendant should pay all the costs payable to Government for institution fees, &c., which the appellants would have had to pay if they had not been permitted to sue or appeal in *forma pauperis*. This application was opposed by the parties, so the Government Pleader then filed an application, under s. 414 of the Civil Procedure Code, praying that the appellants should be dispaupered on the ground that their means were such that they ought not to continue to sue in *forma pauperis*, and that they had entered into the agreements above mentioned, and that respondent had already prayed that appellants should be dispaupered. I am of opinion that the applications of the Government Pleader must be rejected.

Certainly it is not open to this Court to order the respondent to pay any fees on the strength of any agreement between the parties. The appeal having been withdrawn, the decree of the First Class Subordinate Judge stands, and thus the right of Government to the Court fees payable in the Court of first instance is secured.

Appellants have not failed in their appeal, nor has it been dismissed in consequence of appellants' failure to cause notice of the appeal to be issued, or in consequence of the absence of both sides; therefore no order can be made under s. 412, unless the appellants are dispaupered under s. 414. But this latter section clearly contemplates the continuance of the suit (or appeal). Clause (*a*) admittedly does not apply. Clause (*b*) is not applicable, because appellants do not wish to continue the appeal. Clause(*c*) answers to cl. (*d*) of s. 407, and prevents the prosecution of a suit or appeal when the plaintiff or appellant has entered into a champerty or maintenance agreement for the prosecution of litigation. That is evidently not applicable to the present case, in which the parties have settled their differences in order to put an end to litigation. Section 414 is, therefore, not applicable to the present case; and thus no order can be passed under s. 412.

Appeal No. 82 of 1889 is withdrawn. No order as to costs. The same order as to application No. 293 of 1892.

[468] Applications Nos. 48 and 205 of 1893 are dismissed.

In application No. 205 the Government Pleader will get the costs of that application from appellants.

FULTON, J.—I concur. The withdrawal of an appeal cannot, consistently with the decision in *The Collector of Kanara* v. *Krishnappa Hegde* (1), the correctness of which the Government Pleader has not impugned, be treated as failure by the appellants within the meaning of s. 412. The application to dispauper them under s. 414 appears to me to fall to the ground with the withdrawal of the appeal. But as the determination of this application has been prevented by the action of the appellants, I think the Government Pleader is entitled to recover from them his costs in respect thereof. The withdrawal of the appeal and the dismissal of the Government Pleader's application will not, of course, affect any orders which the Court below may have made for the payment of the Court fees due to Government in that Court.

Applications rejected.

(1) 15 B. 77.

1893
OCT. 16.

CRIMINAL REFERENCE.

18 B. 468.

18 B. 468.

CRIMINAL REFERENCE.

Before Mr. Justice Candy and Mr. Justice Fulton.

ROZARIO (*Applicant*) v. INGLES (*Opponent*).* [16th October, 1893.]

Criminal Procedure Code (Act X of 1882), s. 488—Maintenance—Illegitimate children—Right of a married woman to claim maintenance for her illegitimate children—Evidence of wife to prove non-access—Evidence—Presumption of legitimacy—Evidence Act (I of 1872), s. 112.

A married woman is entitled under s. 488 of the Code of Criminal Procedure (Act X of 1882), to claim maintenance for her illegitimate children from the putative father.

A wife can be examined as to non-access of her husband during her married life, without independent evidence being first offered to prove the illegitimacy of her children.

[R., 19 M. 461 (463) = 2 Weir 623; 25 M.L.J. 594 = 14 M.L.T. 447 = (1913) M.W.N. 983.]

THIS was a reference by Khan Bahadur P. H. Dastur, Presidency Magistrate, under s. 432 of the Code of Criminal Procedure (Act X of 1882).

[469] The reference was in the following terms:—

"The respondent in the above case is charged by one Mrs. Rozario, a married woman, with the maintenance of her three illegitimate children under s. 488, Criminal Procedure Code.

"In the course of these proceedings it was contended by Lord Colin Campbell for the defence that in England the Bastardy Acts apply only to single women, or those in the position of single women; and that as the law in India was based on the same Acts, the Legislature could never have intended s. 488, Criminal Procedure Code, to apply to illegitimate children of married women. Cites *Stacey* v. *Lentill* (1); 7 and 8 Vict., c. 101; 35 and 36 Vict., c. 65, in support of his contention.

"The learned counsel also maintained that the law presumes the children of married women to be legitimate, unless this presumption is rebutted by impotency of the husband or his non-access to his wife, and this could only be proved by calling independent evidence and not by examining the wife as a witness. Cites *Hargrave* v. *Hargrave* (2); *The King* v. *The Inhabitants of Sourton* (3); *Queen* v. *The Inhabitants of Mansfield* (4).

"Now it is no doubt true that the Bastardy Acts in England are limited in their application to single women, and it was, therefore, held in *Stacey* v. *Lentill* (1) that if a woman marries, she cannot be allowed to proceed against the putative father, as her husband becomes responsible for the maintenance of her children. This express provision of the English law is not, however, incorporated in s. 488, which in general terms makes a father responsible for the maintenance of his illegitimate children irrespective of their being born of a married or a single woman. For at the end of this clause provision has been made for the Magistrate ordering payment of the amount to such person as the Court deems fit. Now if the case of single woman alone were considered in this section, there would have been no adequate reason for the insertion of this provision. Moreover, this section is intended to provide for vagrants; illegitimate children of a

* Criminal Reference No. 102 of 1893.

(1) 4 Q.B.D. 294.
(2) 9 Beav. 552.
(3) 5 A. and E. 190.
(4) 1 Q.B. 444.

married woman would not naturally be supported by her [470] husband; and they would, therefore, be thrown on the world if the putative father were not made responsible.

"With regard to the second objection, it is clear that some of the authorities cited by Lord Colin Campbell lay down that a wife cannot be examined in the first instance to prove the bastardy of her own children; non-access during marriage must be proved by independent evidence. But it has not been shown that this law is applicable to India. On the contrary the whole tenor of the Evidence Act shows that in it the admissibility of evidence is made the rule and its exclusion an exception. For s. 118 of this Act declares all persons competent to testify, unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to questions by tender years, extreme old age, disease of body or mind, and other cognate causes. This incapacity is due to physical causes, and the Legislature has, therefore, wisely excluded such evidence; but it has not gone beyond this and made exceptions in favour of those who can understand and rationally answer questions put to them. The only exception to this rule is that of an accused person, who owing to an express provision in the Criminal Procedure Code could not be examined on oath and is, therefore, incapable. Even ss. 121 to 131, Evidence Act, could not be said exceptions to the general rule laid down in s. 118, because there is a difference between competent and compellable witnesses. One can well understand why some people should not be compelled to divulge information received by them under peculiar circumstances, but there is no proper reason assigned, except a sentimental one, why the wife should not be heard against her husband or against her lover. Further, s. 120 of the Evidence Act makes a husband and wife competent witnesses for and against each other, and, if so, there is greater reason why the wife's evidence should be admitted against her lover. The only other section, then, that could apply to this case is 152, which forbids scandalous and indecent questions, and I readily admit that nothing could be more scandalous than a wife proclaiming her infamy from the witness box; but the latter part of this section expressly provides that if such questions relate to matters in issue, they shall be allowed. In the present [471] case the main fact to be established is the paternity of the children, and nobody could be in a better position than the wife to say whose they are. I do not think, therefore, that either of the objections is tenable, but the points raised by the learned counsel seem to be very important, and as I am not aware of any Indian cases deciding them, I think it proper to make this reference for an expression of their Lordships' opinion on the following two questions:—

"*1st*. Has a married woman a *locus standi* under s. 488, Criminal Procedure Code, to claim maintenance for her illegitimate children?

"*2ndly*. Could a wife be examined to prove non-access during a married life, without independent evidence being first offered to prove the illegitimacy of the children."

Inverarity (with *Mathubhai* and *Jamaitram*), the opponent.—A married woman is no doubt entitled under s. 488 of the Code of Criminal Procedure to claim maintenance for her illegitimate children. The English cases on the subject are decided under s. 3 of 35 and 36 Vict., c. 65, which expressly applies to unmarried women. Refers to *Tozer* v. *Lake* (1). Those cases, therefore, cannot govern the present case.

1893
OCT. 16.

CRIMINAL REFERENCE.

18 B. 468.

(1) 4 C.P.D. 322.

1893
OCT. 16.

CRIMINAL REFERENCE.

18 B. 468.

As regards the second point referred by the Magistrate to this Court, the practice in England is that neither parent is allowed to prove non-access when the legitimacy of a child is a fact in issue. A wife cannot confess her adulterous connection unless and until the fact of her husband's non-access has already been proved by independent evidence—Taylor on Evidence, p. 818; Lyon's Medical Jurisprudence, p. 505. The same principle ought to apply here. And we submit that a wife is not a competent witness to rebut the presumption of legitimacy referred to in s. 112 of the Evidence Act. Cites *Guardians of Nottingham* v. *Tomkinson* (1).

Applicant in person.

JUDGMENT.

CANDY, J.—The first question must be answered in the affirmative. Mr. Inverarity did not contest this point, and the words of s. 488, Criminal Procedure Code (X of 1882), are manifestly wide enough to include a married woman claiming maintenance for **[472]** her illegitimate children. The English cases depend upon the words of the English Statute applying to a "single woman."

To the second question I would answer that a wife can be examined to prove non-access of her husband during her married life, without independent evidence being first offered to prove the illegitimacy of the children.

No doubt in England the positive rule at common law is clear that neither husband nor wife can be examined for the purpose of proving non-access during marriage. That is still the law except as to any proceeding instituted in consequence of adultery—*Guardians of Nottingham* v. *Tomkinson* (1). But in this country we must follow the provisions of the Evidence Act. Section 112 provides that "the fact that any person was born during the continuance of a valid marriage between his mother and any man, or within 290 days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten."

Mr. Inverarity quoting a note (of which he is the author) at p. 505 of Lyon's Medical Jurisprudence contended that the above section would be construed in accordance with English decisions. So far as the possibility of presumption of the husband being father of the children born to his wife during the continuance of their marriage, being rebutted, there is no difficulty. The leading case is *Morris* v. *Davies* (2), which decides that non-access may be proved by means of such legal evidence as is admissible in every other case in which it is necessary to prove a physical fact, and that the presumption as to the husband being the father of a child alleged to be illegitimate can be rebutted by the conduct of the parties (taking the whole *res gestæ*) raising a strong and irresistible conclusion that the child born was not the child of the husband, but the child of another. See also *The Aylesford Peerage* (3) case, in which it was decided that where the legitimacy of a child born in wedlock is in issue, previous **[473]** statements by the mother that the child is a bastard are admissible as evidence of her conduct, although she could not be allowed to make such statements in the witness box. Here Mr. Inverarity did not contend, and the question referred by the Magistrate does not assume, that the wife cannot under

(1) 4 C.P.D. 343. (2) 5 Cl. and Fin. 163. (3) 11 A. C. 1.

1893
OCT. 16.
CRIMINAL REFERENCE.
18 B. 468.

any circumstances be allowed to make statements in the witness box bastardizing her own issue; but the learned counsel contended, quoting Taylor on Evidence, s. 951, that in a case of bastardy, provided that the husband's non-access has first been proved by independent evidence, the wife may in the witness box confess her adulterous connection with another person, and thus enable the order of maintenance to be made in the event of her testimony being corroborated in some important particulars. I can find no authority in the Evidence Act for laying down the order in which evidence would be led to prove the fact of non-access in accordance with s. 112. Proceedings under s. 488, Criminal Procedure Code, have been held to be of a civil nature—*Nur Mahomed* v. *Bismulla Jan* (1). By s. 120, Evidence Act, in all civil proceedings the parties to the suit shall be competent witnesses. Here Mrs. Rozario is a party and a competent witness. If she states in the witness box that her husband had no access to her at any time when the children now in question could have been begotten, her statement may be taken for what it is worth. If her evidence of this alleged fact cannot be excluded as inadmissible, then there is no provision of law determining at what stage of the proceedings her evidence may be recorded.

FULTON, J.—I concur. The wording of s. 488, Criminal Procedure Code, and s. 118 of the Evidence Act seems to me so clear as to leave no room for doubting that both the questions referred by the learned Magistrate must be answered in the affirmative.

---

18 B. 474.

[474] ORIGINAL CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Farran.

GHANASHAM NILKANT NADKARNI (*Original Defendant*). *Appellant v.*. MOROBA RAMCHANDRA PAI (*Original Plaintiff*), *Respondent.**

[9th, 16th and 17th February and 16th March, 1894.]

Easement—Light and air—Obstruction—Injunction or damages—Specific Relief Act I of 1877—Costs—Costs where lower Court grants an injunction and appeal Court refuses injunction, but awards damages.

The plaintiff was the owner of a house in Jambulwadi street in Bombay. The defendant owned a house to the east of it, and between the two houses was a gully three feet seven inches wide, the part of which next the defendant's house was a gutter. On the ground floor of the plaintiff's house were four windows and on the first floor two windows all looking out into the gully and all of them ancient windows. The defendant's house originally was a little higher than the plaintiff's house and consisted of a ground floor, a first floor and a loft. Shortly before suit, the defendant pulled down this house and on the same site began to build a new four-storied house with a loft. The plaintiff sued for an injunction, alleging that this new house, which would be of much greater height than the old one, would completely block up his ancient windows and cause him material damage, there being no other window in his house on the side next the defendant. The defendant in his written statement denied that his new house would cause material damage to the plaintiff. He alleged that his old house, which was higher than the plaintiff's, had a projecting cornice, so that hardly any direct light came to the plaintiff's windows, which were almost, if not entirely, lighted by the light that came from each end of the gully. He further stated that his new house would have no cornice and that he had widened the

---

* Suit No. 282 of 1892.

(1) 16 C. 781.

1894
MARCH 16.

ORIGINAL CIVIL.

18 B. 474.

gully, so that light to the plaintiff's windows would not be appreciably diminished, but that even if the passage had not been widened there would have been little diminution of light. He also alleged that the plaintiff had other windows and sources of light than the said six windows. While denying all damage, the defendant, however, to avoid litigation and without prejudice paid into Court Rs. 200, which he said was more than sufficient to compensate the plaintiff.

After filing the suit the plaintiff obtained a rule for an injunction at the date of which the walls of the defendant's house had been built up as far as the second floor. The rule was subsequently discharged, the defendant consenting that the case should be argued at the hearing as if the new house was then in the same condition. The defendant, however, subsequently, continued to build, and at the date of hearing it was practically complete.

The lower Court (STARLING, J.) found that prior to the building of the new house direct light came to the plaintiff's windows to the extent at all events of 5° and in addition to this a considerable amount of lateral light came to the windows over the defendant's roof. The Court held that, as the plaintiff had a right to this light by **[475]** prescription, he was absolutely entitled to the whole of it: that the defendant had by his new building cut off all the direct light, and that practically all the light left to the plaintiff was reflected light, the amount of which depended on the condition in which the defendant might choose to keep the walls of his house. Under these circumstances the lower Court, looking at the house, as if it was still in the condition in which it was at the time the injunction was discharged, held that the plaintiff was entitled to a mandatory injunction, and directed the defendant to remove the upper portion of the house which had been built since that time. On appeal:—

Held, that although the plaintiff's light had been sensibly diminished by the defendant's new building, there had not been such a large, material and substantial damage as to require interference by injunction, or that the plaintiff's room had been rendered unfit for the purpose for which it might reasonably be expected to be used.

The appeal Court, therefore, varied the decree of Starling, J., and refused an injunction, but ordered the defendant to pay the plaintiff Rs. 500 as damages.

On the question of costs it was argued for the defendant (appellant) that he should be given his costs of appeal, as he had succeeded in setting aside the injunction granted by the lower Court and should also get his costs of hearing in the lower Court, as the whole contest there had been as to the right to an injunction, which in appeal had been refused. The defendant had paid Rs. 200 into Court when he filed his written statement, and would have paid more if he could have obtained any indication from the plaintiff of the amount that would satisfy him. Nothing, however, would satisfy the plaintiff but an injunction, and he had failed to get it.

Held, that the plaintiff should have his costs of hearing in the lower Court and that each party should pay his costs of the appeal and of the proceedings on the rule for an injunction before the trial. The ordinary rule should be observed, and the costs should follow the event. The event in this case was that the plaintiff had proved his case against the defendant, although he had not got the precise form of relief which he wanted. If a party substantially succeeds he is entitled to his costs.

[F., 19 A. 259 (260); 20 B. 704 (711); 9 Ind. Cas. 417=21 M.L.J. 313=9 M.L.T. 383 (386)=(1911) 1 M. W. N. 251; **R.,** 22 M. 251 (254); 5 Bom. L. R. 446 (452); 7 Bom. L.R. 352 (362); 1 Ind. Cas. 958 (960)=3 S.L.R. 30; 3 N.L.R. 114 (122); (1900). P.L.R. 173 (176).**]**

SUIT for an injunction, &c. The plaintiff owned a house in Jambulwadi Street in Bombay. The defendant was the owner of a house situated to the east of it, and between the two houses was a space of about three feet seven inches, the part of which adjacent to the plaintiff's house was a passage, and that part adjacent to the defendant's house was a gutter of about eighteen inches wide. The plaintiff claimed to be the owner of the passage: he admitted the defendant to be the owner of the gutter, but claimed the right to use the gutter for the flow of refuse water from his own house, alleging that it had been so used for more than fifty years.

1894
MARCH 16.
ORIGINAL CIVIL.
18 B. 474.

On the ground floor of the plaintiff's house were four windows and on the first floor two windows. The plaintiff alleged that [476] these six windows were ancient windows through which he and his predecessors had enjoyed light and air without any obstruction, except that caused by the old house of the defendant, which consisted only of a ground floor, a first floor and a loft and was of about the same height as the plaintiff's house.

The plaintiff complained that the defendant had recently pulled down his old house and had begun to build a new four-storied house with a loft on the site of his old house: that in doing so he had wrongfully placed scaffolding on the aforesaid passage of the plaintiff and had blocked it up: that he had also threatened to alter the position of the aforesaid gutter so as to prevent the plaintiff using it. He further complained that, if the defendant completed his new house, which would be of much greater height than the old one, he would completely block up the ancient windows of the plaintiff's house and cause material damage to the said owner, as there was no other window therein on the side next the defendant. The plaintiff prayed for a declaration that the passage was his, subject to the defendant's right to use it, and that the plaintiff was entitled to use the gutter to carry off refuse water, and for an injunction against the threatened obstruction to the plaintiff's windows. He also prayed that the defendant should be ordered to pull down so much of his new house as interfered with his said rights, and for damages.

The defendant denied the plaintiff's ownership of the passage and his right of user of the gutter. He complained that the plaintiff had known of his intention to build, but delayed taking proceedings until a large quantity of materials had been collected, and had then, just before the vacation, obtained an *interim*-injunction which was afterwards discharged, but by reason of which he (the defendant) had suffered severe loss. He denied that the erection of his new house would cause material damage to the plaintiff. He alleged that his old house was higher than the plaintiff's and had a projecting cornice, so that hardly any direct light came to the defendant's windows, which were almost, if not entirely, lighted by the light that came from each end of the gully. He stated that his new house would have no cornice, and that he had widened the passage, so that the light [477] to the plaintiff's windows would not be appreciably diminished; but that even if the passage had not been widened, there would have been little diminution of light. He also alleged that the plaintiff's rooms had other windows and sources of light besides the six windows mentioned.

The defendant's written statement contained the following paragraph:—

"8. Although the defendant believes that no damage has been done to the plaintiff's light, and that he is not entitled to any sum whatever as damages, the defendant, for the sake of peace, and to avoid litigation, and without prejudice to his contention, brings into Court the sum of Rs. 200, and is willing that the plaintiff should receive the same; and the defendant says that such sum is more than sufficient to compensate the plaintiff for any injury done to the plaintiff in consequence of the defendant's new building."

The case was heard on the 12th December, 1892, and following days by Starling, J.

Anderson and *Scott*, for plaintiff.

Lang (Advocate-General), *Inverarity* and *Jardine*, for the defendant.

1894

MARCH 16.

ORIGINAL CIVIL.

18 B. 474.

Counsel referred to *Dhunjibhoy Cowasji Umirgar* v. *Lisboa* (1); *Manekial* v. *Narbheram* (2); *Aynsley* v. *Glover* (3).

16*th January*, 1893. STARLING, J.—[Upon the evidence His Lordship found that the defendant had trespassed upon the plaintiff's passage, but that the plaintiff had not suffered damage from such trespass. He awarded the plaintiff Re. 1 as nominal damages. He also held that the plaintiff was entitled to drain the refuse water from his house into the defendant's gutter. On the question of light and air his judgment was as follows :—]

The last point to be considered is that of light and air. I do not propose to consider each window separately, but shall deal with number 5 only; as, if the plaintiff can establish his right with regard to that, he will get all he is entitled to with regard to the others. Now, according to the defendant's surveyors, direct light came to that window over the defendant's cornice to the outer edge of the sill of that window in a line, making an angle of 10 or 11 degrees with the wall of the plaintiff's **[478]** house; the plaintiff's surveyor makes the angle 16. A portion of that light was intercepted by the plaintiff's own roof, but that does not prevent him from being entitled to the remainder, which the defendant puts at 5 and the plaintiff at 11. Besides this, it must be borne in mind that this window was on the south side of the highest point of the defendant's larger roof. Consequently over the sloping portion of that roof and the smaller roof, a considerable amount of lateral light would come to that window. As the plaintiff claims this light by prescription, he is absolutely entitled to the whole of it. See *Birmingham, &c., Banking Co.* v. *Ross* (4), and, further, he would be entitled to it even if acts had been done to other buildings or to other parts of the same building by which he got additional light from other points—*Dyres Co.* v. *King*(5). Now it is admitted that by his present building the defendant has cut off from this window the whole of the direct light which hitherto came to it, but he says that no damage has been done to the plaintiff, and that substantially his rooms are as comfortable and as well adapted for occupation as in times past. He also says that no portion of the light which came over his house ever passed directly into the room itself, because of the smallness of the angle and the thickness of the wall in which the window was fixed. Possibly this may have been so, but the photograph (Ex. D), shows that at a certain time in the day the sun shone directly on the wall in which the window was, and the effect of having a beam of sunlight passing directly in front of the window, although it might not actually enter it, must have caused a large amount of sunlight to be diffused through the window and very much increased the comfort of the room, and it must be remembered that it is light, not direct sunbeams, which is claimed.

The defendant further says that he has done no substantial damage to the plaintiff, as there is still ample light in the room, and I was taken down to view the premises in order to satisfy myself as to the amount of light. In this room I could read a book which was presented to me for that purpose. It was a book clearly printed in good type, and I could read it when the face of the page was turned towards the window, and when I stood in front of the **[479]** window or just a little on one side. I should not, however, have cared to read the book within that space for half an hour

---

(1) 13 B. 252. (2) P.J., 1891, p. 302. (3) L. R. 18 Eq. 544.
(4) 38 Ch. D. 295, (313, 314). (5) L. R. 9 Eq. 438.

continuously, except perhaps quite close to the window. The rest of the room was very deficient in light, and this was about 10 A. M. on a bright day. The room was pretty fairly lighted, as far as native rooms of that description are concerned, within the cone of light coming through the window, but I should not consider it was well lighted.

In order, however, to consider what the effect of the defendant's acts may be, it is necessary to consider what the light which does come in consists of. In the first place, there is a very large proportion of reflected light thrown off from the freshly whitened surface of the defendant's wall and a very small proportion of horizontal light which comes in from the ends of the gully, which, I think, need not be seriously taken into account, as, according to the evidence of the defendant's surveyor, none of that can go directly into the room. Consequently the light which the plaintiff now gets in this room is practically all reflected light, and the amount of that light depends upon the whiteness of the defendant's wall. There is no means by which the defendant can be made to keep his wall well whitewashed, or even to prevent him painting it a dark colour, in which case there would be but a very small amount of light reflected, and the Courts have always refused to take into account suggestions of this kind —see *Dent* v. *Auction Mort Co.* (1); besides which, in order that the plaintiff may continue to enjoy the amount of reflected light which he now does, assuming that the defendant keeps the wall of his house well white-washed, the plaintiff must keep his house at the same height it is now, and thus would be deprived of his undoubted right to build his house higher. Consequently I must regard the plaintiff as in the present enjoyment of but a very small amount of the light to which he can legally enforce a claim, and I am of opinion that the defendant by shutting off all the direct light which came to this window, although the quantity was not large, has done to the plaintiff material and substantial damage. That being so, **[480]** it is no excuse for the defendant to say to the plaintiff, if you open windows in your west wall, and keep the western doors of the rooms open, you will get ample light. He is entitled to his ancient lights, and is not to be forced to adopt other ways of meeting the wrong done to him by the defendant. The fact, too, that in the northern wall of the room lit by No. 5 there is an opening, ordinarily closed by a shutter, which looks into the room to the north opposite a window which opens directly into the street, does not lessen the defendant's liability, because it is evident that that shutter is intended to be opened or closed at the occupant's pleasure, and ought not to have to be kept always open to make up for the result of the defendant's wrong-doing. Besides this, as a matter of fact, the amount of light which enters the room when the shutter and the opposite window are both open is by no means large, and does very little else than make darkness visible.

What relief, then, am I to give to the plaintiff? The defendant relying on *Lisboa's case* (2) says that damages only ought to be given, and asserts that the Rs. 200 paid into Court are sufficient. But this case differs from *Lisboa's case* in that here the defendant has cut off the whole of the plaintiff's direct light and left him a very small portion of light from other sources, the enjoyment of which he can enforce. In *Lisboa's case* although the light was diminished, there was still some direct light left. This, I think, would of itself point to the fact that an injunction is the proper remedy. Further, the defendant admitted in his

(1) L. R. 2 Eq. 238 (251).

(2) 13 B. 252.

1894
MARCH 16.
ORIGINAL CIVIL.
18 B. 474.

cross-examination that he had all along been aware that the building of his house would do damage to the plaintiff, although in the letter of his attorney's (Ex. L) he denies the plaintiff's rights, and asserts that his new house would cut off no more light than the old one; but he thought that *Lisboa's case* would protect him, and under that impression he doubtless consented that this case should be argued at the hearing as if his house was in the condition in which it was on the day the injunction was discharged, *i.e.*, with the walls on the plaintiff's side built up no higher than the second floor. I look at his house, therefore, at the present time as if it had not risen above the second floor, and taking into account that any substantial increase above that will cut off all **[481]** the plaintiff's direct light, I must prevent him continuing his house above that line. All that he has built above that has been built at his own risk, not merely by reason of notice of the plaintiff's claim, but at his own risk solemnly taken upon himself at the time the rule was discharged. The case otherwise is very much like that of *Lawrence* v. *Horton* (1). I must, therefore, grant a mandatory injunction for the removal of the upper portion of the defendant's house, as I shall hereafter set it out in the decree. Defendant must pay the costs of the suit and the costs of, and incidental to, the rule.

The defendant appealed. The appeal came on for hearing before SARGENT, C. J., and FARRAN, J.

Lang (Advocate-General) and *Jardine*, for appellant (defendant).

Scott and *Robertson*, for respondent (plaintiff).

The following cases were cited :—

Dhunjibhoy Cowasji v. *Lisboa* (2); *Kadarbhai* v. *Rahimbhai* (3); *Ratanji H. Bottlewalla* v. *Edulji H. Bottlewalla* (4); *Aynsley* v. *Glover* (5); *Dicker* v. *Popham Radford & Co.* (6); Limitation Act (XV of 1877), s. 26; Specific Relief Act (I of 1877), s. 54; *Martin* v. *Price* (7); *Dreyfus* v. *Peruvian Guano Company* (8); *Lawrence* v. *Horton* (1); *Krehl* v. *Burrell* (9).

JUDGMENT.

16*th March*, 1894. SARGENT, C.J.—The most important question in this case is as to the extent of the obstruction, by the defendant's new house, of the light and air hitherto enjoyed by the plaintiff's ancient windows, and the nature of the relief (if any) he is entitled to. The Judge of the Division Court came to the conclusion that, having regard to the diminution of light in the room to which the window No. 5 in the upper floor belongs, the plaintiff was entitled to a mandatory injunction, which would practically serve the plaintiff's purpose as regards all the windows in question, and, therefore, render it unnecessary to consider the case of the other windows.

[482] The houses are separated by a gully or passage three feet nine inches wide runing north and south. The defendant's original house, like the plaintiff's, was a house with a pole running west and east and eaves sloping towards the north and south parallel to the eastern face of the plaintiff's house. It was higher than the plaintiff's house, the roof running south being seven feet above the top of window No. 5. The light from the sky found its way over the eaves of defendant's roof into the gully, but

(1) 62 L. Times 749.
(2) 13 B. 252.
(3) 13 B. 674.
(4) 8 B. H.C.R. O.C.J. 181 (191).
(5) L. R. 18 Eq. 544.
(6) 63 L. Times 379.
(7) L.R. (1894) 1 Ch. 276.
(8) 43 Ch. D. 316.
(9) 7 Ch. D. 551=11. Ch. D. 146.

owing to the cornice and weather-boards of defendant's roof and windows and the overhanging eaves of the plaintiff's roof, the angle of the cone of lateral light actually entering the gully was much diminished, and it was not disputed at the hearing before us that it could not have been more than five or six degrees. At the time of the trial by the Division Court this fact was not clearly made out. The learned Judge who visited the premises seems to have thought it highly probable, as stated by defendant, that this lateral light owing to the smallness of the angle and thickness of the wall only struck the sill of the window, and that very little, if any, entered directly into the window. Having visited the premises ourselves, I cannot doubt that this must have been the case. The gully was, of course, also lighted by the sky vertically above it and by the light which found its way into it at both ends, and, lastly, by the light reflected from the walls of the two houses.

Such being the sources of light with which the room was supplied, it is plain, I think, that it was substantially a gully room, in the sense I mean of deriving its light almost, if not entirely, from the light in the gully, and must always have been a dark room even according to native ideas.

Since the defendant's house has been raised, there can be no doubt that the light which now finds its way into the gully is sensibly diminished, although not by any means so much as might be expected owing to the cornices and weather-boards of the plaintiff's house, which used to obstruct the light, having been removed and also owing to the larger area of the western wall of defendant's new house, which has increased the reflected light, which must always have been an important part of the light with which the room was lighted, especially in the afternoon.

[483] Mr. Justice Starling, who visited the room in the morning, says: "The room was fairly lighted as far as native rooms of that description are concerned, but I should not consider it well lighted." We ourselves found on visiting the room that, although a dark room according to the European ideas, it was light enough to enable us to read small print two or three feet from the window. Mr. Justice Starling, however, considered that all the light the window now gets, with the exception of the light coming into the gully vertically and at the end, is practically reflected light, which depends on the whiteness of the walls, and as to the former, thought it of little importance as not entering the room. But I have already stated (and this Mr. Justice Starling appears to have overlooked or not to have fully appreciated, as the matter was represented to him) that the room must, having regard to the small angle of light, have been substantially lighted by the light in the gully, and have had very little (if any) other light. Moreover, the light which entered the gully at the ends, and which is practically unaltered owing to the gully being only 30 feet long and open at both ends (there being an open space between the front and rear bungalows), must always have contributed very considerably to the light in the gully.

At this stage, it will be convenient, I think, to consider the authorities bearing on this class of questions. The English cases were discussed at length in *Dhunjibhoy Cowasji* v. *Lisboa* (1), and the conclusions arrived at is that the view taken by Pearson, J., (in *Holland* v. *Worley*(2) when discussing Lord Cairn's Act), "if applied with caution is suited to the circumstances of this city, which, from its nature, can in most parts of it only extend itself vertically upwards, and, we think, therefore, that

(1) 13 B. 252.

(2) 26 Ch. D. 578.

1894
MARCH 16.
ORIGINAL CIVIL.
18 B. 474.

it ought to be considered as the general practice of this Court, although doubtless one to be administered with much care and with due regard to the special circumstances of each case." Mr. Justice Pearson in his judgment in the above case (see p. 587), after referring to *Smith* v. *Smith* (1), where Jessel, M. R., discusses the application of the above Act, which enabled the Court of Chancery to [484] give damages in a case in which an injunction would otherwise have been given, draws the conclusion that "where the property may still remain the plaintiff's (*i.e.*, as distinguished from the case where the only fair compensation would virtually be to make the plaintiff to sell his property to the defendant) and be substantially useful to him as it was before," the injury is one which can in that case be properly compensated by money.

This view of Lord Cairn's Act is spoken of by Kekewich, J., in *Dicker* v. *Popham Radford & Co.* (2) as not laying down any new rule, and as amounting to no more than that (as had already been said in several cases), where there is a discretion exerciseable, the Court is bound to look at all the circumstances of the case. In this country the jurisdiction of the Civil Court in granting relief by injunction is given by the Specific Relief Act (I of 1877). Section 54 of the Act provides that it may be granted in certain cases, one of which is where pecuniary compensation would not afford adequate relief. No doubt the jurisdiction of the Court of Chancery in question of relief by injunction, &c., as stated by Lord Eldon in *Attorney-General* v. *Nichol* (3), and explained by V. C. Wood in *Dent* v. *Auction Mart Co.* and by Sir G. Jessel in *Aynsley* v. *Glover* (4), is treated as existing where substantial damages would be given by a Court of law. But this Court has the jurisdiction, both of a Court of Law and Equity, and in the exercise of the discretion will regard the "materiality" of the injury in the sense in which that expression was used by Sir G. Jessel in *Smith* v. *Smith* (1), and which, as pointed out by Fry, J., in *National Provincial Plate Insurance Company* v. *Prudential Insurance Company* (5), means something more than is sufficient to give the Court jurisdiction to grant an injunction and may depend on all the circumstances of the case.

In the present case, as we have already expressd the opinion that little or no light found its way directly into the room, and that the room was always, for all practical purposes, a gully room receiving its light from the light in the gully, the question for consideration is, whether that light has been so diminished as to [485] render the room,—having regard to the habits of the people who occupy rooms so situated,—unfit for the purpose to which it might reasonably be applied, which purpose would be sleeping and living in during the day. That the light which came into the gully laterally has been sensibly diminished, there can be little, if any, doubt; but the light coming in vertically and at the ends remains substantially unaltered, and must always, as we have stated, have played an important part in lighting the gully from which the room derived almost all, if not entirely, its light. Again, the light from the increased area of the defendant's west wall, as I have already pointed out, ought not to be altogether disregarded. Mr. Justice Starling refers to the remarks of Lord Hatherley in *Dent* v. *Auction Mart Co.* (6) as showing that the plaintiff cannot be expected to trust to the consideration of the defendant. But in that case

(1) L. R. 20 Eq. 500.
(2) 63 L. Times 381.
(3) 16 Ves., 342.
(4) L.R. 18 Eq. 544.
(5) 6 Ch. D. 769.
(6) L.R. 2 Eq. 238 (251).

1894
MARCH 16.
ORIGINAL CIVIL.
18 B. 474.

the defendant had offered to have his roof tiled with glazed tiles to remove the plaintiff's objection, continuance of which it was said the plaintiff could not be sure of or enforce; but here the only possibility is that the defendant may not whitewash his house as often as the plaintiff might wish.

On the whole I do not think, although the light has been sensibly diminished, that there has been such a "large, material and substantial damage," to use the language of Sir G. Jessel in *Aynsley* v. *Glover* (1), as to require interference by injunction, or that the room, although the light has been sensibly diminished, has been rendered unfit for the purpose for which it may reasonably be expected to be used. The above remarks apply with even greater force to the other windows. As to the amount of damages, we do not think the Rs. 200 paid in by defendant is sufficient, and that, having regard to the evidence in the case, they should not be less than Rs. 500.

As to the ownership of the gully, the Division Court has found it belongs to the plaintiff up to the middle line between the two houses, relying on the plans annexed to the conveyance to the plaintiff's and defendant's predecessor, Shantaram Narayan.

An examination of those maps, however, clearly shows that the plaintiff's ownership is, in fact, confined to the west of a line [486] which is the continuation of the wall of the rear bungalow. Mr. Scott contended that Mr. Inverarity had admitted that the plaintiff's ownership extended to the middle line of the passage, but he did this on the condition that he would give up the right to have the water from his house run down the passage, which was refused.

It remains to consider the right claimed by plaintiff to drain his refuse water from the *nanis* in his house into the gully. As to this the evidence is very conflicting, and embarrassing and, looking at the probabilities as stated by Mr. Justice Starling, we do not think we ought to disturb the conclusion he has arrived at.

As to the damage done to the plaintiff's portion of the passage by the defendant's scaffolding and building materials, as the Division Court has only awarded one rupee, it is not necessary to consider it, as it cannot affect the question of costs.

The defendant's claim for damages by reason of the granting of the injunction must be rejected.

FARRAN, J.—The defendant's building at the time the suit was commenced had reached the top of its first floor, and had obstructed the light which used to pass over the sloping roof of the defendant's old house and strike the plane, in which the plaintiff's windows are set, in an oblique direction. Since the dissolution of the injunction the defendant has added two more stories and a loft to his building after having given an undertaking to argue the case at the hearing as if the building had been left in the state in which it was when the rule was discharged. Under these circumstances we ought, I think, to consider the case as if at the hearing the defendant's house had reached only the height at which it stood when the suit was brought and the injunction was applied for. On that footing the Division Court has held that the plaintiff was entitled to an injunction in the terms of its decree.

The facts of the case are very similar to those which the Court had to deal with in *Dhunjibhoy Cowasji* v. *Lisboa* (2) so [487] much so that

(1) L.R. 18 Eq. 544.

(2) 13 B. 252.

1894
MARCH 16.
ORIGINAL CIVIL.
18 B. 474.

it is quite impossible, to my mind, to draw any substantial distinction between them ; and were I sitting in the Court of first instance, I should be satisfied to say that I considered myself bound by the decision of the appellate Court in that case. But, as the judgment of the Division Court by necessary implication and the argument of counsel before us directly impugned the basis upon which that decision rests, I propose to state my views of the law applicable to the case.

When the Specific Relief Act was passed in 1877 the law in England on the subject of injunctions—I speak more particularly in reference to injunctions restraining the obstruction of ancient lights—was this. A plaintiff who had sustained, or who was likely to sustain, material injury entitling him to substantial damages by reason of the obstruction or proposed obstruction of his ancient lights by the defendant's buildings, was, in the absence of special circumstances, entitled to an injunction, according to the established principles of Courts of Equity—*Martin* v. *Price*. (1). Lord Cairn's Act had, however, conferred upon Courts of Equity the power to award damages to the party injured, either in addition to, or in substitution for, an injunction, in cases in which those Courts had jurisdiction to entertain an application for an injunction. That power was a discretionary one, but the law as to the circumstances under which the Courts would exercise that discretion was in an unsettled state, and no clear rules for the guidance of the Court had been established by the decisions—*Holland* v. *Worley* (2). Even now it is an open question whether damages in lieu of an injunction can be awarded by way of compensation for an injury not yet committed, but only threatened and intended—*Martin* v. *Price* (1). Section 33 of the Easements Act, 1882, lays down for us the law as to the case in which damages or compensation can be awarded, and sets that question at rest.

The Specific Relief Act (I of 1877), s. 54, enacts that when the defendant invades or threatens to invade the plaintiff's right to or enjoyment of property, the Court *may* grant a perpetual injunction in the following case : —(*c*) when the invasion is such **[488]** that pecuniary compensation would not afford adequate relief. (I omit cls. (*a*), (*b*), (*d*) and (*e*) as not specially applicable to the present circumstances.) The Court has under that section jurisdiction to grant an injunction only in those cases where pecuniary compensation would not afford adequate relief. The expression "adequate relief" is not defined, but it is probably used in the sense in which Kindersley, V. C., uses it in *Wood* v. *Sutcliffe* (3) as meaning "such a compensation as would, though not in specie, in effect place the plaintiffs in the same position in which they stood before." If that be the correct meaning of the phrase, it is, I think, difficult to predicate of any material obstruction to ancient light that pecuniary compensation for it would in effect place the plaintiff in the same position as before, and more particularly so where the light is obstructed in a house in which a man is himself residing.

It does not, however, follow that in such cases a plaintiff is entitled as of right to an injunction. Under the Specific Relief Act the Courts are given a discretion to grant or withhold an injunction, as in England they have a discretionary power to award damages in lieu of an injunction. In this view of the law, the Court has to consider in each case not merely whether the plaintiff's legal right has been infringed, or even materially

(1) L. R. (1894) 1. Ch. 276. (2) 26 Ch. D. 578 (587). (3) 21 L. J. (Ch.) 255.

infringed, but also whether under all the circumstances of the case he ought to be granted an injunction as the proper and appropriate remedy for such infringement.

Two principles are, I think, deducible from the English cases, which may be deemed binding upon our Courts (1) : that Courts ought not to interfere by way of injunction when obstruction of light is very slight and where the injury sustained is trifling, except in rare and exceptional cases —*Dent* v. *Auction Mart Co.* (1) ; *Herz* v. *Union Bank of London* (2); Goddard on Easements, p. 438 ; and (2) that where " the defendant is doing an act which .will render the plaintiff's property absolutely useless to him unless it is stopped, in such a case, inasmuch as the only compensation, which could be given to the plaintiff, would be to compel the defendant to purchase his property out and out, the Court will not, **[489]** in the exercise of its discretion, compel the plaintiff to sell his property to the defendant " by refusing to grant him an injunction and awarding him damages on that basis (see *Holland* v. *Worley* (3)). Between these two extremes, where the injury to the plaintiff would be less serious, where the Court considers the property may still remain with the plaintiff and be substantially useful to him as it was before, and where the injury is one of a nature that can be compensated by money, the Courts are vested with a discretion to withhold or grant an injunction, having regard to all the circumstances of the particular case before them, including the fact that the premises are situated in a city, like this, where land suitable for building is limited and very valuable, and where property owners should, so far as is possible consistently with the exlsting rights of their neighbours be allowed to utilize it to the utmost extent.

Mr. Scott for the respondent contended that the present was a case for an injunction, because it fulfilled the conditions of s. 54, sub-cl. (*b*), in as much as there was no standard for ascertaining the actual damage caused or likely to be caused by the invasion. I think, however, that this sub-clause has rather application to such cases as are referred to in the illustrations (*h*) and (*i*) to the section where there is no possible standard with reference to which the contemplated injury can be compensated, than to a case of injury to property like a house occupied by its owner in danger of being deprived of its ancient light. Juries have never experienced any insuperable difficulty in cases of the latter kind. In earlier times, before the passing of Lord Cairn's Act, Courts of Common law, rather than Courts of Chancery, were resorted to in cases of obstruction of ancient lights : Goddard (3rd Ed.), p. 423 —the aid of the Court of Chancery being invoked in later times on account of damages being an inadequate remedy or inappropriate to the circumstances of the case.

I proceed to a consideration of the facts of the case before us. The plaintiff had six ancient lights in the east wall of his house. They all opened upon a gully about 3 feet 9 inches wide, opposite to them being the wall of the defendant's old house about 30 feet **[490]** high at the apex of the roof and sloping down at each side to a height of about 20 feet. These windows admitted light to four rooms on the ground floor and two rooms on the upper floor. The lower floor was usually let to tenants, the upper floor was occupied by the plaintiff and his family. We are not, I think, embarrassed in this case by such considerations as weighed with Kekewich, J., in *Dicker* v. *Popham Radford &*

(1) L. R. 2 Eq. 238. (2) 2 Giff. 686. (3) 26 Ch. D. 578.

1894

MARCH 16.

ORIGINAL CIVIL.

18 B. 474.

Co. (1) arising from the damage likely to accrue to the plaintiff within some reasonable time by reason of a probable change in the nature of the occupation of his premises. The house has always been used as a dwelling-house, and, as far as one can judge, will never be used for any other purpose. The mode of occupying it may be altered. The *divankhana* may be used as a bedroom, and room No. 5 may be occupied as a *divankhana*, or let separately to a tenant, or other changes in the use of the rooms may take place. These may fairly be contemplated and should be taken into account—*Moore* v. *Hall* (2), *Dicker* v. *Popham Radford & Co.* (1); but having regard to the small amount of light formerly admitted by the windows, 2, 3, 4 and 5 it is almost impossible to conceive the rooms lighted by these windows being used for purposes of delicate handicraft or indeed otherwise than for residential purposes.

The upper floor consists of a *divankhana*, a living room behind it, and behind that a kitchen. The *divankhana* is amply lighted by two windows looking into the public street to the north. The light admitted into this room by the gully window No. 5 cannot at any time have added appreciably to the light of the room. According to the plaintiff, only five degrees of vertical light reached the outer sill of this window, and according to the defendant's experts none at all. In neither view did any actually penetrate into the room. The window always looked into a narrow gully where the eye met a wall, and it does so still. In my view no appreciable injury has been caused to this room by the raising of the defendant's western wall.

I pass over for the present the room behind the *divankhana* lighted by window No. 5 and consider the ground-floor rooms. The kitchen on the upper floor is not lighted from the gully.

[491] On the ground floor are a living room next the street, not lighted from the gully, two rooms behind it each having a window opening into the gully, and behind them a kitchen lighted from the south, but having a small aperture resembling a smoke hole, which looks out into the gully. The kitchen is not, I think, in the smallest degree affected by the defendant's new building being higher than his old one. The two other rooms on the ground floor must always have been badly lighted. The plaintiff's surveyors give an angle of direct light of 4° to window No. 4 opening into the more northern of the two rooms and of 6° to window No. 3 lighting the more southern room. These angles are measured to the outer sills of these windows. The defendant's surveyors give the angles of 1° and 3° respectively measured in the same way. The difference is owing to the different measurement of the projecting cornice of the defendant's old house and of the eaves of the plaintiff's house. The measurement of the cornice of the defendant's house taken by Mr. Stevens appears to be the more correct, while he has a little minimised the plaintiff's eaves. Taking the mean, the angles of the direct light to the sills can never have exceeded 2° and 4° respectively. Owing to the thickness of the wall, which is 18 inches, the direct light cannot, except in a very small degree, have penetrated into these two rooms. They must have been always lighted principally from the light in the gully diffusing itself and being reflected into them. The light in the gully when the defendant's old house was standing was, I doubt not, somewhat better in the forenoon than it is now owing to the sun shining over the southern slope to the defendant's old house and

(1) 63 Law Times, 379.

(2) 3 Q. B. D. 178.

striking the western wall of the plaintiff's house obliquely. In the afternoon, on the other hand, and at noon, the gully is now probably better lighted than of old owing to the removal of the defendant's weather boards. I cannot, therefore, think, in respect of the several windows which I have been hitherto considering, that there has been any marked or substantial diminution of light to the plaintiff's rooms. I think that as to them there is no case for an injunction.

It remains to consider the room lighted by window No. 5. The Division Court, having regard to that room only, has granted an injunction requiring the defendant to pull down and set back [492] the west wall of his new house above the second floor. The injunction does not interfere with the wall till it reaches the height of the second floor, which is nearly level with the apex of the defendant's old house. This injunction, as far as I can judge, will not materially benefit the room in which window No. 5 is situated or restore to it its former *quantum* of light, in as much as it principal source of direct light formerly was over the sloping roof of the defendant's old house reaching the window obliquely. The plaintiff has accordingly appealed from that portion of the decree as not affording him sufficient relief. This wall was, as I have said, built to the height of the top of the first floor, when the suit was brought. The lowering of it to the height of the old sloping roof would be an exercise of the mandatory powers of the Court, and out of the scope of the defendant's undertaking. Section 55 of the Specific Relief Act in express terms makes this exercise of our mandatory power discretionary. The plaintiff complained of the defenant's buildings as soon as the latter began to build: but though he could readily have seen the defendant's building plans, took no legal steps to restrain his building until the ground and first floors had been completed. Prompt action is very essential in these cases. if an injunction is the desired remedy.

The direct light which reached the sill of window No. 5 was 11° according to the plaintiff's case and 5° according to the defendant's, or, taking the mean as before, between 7° and 8° and besides this there was the oblique light from the sky which passed over the sloping roof. We cannot doubt that some portion of this light penetrated into the room lighted by window No. 5. From near the floor of the room the eye could see a small portion of the sky towards the east and south east, but not when standing or sitting on a chair. For purposes of habitation it was essentially a gully room, though it enjoyed the amount of direct light which I have indicated. The defendant's building, as it at present stands, has cut off all direct light from the sill of the window and from the room. The building when it reached the second floor had cut off all the oblique light, but had left the direct vertical light as before. In addition to the vertical light, which never could have been much, the room was [493] lighted by the gully light diffusing itself inwards and the light reflected from the defendant's wall. These must always have been the principal sources of light. These sources of light it still retains. The gully light is probably, as I have said, less bright in the morning hours than formerly, but in the afternoon must be nearly the same as it always has been. We visited the room about 11 A.M. and it was then fairly well lighted. One could read easily in most parts of it. The room from its position behind the *divankhana* would naturally be used as a sleeping room. There is a *nani* in it, and the household gods are said to have been kept there. There is a window opening into it from the *divankhana* which

1894
MARCH 16.
ORIGINAL CIVIL.
18 B. 474.

can be opened or closed at pleasure. It is a question of degree. All questions of discretion usually are. I think that it is not a case in which we should grant a mandatory injunction as to the wall built before suit; and as to the part subsequently built I think it would inflict serious damage upon the defendant to remove it without restoring the plaintiff to the position in which he originally stood, or doing him any real practical good. Damages will, I think, afford more suitable compensation in his case.

We will hear counsel on the question of costs.

Jardine for the defendant (appellant):—The appellant (defendant) should have his costs of appeal. He has succeeded in setting aside the decree of the lower Court which gave the plaintiff an injunction. He should also have his costs of the hearing in the lower Court, for there the whole contest was as to the plaintiff's right to an injunction, which has now been refused to him. The defendant was willing to compensate the plaintiff for the injury which he alleged he had suffered, and he paid into Court Rs. 200 when he filed his written statement. He would, no doubt, have been willing to pay more, but the plaintiff would give no indication of the amount which would satisfy him. In fact, it was not damages he wanted, but an injunction, and it was for an injunction he has fought all through. Pending the hearing he got a *rule nisi* for an injunction against us. The suit has entailed large costs in consequence of the plaintiff's persistent demand for an injunction. In his plaint he does not ask for damages as an alternative. The **[494]** single remedy he asked for he has failed to obtain. He should, therefore, pay the costs.

Scott, for plaintiff (respondent) *contra*:—The plaint prays for damages, and although it is not put as an alternative, that slight informality in the pleading will not affect the decree of the Court. There is also a prayer "for such further and other relief as the nature and circumstances of the case may require." The Court is thus asked to exercise its discretion as to the remedy, although the plaintiff states his preference for a particular remedy. He succeeds if he obtains any relief from the Court, and is entitled to his costs. The cases of *National Provincial Plate Glass Insurance Co.* v. *Prudential Assurance Co.* (1) and *Holland* v. *Worley* (2) were referred to.

JUDGMENT (*Continued*).

SARGENT, C.J.—We think that the ordinary rule should be observed and that costs should follow the event. What is the event in this case? It is obviously this, that the plaintiff has succeeded in proving his allegation. He has established his case against the defendant, although, no doubt, he has not got the precise form of relief which he desired. It is true that in his plaint he does not ask for damages as an alternative to an injunction. But he alleges that he has suffered an injury from the defendant, and he comes to the Court for redress. He has proved the injury. He has proved that he is entitled to some relief, and that being so I cannot see why he should be refused his costs, because, in the opinion of the Court, the extent of the injury proved may be sufficiently redressed by giving him damages rather than an injunction. A man may sue for Rs. 5,000 in damages for an alleged wrong, and only be awarded Rs. 3000, but that is not considered a ground for depriving him of his costs.

It is to be observed that the defendant throughout has denied that the plaintiff has suffered any injury and has thus compelled him to prove

(1) 6 Ch. D. 769.

(2) 26 Ch. D. 578.

his case. It is true that he paid Rs. 200 into Court; but in his written statement he says expressly that he believes that no damage has been done: that the plaintiff is not entitled to any damages whatever, and that the Rs. 200 are paid **[495]** into Court merely for the sake of pleas and to avoid litigation. Thus the defendant has put the plaintiff to prove his case, and the plaintiff has done so. I think if a party substantially succeeds he is entitled to his costs. The plaintiff must have his costs of the hearing in the Court below, and each party must pay his own costs of this appeal and of the proceedings on the rule for an injunction obtained before trial.

Attorney for the plaintiff:—Mr. *Khanderao Moroji.*

Attorneys for the defendant:—Messrs. *Chitnis, Motital and Malvi.*

1894 MARCH 16. ORIGINAL CIVIL. 18 B. 474.

---

18 B. 495.

ORIGINAL CIVIL.

Before Mr. Justice Starling.

AHMED BIN SHAIK ESSA KHALIFFA AND OTHERS (*Plaintiffs*),
v. SHAIK ESSA BIN KHALIFFA AND OTHERS (*Defendants*).*
[23rd June, 1894.]

Civ. Pro. Code, (XIV of 1882). *s.* 244—*Decree—Execution—Questions arising in-execution between the parties—Decree incapable of execution by reason of events subsequent to decree—Decree giving an option to the parties—Practice—Procedure.*

A partition suit brought by a son against his father was referred to arbitration. On the 9th January, 1890, the award was published, and on the 27th March, 1890, the defendants moved for and obtained a decree in terms of the award. By this decree it was ordered that in satisfaction of the plaintiff's claim the defendant should pay to him Rs. 1,05,000 in the manner therein stated, *viz.*, Rs. 40,000 to be paid forthwith and the balance of Rs. 65,000 to be paid "upon the plaintiff's delivering to the defendant certain specified property, which included two vessels or buglows, called respectively the 'Nasri' and 'Sambuk'." In no event was defendant to be required to pay the Rs. 65,000 before the 15th November, 1890. At the date of the decree the vessel "Sambuk" wat at sea on a voyage, and on the 18th June, 1890, while still on the voyage, she was lost. On the 15th November, 1890, the plaintiff's attorneys demanded payment of the balance of Rs. 65,000. They offered to deliver the other properties specified in the decree, but stated that the vessel "Sambuk" had been lost. They offered to pay its value, which they estimated at Rs. 1,000. The defendants, however, demanded the delivery of the buglow, which they stated to be worth a very large sum. The defendant having, under the circumstances, refused to pay the Rs. 65,000, the plaintiff applied for execution of the decree, which was refused. He then obtained a rule calling on the defendant to show cause why the decree of the 27th March should not be amended or rectified by stating **[496]** therein the amount of money to be paid to the defendant as an alternative of its delivery of the vessal "Sambuk" could not be made, such delivery having become impossible.

That rule was discharged. The plaintiffs then took out a summons calling on the defendant to show cause why an order should not be made, under s. 244 of the Civil Procedure Code, directing the plaintiffs to pay to the first defendant, in lieu of the delivery of the vessel "Sambuk," such sum of money as might be fixed by the Court as the value of or compensation for the loss of the vessel "Sambuk" in the decree mentioned, and why an order should not be made that on payment of such sum and delivery of the other properties mentioned in the decree which the plaintiffs were to deliver under the decree to the first defendant on payment by the latter to them of Rs. 65,000, the first defendant should pay to the plaintiffs Rs. 65,000 and interest thereon from the 15th day of November 1890, mentioned in the said decree, and in the event of its being held that the

* Suit No. 383 of 1886.

1894
JUNE 23.

ORIGINAL CIVIL.

18 B. 495.

first defendant was not bound to pay the said sum of Rs. 65 000 then why an order should not be made that the property mentioned in the decree which the plaintiffs were to hand over to the first defendant on payment of Rs. 65.000 should not be retained, used and appropriated absolutely by the plaintiffs for their own use and benefit freed and discharged of all claims on the part of the first defendant, and why the first defendant should not be directed to withdraw the claims made by him to the said debt of Rs 22,000, or thereabouts mentioned in the said affidavit of Ahmed bin Essa Khaliffa, and why such further or other order as to the Court might seem fit and the justice of the case may require should not be made in the premises and in relation to the properties mentioned in the decree which were to be delivered over by the plaintiffs to the first defendant on receiving from him Rs. 65,000 and why, in the alternative, this suit should not be restored on the board for trial.

It was contended by the plaintiff that the questions raised in the summons were questions arising in execution to be dealt with by a Judge in chambers under s. 244 of the Civil Procedure Code (XIV of 1882), and that a fresh suit was not necessary.

Held, (dismissing the summons) that the application was not one in execution of a decree, nor was the question one arising in the course of execution, but that the decree having become incapable of execution the summons asked the Judge to decide what were the rights of the parties in consequence of its non-execution.

Held, also (as to the part of the summons asking for restoration of the suit) that the matters in issue in the suit had been fully heard and determined and the rights of all parties had been settled by the decree, and consequently there was nothing further to be tried. The Court could not in this suit after passing a decree proceed to ascertain the rights of the parties under a state of facts quite different from those which appeared in the pleadings and arising subsequently to the decree.

[R., 5 Bom. L. R. 1036 (1040).]

IN chambers.

Suit for partition. The first plaintiff was the son of the first defendant, and he brought this suit in September, 1886, praying that the property of his grandfather Khaliffa bin Abdulla [497] might be divided and partitioned among the parties entitled thereto according to their rights and interests therein.

By a consent order, made in the suit on the 15th August, 1889, the suit and *all matters in difference* between the parties were referred to arbitration. On the 9th January, 1890, the arbitrator made and published his award, which was filed on the 11th March, 1890. On the 27th March, 1890, on a motion made on behalf of the defendants, a decree was passed in terms of the award.

By this decree it was ordered that in full satisfaction of the claim of the plaintiff the first defendant should pay to the plaintiff the sum of Rs. 1,05,000 in the manner therein provided, *viz.*, that the sum of Rs. 40,000 should be forthwith paid by the said defendant and the balance of Rs. 65,000 should be paid "*upon the said plaintiff delivering over to the* said Shaik Essa bin Khaliffa the five boxes mentioned in paragraph 5 of the plaint and two buglows (ships) 'Nasri' and 'Sambuk' referred to in the affidavit of Ahmed bin Essa, and the whole of the immoveable property in the Persian Gulf, &c." The said decree further provided that in no event should the defendant be required to pay the said balance of Rs. 65,000 before the 15th November, 1890.

At the date of the said award and decree, the vessel "Sambuk" was at sea on a voyage, and on the 18th June, 1890, while still on the voyage, was lost.

On the 15th November, 1890, the plaintiffs' attorneys wrote to the defendants' attorneys reminding them that the sum of Rs. 65,000 had become due on that day, and requiring payment. They offered to deliver

the other properties mentioned in the decree, but stated that the vessel "Sambuk" had been lost at sea. In the correspondence which subsequently took place, the plaintiffs offered to pay the value of the lost vessel "Sambuk," but they and the defendants could not agree upon the value. The plaintiffs estimated her value at Rs. 1,000, but the defendants' attorneys in a letter of the 20th December, 1890, said "our client wants the said bungalow under one of the conditions in the decree, as your clients, the plaintiffs, are bound specifically to deliver [498] the same, and as it is worth a very large sum in our clients' estimation."

The defendants having under these circumstances refused to pay the Rs. 65 000, the plaintiff applied to the Judge in chambers (Telang, J.) for execution of the decree, but on the 16th July, 1891, his application was refused.

The plaintiff then obtained a *rule nisi*, calling on the first defendant "to show cause why the decree of the 27th March, 1890, should not be amended or rectified by stating therein the amount of money to be paid to the first defendant as an alternative if delivery of the vessel named 'Sambuk' could not be made to the said first defendant, and why such further order should not be made as justice and good conscience require in consequence of the loss of the said vessel 'Sambuk,' and by reason of all the circumstances of the case as disclosed in the said affidavit, and why (if necessary) the amount of money to be fixed as an alternative for the delivery of the said vessel should not be ascertained by this Honourable Court or by the arbitrator, Mr. Shaik Abdul Aziz bin Ali Ebrahim, heretofore appointed in this suit after taking such evidence as may be necessary." In his affidavit the plaintiff said: "The plaintiffs are unable to execute the said decree for the value thereof and interest without having the said decree amended by this Honourable Court in the following respect, namely, in regard to the delivery of the said vessel 'Sambuk' the delivery of which has become impossible by the act of God. Under the circumstances aforesaid this Honourable Court will be pleased to direct that the said decree should be amended by stating therein the amount of money, *i.e.*, the value of the said vessel which is to be paid to the defendant in lieu of delivering the said vessel."

That rule, however, was discharged, the Court (Parsons, J.) holding that the objection was really to the award: that the award had been filed without objection, and a decree passed in accordance with the award, and that the Court had now no power to alter the award or the decree (see I. L. R. 17 Bom., p. 657).

The plaintiff appealed from this decision, but the appeal Court (Sargent, C. J., and Farran, J.) dismissed the appeal with costs.

[499] On the 10th day of April, 1894, the plaintiff took out the present summons calling on the defendant

"to show cause why this Honourable Court should not make an order under s. 244 of the Civil Procedure Code, directing that the plaintiffs do pay to the first defendant, in lieu of the delivery of the vessel 'Sambuk,' such sum of money as this Honourable Court may fix as the value of or compensation for the loss of the vessel 'Sambuk' in the decree mentioned, and why an order should not be made that on payment of such sum and delivery of the other properties mentioned in the decree herein which the plaintiffs are to deliver under the decree to the first defendant on payment by the latter to them of Rs. 65,000, the first defendant shall pay to the plaintiffs Rs. 65,000 and interest thereon from the 15th day of November, 1890, mentioned in the said decree;

1894
JUNE 23.
ORIGINAL CIVIL.
18 B. 495

"and in the event of this Court holding that the first defendant is not bound to pay the said sum of Rs. 65,000, then why an order should not be made that the property mentioned in the decree which the plaintiffs were to hand over to the first defendant on payment of Rs. 65,000 should not be retained, used and appropriated absolutely by the plaintiffs for their own use and benefit, freed and discharged of all claims on the part of the first defendant,

"and why the first defendant should not be directed to withdraw the claims made by him to the said debt of Rs. 22,000 or thereabouts mentioned in the said affidavit of Ahmed bin Essa Khaliffa,

"and why such further or other order as to the Court may see fit and the justice of the case may require should not be made in the premises and in relation to the properties mentioned in the decree which were to be delivered over by the plaintiffs to the first defendant on receiving from him Rs. 65,000 and why, in the alternative, this suit should not be restored on the board for trial."

In the affidavit on which he obtained the summons, the plaintiff stated that until the questions raised in the summons were decided, it was impossible to deal with properties which under the decree he was to assign and deliver over to the defendant. Amongst these was a debt of Rs. 22,000 due by a third person (Haji Mahomed bin Kazum), which remained unrecovered, and the defendant had written a letter which prevented its payment. In his affidavit the plaintiff on this point said: "The defendant, although he would not pay the Rs. 65,000, or any part thereof, still claims to prevent the plaintiff's recovering the said debt, and apparently seeks to recover the same himself. The plaintiffs are apprehensive that, unless the said sum of Rs. 22,000 is recovered forthwith, it will be entirely lost." He further stated that the second ship "Nasri," which under the decree was also to be delivered by him to the defendant, would soon become valueless if left undelivered.

[500] The last two paragraphs of the affidavit were as follows:—

23. "The plaintiffs submit that, in the events that have happened, the first defendant is bound to pay them Rs. 65,000 and receive the property aforesaid and the value of the 'Sambuk', or if he is not bound to do so he is not entitled to retain possession of the 'Nasri' or to prevent the plaintiffs recovering the debt aforesaid, but that the plaintiffs are entitled to possession of the 'Nasri' and to recover payment of the debt aforesaid, and the other property they were to deliver to the first defendant in getting payment of Rs. 65,000 from him, and that the first defendant has no claim on the said debt and vessel and the said property, and that the same may be declared to belong to the plaintiffs (in the event of it being held they are not entitled to the said Rs. 65,000).

24. "Under the foregoing circumstances I pray that this Honourable Court will be pleased to decide under s. 244 of the Civil Procedure Code (XIV of 1882) the foregoing questions which have arisen between the plaintiffs and the first defendant since the passing of the said decree, and to make such order in relation thereto as to this Honourable Court may seem fit and the justice of the case may require."

The summons now came on for argument in Chambers.

Inverarity for the plaintiffs in support of the summons:—The parties are now at a dead lock. The decree cannot be executed because a clause has been omitted from it which by s. 208 of the Civil Procedure Code (XIV of 1882) ought to be in it, *viz.*, the clause which provides for the payment

1894
JUNE 23.
ORIGINAL CIVIL.
18 B. 495.

of money where delivery of moveable property cannot be given. The value of the lost ship is trifling and the plaintiff is willing to allow the defendants to deduct the amount out of the money to be paid by them, but the defendants will have the ship or nothing. The plaintiff consequently cannot get execution of the decree as it stands, and the Court has refused to alter it. The defendant thus keeps the properties which we sued to partition and our right in which is admitted and declared in the decree. We, therefore, have taken out this summons to prevent the defendant getting the benefit which the award and decree only intended him to get in case we got other benefits. He wants to get his rights under the decree, but prevents us getting ours. In this summons we seek to get an order under which we can pay the value of the lost vessel and recover the amount due to us by the defendant, or, in the alternative, to have the suit restored to the list for hearing. We say these are questions arising in execution within the meaning of s. 244 of the Civil Procedure Code (XIV of 1882) **[501]** and that we are not obliged to bring a new suit. The plaint prayed for partition of property to which we asserted a claim. The award and decree recognise our rights in the property, for they awarded us Rs. 1,05,000 in full satisfaction and discharge of our claim. If and when this money is paid to us we are to give up these rights. But the decree does not order us to give up these rights. It gives us an option. We are only to give them up if and when we are paid a certain sum. The decree says that "upon the plaintiffs delivering over certain property" and "upon the plaintiffs executing valid and effectual assignment of their rights in the said properties" the defendant is to pay us certain monies. This decree, therefore, gives the plaintiffs an option either to retain their rights or to hand them over and to receive the money from the defendant. But the plaintiffs cannot now hand over the ship, and the defendant refuses to take what the plaintiffs can give. So the plaintiffs must elect to stand by the other alternative and retain the property. But if they do so, it is plain that the award and decree have not dealt with all the questions raised by the plaint in the suit, and we, therefore, ask that the suit may be restored to the list for hearing. The award and decree only dealt with our rights in the event of our handing over the property, but not in the event of our not handing them over.

[STARLING, J.—Can the suit be restored after a decree is passed?]

Yes, for the decree was merely on an award, and the award is not complete. It does not dispose of all the questions raised in the suit. The suit was never heard. The reference to arbitration was made before the suit came on for hearing. If the defendant will not accept our proposals so as to enable the decree to be executed, we are entitled to have the suit heard.

[STARLING, J.—Has there not been a final decree in the suit? The circumstances that have created the difficulty are circumstances which have occurred subsequently to the decree and make execution impossible. Is not another suit necessary?]

No. The decree was not a final decree. Even supposing these events had not happened at all, there is nothing in the decree to **[502]** prevent us electing. We might have elected not to hand over the property, and our rights would then have been left undetermined. We ask now that your Lordship should say that under the decree the defendant is not entitled to these properties and that we are entitled to them. So it is a question relating to the execution of the decree under s. 244 of the Code. The fact that the defendant shows cause against this summons shows that he claims

1894
JUNE 23.
ORIGINAL CIVIL.
18 B. 495.

the properties. Our rights under the decree are a question in execution. We contend that the decree gives us these properties in the alternative, *i.e.*, if we elect to retain them instead of handing them over and receiving their equivalent from the defendant. The decree in effect says: "If the plaintiff chooses he may hand over the property, and receive Rs. 1,05,000 from the defendant." We want a declaration of our rights under the decree.

Lang (Advocate-General), for the defendant, showed cause:—This is not a question relating to execution of a decree. The plaintiffs are only making another attempt to alter the decree by making it declare their rights. They have already made three attempts and failed.

JUDGMENT.

23*rd June*, 1894, STARLING, J.—This is a suit for a declaration of the rights of the plaintiffs in certain property, moveable and immoveable, and for its partition between the plaintiffs and defendants. The suit was referred to arbitration and the arbitrator awarded Rs. 1,05,000 to be paid by the first defendant to the plaintiffs—Rs. 40,000 at once and Rs. 65,000 on the plaintiffs handing over to the first defendant certain moveable and immoveable property and executing certain deeds of conveyance and releases. No objection was filed to this award, and a decree was passed in accordance therewith. The second portion of the decree has not been carried out, because a vessel, part of the moveable property to be handed over by the plaintiffs, has been lost at sea, and they are consequently unable to fulfil the condition on which alone they can claim payment of the Rs. 65,000.

Subsequently the plaintiffs issued a notice calling upon the first defendant to show cause why in the execution of the decree the Court should not ascertain and fix some sum as the value of the [503] lost vessel to be allowed to the first defendant out of the Rs. 65,000, because the vessel could not be delivered to him. The matter was heard before Telang, J., who dismissed the notice on the ground that what he was asked to do would be tantamount to making a fresh decree. Then the plaintiffs applied to Parsons, J., who had passed the decree on the award, to amend the decree by inserting some sum to be allowed in executing the decree as the value of the lost vessel. This application was refused on the ground that the only decree which could be passed was one in accordance with the award, and the amendment asked for was not in accordance with the award (1); and this refusal was on appeal upheld by the appeal Court.

The plaintiffs have now taken out a summons for an order to be made in one of three alternative ways. The first relief is the same as was asked for from Telang, J., and I must refuse it for the same reason, and also for the reason that the matter having been disposed of by him is now *res judicata*. The second alternative is that, seeing that the plaintiffs cannot hand over all the property referred to in the decree, and that consequently the first defendant is not liable to pay the Rs. 65,000, the Court should declare that the said property now in the hands of the plaintiffs should be retained, used and appropriated absolutely by them. In the first place, it would be impossible on this summons to make such an order, supposing it to be otherwise unobjectionable; because it appears by the plaint that all the defendants have some interest in all

(1) 17 B. 657.

1894
JUNE 23.
ORIGINAL CIVIL.
18 B. 495.

the property, the subject-matter of the suit, and it would be wrong for me to pass an order that the plaintiffs were absolutely entitled to any portion of it without the presence of all the parties to the suit. In the second place, this is not an application in execution of a decree, nor is the matter I am asked to decide upon, a question between the parties to the the suit arising in the course of the execution of the decree; but the decree being incapable of execution, I am asked to decide what are the rights of the parties in consequence of its non-execution. I think that if I made an order as asked, and a suit was brought to set it aside, the case would be [504] very similar to that of *Chowdhry Wahed Ali* v. *Mussamut Jumaee* (1), wherein at p. 157 their Lordships say: "Their Lordships cannot find, after the incongruous proceedings above described, that there exists any decree authorising an execution against the respondent's estate, and consequently the question in the present suit is one not properly relating to the execution of a decree, but to a sale under orders which have not the support of any decree." There is no decree in this suit which would authorize the order I am asked to make; it would, in fact, amount to an alteration in the decree or the making of a new decree. In my opinion, the only way in which the plaintiffs can obtain what they seek is by filing a fresh suit setting out the decree herein, and the circumstances which have transpired since the passing of that decree, and asking for a declaration of their rights under all the circumstances of the case.

As to the third alternative, the matters in issue in this suit have been finally heard and determined and the rights of all parties have been settled by the decree; consequently there is nothing further to be tried. The Court cannot in this suit after passing a decree proceed to ascertain the rights of the parties under a state of facts quite different from those which appear in the pleadings herein and arising subsequent to the decree. Under these circumstances I must dismiss the summons with costs. Counsel certified for.

Summons dismissed.

Attorneys for plaintiffs:—Messrs. *Little, Smith and Nicholson.*
Attorneys for defendants:—Messrs. *Payne, Gilbert and Burder.*

---

18 B. 505.

[505] APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Bayley.

KRISHNAJI BIN MALJI (*Original Plaintiff*), *Appellant v.* VITHU AND OTHERS (*Original Defendants*), *Respondents.** [3rd August, 1893.]

Hindu law—Joint ownership—Decree against joint owner—Execution sale—Right of purchaser—Co-sharers made parties after period of limitation—Limitation.

The interest of Vithu, as co-sharer in certain land, was sold in execution of a decree against him. It was purchased by one Sakharam, who sold it to the plaintiff. The plaintiff sued for possession, and the other co-sharers were made party defendants to the suit, which, however, was held, as against them, to be barred by limitation.

Held, that the plaintiff was entitled to be put into joint possession of the land with them although the suit as against them was barred.

---

* Second Appeal No. 198 of 1892.

(1) 11 B.L.R. 149.

1893
AUG. 3.

APPELLATE CIVIL.

18 B. 505.

THIS was a second appeal from the decision of the First Class Subordinate Judge of Satara with appellate powers.

The plaintiff sued for possession of certain land which he purchased from one Sakharam bin Vithoji on the 11th June, 1888. Sakharam had purchased it on the 12th June, 1876, at a Court-sale in execution of a decree against the defendant Vithu.

In June, 1888, the plaintiff applied to the conciliator appointed under the Dekkhan Agriculturists' Relief Act (XVII of 1879) to settle the dispute with regard to the land. The conciliator gave his certificate on the 31st May, 1889, and the plaintiff filed this suit on the 5th June, 1889, on which day the Court opened after the summer vacation.

The defendant alleged that the land was in possession of one Gangai, the widow of Ganu. On the 29th August, 1889, Gangai and her minor son were made defendants Nos. 2 and 3. They alleged that they were in exclusive possession of the land, and pleaded that as against them the suit was barred by limitation.

At the hearing the plaintiff admitted that Vithu and Ganu and their widows had held joint possession of the land since before the auction-sale in 1876.

The lower Court held that "excluding that conciliation period" the suit was not barred as against the first defendant, but that [506] whether the conciliation period was excluded or not, it was barred by limitation as against defendants Nos. 2 and 3. The Court, however, dismissed the suit as against all the defendants with the following observations :—" The defendants' case is that their possession was exclusive of the title of Vithu. If the defendants' story is believed, it is fatal to the plaintiff's claim. If the plaintiff's story is credited, the same is none the less fatal, since the possession of Vithu and Ganu or of their wives has been joint, and the claim was barred long before the heirs of Ganu were made parties to this suit ; and so it must be held to be barred against the defendant No. 1 too."

The plaintiff preferred a second appeal.

Ghanasham N. Nadkarni for the appellant (plaintiff) :—We purchased Vithu's interest in the land, and claim it in this suit which the Judge held is not barred. If that interest is a joint interest, we are entitled to it. Our claim was, no doubt, to eject the heirs of both Vithu and Ganu as we believed that the property belonged to Vithu alone. But if the Court found that Vithu's representative was in joint possession with other persons, we should have been given the relief to which we are entitled according to law. It was wrong to dismiss the suit *in toto*.

There was no appearance for the respondents (defendants).

JUDGMENT.

SARGENT, C. J.—As the Court has found that the plaintiff's title is proved as against defendant No. 1, and that his suit is not barred against him, the circumstance that his suit is barred as against Ganu's heirs affords no reason why he should not be put into joint possession of the land with them if Vithu had joint possession with Ganu and his widow Gangai after the sale in 1876. We must, therefore, send back the case for a finding on the following issue :—

Had Ganu and his widow Gangai exclusive possession of the properties in suit since the date of the sale in 1876 ?

The finding to be sent to this Court in two months.

Issue sent down.

18 B. 507.

1893
AUG. 22.

APPELLATE CIVIL.

18 B. 507

[507] APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice and Mr. Justice Telang.

VITHALBOWA (*Original Plaintiff*), *Appellant v.* NARAYAN DAJI THITE (*Original Defendant*), *Respondent*; AND NARAYAN DAJI THITE (*Original Defendant*), *Appellant v.* VITHALBOWA (*Original Plaintiff*), *Respondent.** [22nd August, 1893.]

Math—*Manager—Land appertaining to* math—*Sale of* "miras malki" *(ownership of* Miras *tenure)—Miras tenure—Mirasdar on inam estates, position of—Adverse possession—Limitation Act (XV of* 1877), *s.* 28—*Right to recover rent—Construction.*

In 1860 Krishnaji, the manager of a *math*, sold to Baxarbhai the "*miras malki*" (ownership of *miras* tenure) of certain lands appertaining to the *math*, subject to the payment of assessment. Krishnaji died in the same year and was succeeded by Ramkrishna as manager. In 1864 Ramkrishna sued Baxarbhai to set aside the sale. The suit was dismissed in 1865 and Baxarbhai's *miras* right was confirmed. In 1871 one Gopal obtained a decree declaring him to be the legal manager of the *math* and removing Ramkrishna, who was held to have had no title to the office.

In 1887 the plaintiff, who succeeded Gopal in the management of the *math*, brought the present suit against the defendant who was the vendee of Baxarbhai, to recover possession of the lands or to recover assessment for three years previous to the suit. The defendant pleaded that the suit was barred by limitation.

The plaintiff contended that as there was no lawful manager between 1860 and 1875 that period ought to be omitted in computing the period of limitation, and that as under the deed of sale to Baxarbhai the vendee became a tenant, the possession of the vendee and of the defendant could not be adverse.

Held, that if defendant's possession was adverse to the ownership of the *math* during twelve years after Krishnaji's death, the operation of the law of limitation would not be affected by the fact that there was no legal manager during that time.

Held, further, that in the Bombay Presidency the *mirasdar* on inam estates is only "a tenant at quit-rent or at a reasonable rent not subject to ejectment so long as he pays it;" and as there was nothing in the sale-deed passed by Krishnaji to Baxarbhai which required a different construction to be put on the *miras* tenure created by it, Baxarbhai's possession under it could not be adverse to the *math* until there was an assertion by the grantee of his claim to be a permanent tenant, up to which time he would, in the eye of the law, be regarded as a tenant-at-will. But the suit brought by Ramkrishna in 1864 showed that Baxarbhai was then asserting his *mirasi* right, and as more than twelve years had elapsed between that date and the bringing of the present suit, the plaintiff's right as representing the *math* to recover immediate possession was barred.

Held, further, that the plaintiff's right to recover three years' arrears of rent as reserved by the *mirasi* grant was not affected, as the effect of s. 28 of the **[508]** Limitation Act (Act XV of 1877) was to extinguish the plaintiff's right as claimed by him to treat the grant as null and void.

[F., 1 Bom. L.R. 373 (374, 380); **R.**, 27 B. 515 (538)=5 Bom. L.R. 274; 5 Bom. L.R. 186 (194); 7 Ind. Cas. 202=8 M. L. T. 258 (263).**]**

THESE were cross second appeals from the decision of Rao Bahadur G. A. Mankar, additional First Class Subordinate Judge of Sholapur with appellate powers.

The plaintiff Vithalbowa *alias* Govindbowa Guru Gopalbowa Gosavi, manager of a *math* at Pandharpur in the Sholapur District, sued to recover possession of certain lands under the following circumstances:—

The lands were an *inam* property granted to the managers of the *math* of Shri Jairam Swami at Vadgaon in the Satara District. The

* Cross Second Appeals, Nos. 670 and 683 of 1891.

1893
AUG. 22.
—
APPEL-
LATE
CIVIL.
—
18 B. 507.

grant was made by Bahirji Raje bin Tukoji Raje Pandhare under a *sanad* dated the 2nd August, 1836, to Muneshvarbowa, who was then the chief manager of the *math*. The *sanad*, which was confirmed by the Inam Commission in 1854, mentioned that the lands in suit were granted as inam to the then manager of the *math* Muneshwarbowa, and that he was to apply the income thereof towards the expenses of the *math* at Pandharpur, which was a branch of the principal *math* of the Shri Jairam Swami at Vadgaon.

In the year 1860 Krishnaji, who was then the manager of the *math*, sold the "*miras malki*" (ownership of *miras* tenure) of the lands to one Baxarbhai. The following is an extract from the deed of sale:—

"To Rajashri Baxar valad Masubhai Musalman Sepoy Gosavi. Deed of sale passed in writing by Krishnaji Gosavi (of) sansthan Vadgaon is as follows:—There is at mauze Shirdhan, taluka Pandharpur, (some) *inam* land belonging to the sansthan. You having agreed to take (*i.e.* purchase) the *mirasi* ownership thereof, Rs. 250 (two hundred and fifty) of the Company's currency are received from you and the abovementioned *jirayit* land, survey No. 42, measuring bighas 155·1 and of the assessed value of Rs 120 of the Chandvad currency, of which Rs. 40 (being deducted) as *tota* (loss, discount) there remain Rs. 80, is sold to you as *miras* for this (*i.e.* Rs. 80), and for the above amount together with the trees in the land and the broken well (therein). The four boundaries of the same land are as follows:— * * * The land as comprised within the four boundaries is given (sold to you as) *miras*. The above *chavdi* amount is payable to the sansthan. But you being employed for the purpose of collecting the sansthan income on the aforesaid taluka, you are to give credit for (the above amount of the *chavdi*) as your remuneration and *potgi* (subsistence money). If there be any obstruction to (your) service, you should then deduct and take Rs. 40 **[509]** out of the assessment and pay the remaining Rs. 40 to the sansthan. This deed of sale is duly given in writing. Lunar date the 1st of Bhadrapad Sudh, Shak 1782 (17th August, 1860). (Here follows an explanation of an erasure.) The date aforesaid. You should carry on the management of the above-mentioned land from generation to generation."

Krishnaji died in 1860 subsequently to the sale, and Ramkrishna succeeded him as manager of the *math*, having obtained a certificate of heirship. In 1864 Ramkrishna brought a suit against Baxarbhai to set aside the sale of the "*miras malki*," but the suit was dismissed and Baxarbhai's rights were confirmed on the 18th January, 1865.

One Gopal subsequently claimed to be the manager of the *math* in preference to Ramkrishna. He sued to have him removed from the management, and obtained a decree in the year 1871 in the Court of the Principal Sadar Amin at Satara and this decree was confirmed, in appeal, by the High Court in 1875.

In 1887 the plaintiff, who succeeded Gopal as manager, sued the defendant Narayan Daji Thite, the vendee of Baxarbhai, to set aside the sale by Krishnaji and to recover possession of the lands, or, in the alternative, to recover Rs. 223-11 9, being the amount of assessment due by the defendant for three years previous to the suit, deducting the amount of the quit-rent, namely Rs. 134-3 3, paid by the defendant direct to Government.

The defendant pleaded that he had purchased the land from Baxarbhai, who had purchased it from the owner Krishnaji, and that the plaintiff's claim was barred by limitation.

The Subordinate Judge held that the claim for possession was barred, as the sale to Baxarbhai had not been set aside within twelve years either from its date or from the date of Krishnaji's death, but that the claim to recover assessment of three years before suit was within time. He awarded Rs. 223-11-9 to the plaintiff as the amount of the assessment.

Both parties appealed, but the decree was confirmed.

Both parties then filed second appeals to the High Court—the defendant appealing (appeal No. 683 of 1891) against the decree in respect of the assessment awarded, and the plaintiff [510] (appeal No. 670 of 1891) against the decree so far as it refused possession.

Macpherson (with *Ghanasham N. Nadkarni*) for the appellant (defendant) in appeal No. 683 of 1891 and the respondent in appeal No. 670 of 1891 :—The whole claim of the plaintiff was barred and not merely his claim for possession. The sale to Baxarbhai was a valid one and we claim under Baxarbhai. Krishnaji was *de facto* and *de jure* manager of the *math* and could sell. But even if he had no authority to sell, nevertheless we have been in possession for more than twelve years, and the plaintiff's claim is now barred—*Bejoy Chunder Banerjee* v. *Kally Prosonno Mookerjee* (1). The possession of the vendee was adverse when he entered. At all events it became adverse from the time Ramkrishna sued Baxarbhai in 1864 to set aside the sale, because Baxarbhai then openly asserted his title to the land. The claim to account is also barred.

Inverarity (with *Mahadev B. Choubal*) for the respondent (plaintiff) in appeal No. 683 of 1891 and the appellant in appeal No. 670 of 1891 :—Under the deed of sale the defendant is a tenant from year to year, and his possession cannot, therefore, be adverse to the plaintiff. A tenant cannot say he holds adversely to his landlord, and is not liable to pay rent. In calculating the period of limitation the time during which Ramkrishna was acting as manager (*i.e.* between 1860 and 1875) should be omitted, as he was judicially held not to have been the proper and legal successor of Krishnaji, and was removed.

Macpherson in reply :—If the deed of sale be construed to mean that we are tenants, we submit that the document confers upon us a *mirasi* tenure, and, therefore, we are not liable to be evicted so long as we pay rent. West and Buhler, p. 177 ; *Prataprav Gujar* v. *Bayaji* (2).

JUDGMENT.

SARGENT, C.J. :—These appeals arise out of a suit by the plaintiff as manager of the *math* at Pandharpur to set aside the sale in 1860 (Ex. 17) of the "*miras malki*" by Krishnaji, a previous manager of the *math*, of certain lands in favour of one Baxarbhai, subject to the payment of assessment as therein provided. [511] The Court below has found that the lands were not the private *inam* of Krishnaji, but the property of the *math*, and that the alienation by Krishnaji as manager was invalid beyond his life. This was not disputed before us on appeal. The lower Court of appeal has, however, held that the plaintiff's claim to recover the lands is barred by the Statute of Limitations, inasmuch as twelve years had elapsed both since the alienation and the death of Krishnaji in 1860, but that the plaintiff had not lost his right to recover full assessment on the land.

(1) 4 C. 327.

(2) 3 B. 141 (145, Note).

1893
AUG. 22.
APPEL-
LATE
CIVIL.
18 B. 507.

This conclusion is resisted by appeal No. 670 on two grounds: first, that there was no lawful manager of the *math* between 1860 and 1875, Ramkrishnaji, who had succeeded Krishnaji, having been declared by the Civil Court to have had no title to the management; and, second, that Ex. 17 created the relationship of landlord and tenant, and that, therefore, there could be no adverse possession during 1860 and 1875 such as could run against the *math* according to the ruling in *Radhabai* v. *Anantrav* (1).

If the defendant's possession was adverse to the ownership of the *math* during the twelve years after Krishnaji's death, the operation of the Act cannot be affected by the circumstance that there was no legal manager of the *math* during that period. The important question is, what was the character of defendant's possession after Krishnaji's death?

It was contended by Mr. Macpherson, for the defendant, that the grant of a "*mirasi malki*," does not create the relationship of landlord and tenant between the grantor and grantee; and he relied on the judgment of Mr. Justice Markby in *Bejoy Chunder Banerjee* v. *Kally Prosonno Mookerjee* (2). In that case the Court treated a *mirasi* grant in Bengal as creating an estate in fee-simple and passing the ownership in the property, apparently on the ground that there was no reversion reserved to the grantor. It is not necessary for us to say whether that case was properly decided, as in this Presidency we must regard it as well established that the *mirasdar* on *inam* estates is only "a tenant at a quit-rent or at a reasonable rent not subject to [512] ejectment so long as he pays it"—see West and Buhler, p. 177, and *Prataprav* v. *Bayaji* (3), and the note at p. 145; and there is nothing in the language of Ex. 17 which requires a different construction to be put on the *mirasi* tenure created by it. That being the true position of Baxarbhai by virtue of the grant, his mere possession under it after Krishnaji's death could not be adverse to the *math* until there was an active assertion, by the grantee, of his claim to be a perpetual tenant, up to which time he would, in the eye of the law, be regarded as a tenant, at-will. However, the suit brought by Ramkrishna Bowa in 1864 shows that Baxarbhai was then asserting his *mirasi* right, and as more than twelve years elapsed between that date and the bringing of the present suit, the plaintiff's right as representing the *math* to recover immediate possession is barred, and we must, therefore, dismiss appeal No. 670 of 1891, with costs.

This, however, does not affect the plaintiff's right to recover the three years' arrears of rent as reserved by the *mirasi* grant, as the effect of s. 28 of the Statute of Limitations would only be to extinguish the plaintiff's right as claimed by him to treat the grant as null and void.

With respect to the amount of the annual rent payable by defendant, it was stated by plaintiff that the service of collecting the assessment on the *inam* estate has not been performed by Baxarbhai or his alienee, the defendant, during the last three years as contemplated by the grant. It was contended by Mr. Ghanasham that even if not so collected, and whatever may have been the reason for it, and indeed even if it were due to the defendant's own default, the defendant has to pay Rs. 40 rent, and no more. We entertain no doubt that, upon the proper construction of the grant, Baxarbhai or his alienee, the defendant, must pay the full rent of Rs. 80 if the rent was not so collected unless they were prevented from collecting it by reason of some obstruction caused by the manager

(1) 9 B. 198. (2) 4 C. 327. (3) 3 B. 141 (143).

of the *math*, and we must, therefore, send down the following issues for determination :—

1. Was the assessment on the *inam* estate collected by Baxarbhai or the defendant during the three years preceding the suit ?

[513] 2. If not so collected, was it due to the default of Baxarbhai or his alienee, the defendant, or on the contrary to "obstruction" caused by the manager of the *math* that the assessment on the *inam* estate was not collected by Baxarbhai or the defendant during the three years preceding the suit ?

The findings to be sent to this Court within two months, and the parties to be allowed to give fresh evidence.

Issues sent down.

1893
AUG. 22.
APPELLATE CIVIL.
18 B. 507.

---

18 B. 513.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Bayley.

HANMANTA KOLAJI (*Original Plaintiff*), *Appellant v.* MAHADEV KONDAJI (*Original Defendant*), *Respondent.** [29th August, 1893.]

Limitation—Limitation Act (XV of 1877), sch. II, arts. 127, 144—Suit for possession of land alleging a previous partition—Partition—Co-sharers—Adverse possession—Burden of proof—Evidence.

The defendant had purchased the land in question at a sale in execution of a decree obtained by him against cousins of the plaintiff. The plaintiff claimed to recover the land, alleging that it was his share of ancestral property which had been allotted to him on partition four or five years before suit, and of which he had actually been in separate possession. The lower Court upon these allegations rejected the plaintiff's claim, holding that the suit was not one for partition and did not fall within art. 127 of the Limitation Act (XV of 1877), but that art. 144 applied, and that the plaintiff had failed to show that the defendant's adverse possession had begun within twelve years preceding the suit. On appeal to the High Court,

Held (reversing the decree and sending back the case) that under art. 144 it was for the defendant to prove adverse possession for twelve years before suit.

[R., L.B.R (1893—1900) 360 (361).]

THIS was a second appeal from the decision of S. Hammick, District Judge of Ahmednagar.

Suit to recover certain land.

The defendant was in possession of the land in question as purchaser at a sale held in execution of a decree obtained by him against one Rama and his brothers. The plaintiff was Rama's cousin and he alleged that the land was ancestral, and that it had been partitioned equally between himself and Rama's branch of [514] the family four or five years before suit. He claimed to recover his half share.

The defendant (*inter alia*) pleaded limitation.

The lower Court rejected the plaintiff's claim as barred, being of opinion that as the plaintiff alleged that he had been in separate possession of his share after the division, the suit was not one for partition under art. 127 of the Limitation Act, but that the burden of proof was on the plaintiff to show that the defendant's adverse possession had begun

* Second Appeal, No. 186 of 1892.

1893
AUG. 29.

APPELLATE CIVIL.

18 B. 513.

within twelve years before suit. He dismissed the suit. The following is an extract from his judgment:—

"The plaintiff-appellant's pleader has contended that art. 127 of the Limitation Act is the article which is applicable to the appellant's claim. Article 127 prescribes the period of limitation for a suit brought by a person excluded from joint family property to enforce a right to share therein. The plaint in this suit, however, does not exhibit a claim of this nature, and the plaintiff's evidence asserts repeatedly that the field in question was divided by the plaintiff and Rama four or five years before the suit, and that the plaintiff entered into separate possession and separately cultivated the moiety which fell to his share. The suit, therefore, is not a suit to enforce a right to share in joint family property, and art. 127 of the Limitation Act does not apply to it.

"The plaintiff was, therefore, bound to show under art. 144 of the Limitation Act that the adverse possession of the defendant had begun within twelve years of the institution of the suit. I have gone through the evidence, and find that he has failed to discharge this obligation. I concur with the Subordinate Judge in not being satisfied that the plaintiff was ever in possession of the field before suit. His claim is, therefore, time-barred."

The plaintiff appealed to the High Court.

Goverdhanlal M. Tripathi, for appellant:—The suit is really one for partition and falls within art. 127. It is a suit to carry out a partition arranged and agreed to four or five years ago. In no case, moreover, could the possession of the defendant or his predecessor have been adverse to plaintiff further back than the [515] partition, as a co-sharer's possession is not adverse. The burden of proof lay on the defendant—*Faki Abdulla* v. *Babaji Gungaji* (1).

Ghanasham N. Nadkarni, for the respondent (defendant).

JUDGMENT.

SARGENT, C. J.—The District Judge has not recorded any finding as to the plaintiff's title to the land, but has proceeded at once to dispose of the plea of the Limitation Act, on the assumption that the plaintiff's title to the land was, as stated by him in his plaint, *viz.*, that the land being ancestral property had been divided between him and Rama four or five years before the suit: that this was, therefore, not a suit for partition, and that art. 144 and not art. 127 applied, and that the plaintiff must fail, because he had not proved that defendant's possession had become adverse within the twelve years preceding the suit. It was not, however, for the plaintiff to prove this under art. 144, but for the defendant to prove his adverse possession for twelve years before suit; see *Faki Abdulla* v. *Babaji Gungaji* (1). Moreover, if the plaintiff's case is to be accepted, the possession of the family property by Rama and Jaba previously to the division cannot be taken as having been adverse to the plaintiff, and it is clear, therefore, that defendant's possession cannot be treated as adverse further back at any rate than the date of the division.

Under these circumstances, we must reverse the decree of the Court below and send back the case for a fresh decision after recording a finding on the first issue raised by the Subordinate Judge. Costs to abide the result.

Decree reversed and case sent back.

(1) 14 B. 458.

18 B. 516.

1893
APRIL 28.

APPELLATE CIVIL.

18 B. 516.

[516] APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Bayley.

GOVIND SITARAM AND OTHERS (*Original Defendants Nos.* 4, 5 *and* 6) *Appellants v.* BAPUJI MAHADEO AND ANOTHER (*Original Plaintiffs*), *Respondents.** [28th April, 1893.]

Kulkarni vatan—Suit for partition and declaration to a specific share in the vatan and to officiate—Power of Civil Courts to make the declaration—Vatandars Act (Bombay Act III of 1874), *s.* 67†—*Money grant—Vatan consisting exclusively of cash allowance—Collector's certificate—Pensions Act (XXIII of* 1871), *s.* 4.

In a suit for partition of a kulkarni vatan, for a declaration that the plaintiffs were entitled to officiate as kulkarnis and for a third share in the moiety of the vatan belonging to the parties, it was contended that under the Vatandars Act (Bombay Act III of 1874) the suit was not maintainable in the Civil Court.

Held, that the Vatandars Act does not preclude the Civil Court from declaring the plaintiffs' right to the status of vatandars when the share defined is in respect of a share in the vatan belonging to the branch of the parties, and the declaration does not interfere with the rights of the Collector in any way as given by the Act. In preparing the register the Collector's duty as determined by s. 67 of the Act is confined to specifying the names of the heads of families and the proportionate part possessed by each head, and is in no way concerned with the rights of the members of a particular branch *inter se*.

[517] A suit for a declaration that the plaintiffs are vatandars of a share of a moiety of a kulkarni vatan consisting exclusively of a cash allowance from Government, is not a suit relating to a "money grant" within the contemplation of s. 4 of the Pensions Act (XXIII of 1871).

[**R.**, 20 B 202 (206) ; 29 B. 480 (504) = 7 Bom. L. R. 497 ; 11 Bom. L. R. 1339 (1343) (N) ; **Expl.**, 36 B. 420 = 14 Bom. L. R. 395 = 15 Ind. Cas. 840; **D.**, 25 B. 186 (188) ; 37 B. 91 = 14 Bom. L. R. 938 = 17 Ind. Cas. 661.]

SECOND APPEAL from the decision of L. G. Fernandez, First Class Subordinate Judge with Appellate powers at Nasik.

This action was instituted by plaintiffs Bapuji Mahadeo Thombare and Vinayak Mahadeo Thombare for a partition of their one-third share in the properties in suit, and for a declaration that they had a right to a third share in the moiety of the kulkarni vatan belonging to the parties and to officiate as kulkarni in alternate turns with the defendants whenever the turn of the *taksim* (share) of their family may come.

---

* Second Appeal, No. 206 of 1892.

† Vatandars Act (Bombay Act III of 1874), s. 67 :—

67. In the register of lands and allowances in consideration whereof liability to erve still existe, the Collector shall specify—

(*a*) the area of the lands, the names of the occupants, the survey number and assessment, the quit rent, if any, leviable, and the net revenue alienated by Government, the amount and nature of the cash or other allowances, the source from which they are payable, and the land and allowances assigned for the remuneration of officiators ;

(*b*) the names of the heads of families and of the representative vatandars;

(*c*) whether the service is performed by one representative vatandar or otherwise ; if, by several in successive periods, the order in which they are to succeed each other ;

(*d*) the proportional share of the vatan possessed by each head of family which may be expressed in annas or fractions of a rupee ;

(*e*) the number of officiators required to perform the duties ;

(*f*) the nature of the settlement of inferior village-vatans referred to in Part X of this Act ;

(*g*) such other particulars as Government may (from time to time) order to be recorded.

1893

APRIL 28.

APPELLATE CIVIL.

18 B. 516.

Defendant No. 1. Ravji Vitthal admitted the claim.

Defendants Nos. 2, 4, 5 and 6 contended (*inter alia*) that under the Vatan Act (Bombay Act III of 1874) the plaintiff's claim with respect to the vatan was not maintainable in a Civil Court.

Defendant No. 3 did not appear.

The Subordinate Judge allowed the claim in so far as it related to the properties other than vatan, with respect to which he held that the Civil Court had no jurisdiction to entertain the suit under the Vatan Act.

On appeal by the plaintiff, the appellate Court varied the decree by declaring that the plaintiff had a third share in the moiety of the vatan in suit.

Defendants Nos. 4, 5 and 6 preferred a second appeal.

Mahadeo Chimnaji Apte, for the appellants (original defendants Nos. 4, 5 and 6).—Under the Vatan Act, a Civil Court has no jurisdiction to make a declaration that a particular individual has a specified share in a vatan or that he has a right to serve as a vatandar by turns—*Parsha* v. *Lagmya Shan* (1). Under the Vatan Act the share in the emoluments of a vatan is to be fixed by the Collector. A Civil Court can make a declaration that a particular individual is a vatandar, but it cannot fix his share in the emoluments of the vatan. We do not say that the plaintiffs are not vatandars. We admit that they are members of the vatandar [518] family. In this suit we only dispute their right to demand a specific share on the ground that a Civil Court has no jurisdiction to entertain such a suit. If Civil Courts were to determine the rights of the vatandars among themselves, then there would be nothing left for the Collectors to decide—*Khando Narayan* v. *Apaji Sadashiv* (2); *Chinto Abaji* v. *Lkshmibai* (3). We also contend that the suit is barred under the Pensions Act (XXIII of 1871), as the kulkarni vatan in dispute consists of cash allowance to be paid by Government to the kulkarni.

Daji Abaji Khare, for the respondents (original plaintiffs).— The defendants denied our right as a vatandar. A Civil Court has jurisdiction to make a declaration that a person is a vatandar co-sharer—*Ramchandra Dabholkar* v. *Anant Sat Shenvi* (4). If a Civil Court has jurisdiction to make such a declaration, then there is nothing either in the Vatan Act, or in the reported cases, to prevent a Civil Court from defining the share of a vatandar. Under s. 64 of the Vatan Act the Collector is authorized to do certain things with respect to vatandars; but s. 63 of the Act lays down that the provisions of s. 64 are applicable to hereditary village offices of lower degree than that of patel or kulkarni. Section 64 is, therefore, not applicable to the present case. The vatandars concerned in *Parsha* v. *Lagmya Shan* (1) were inferior vatandars.

The Pensions Act cannot bar the present suit, because we do not seek to recover our share in the cash allowance by virtue of the decree. When the allowance has reference to the officiator's remuneration, it is then that the Pensions Act applies, and not otherwise. We do not seek for a declaration to be an officiator, but only to recover our share in the allowance.

JUDGMENT.

SARGENT, C.J.—The District Court has declared the plaintiffs to be vatandars of one-third share in the moiety of the kulkarni vatan.

---

(1) 13 B. 83. (2) 2 B. 370. (3) 2 B. 375. (4) 8 B. 25.

1893
APRIL 28.
APPELLATE CIVIL.
18 B. 516.

It has been argued by Mr. Apte, for the appellants, that the Vatandars Act precludes the Civil Court from making such a declaration.

[519] It has been long settled that the Civil Court has still the power to declare the plaintiffs' right to the status of vatandars—*Ramchandra Dabholkar* v. *Anant Sat Shenvi* (1). It was said, however, that the decree of the Court in this case does more than merely declare the plaintiff's status as vatandars, as it defines the amount of the share in the vatan. That is true, but the share so defined is in respect of the share in the vatan belonging to their own particular branch, and the declaration does not interfere with the rights of the Collector in any way as given him by the Act. In preparing the register, his duty as determined by s. 67 is confined to specifying the names of the heads of families and the proportionate part possessed by each head, and is in no way concerned with the rights of the members of a particular branch *inter se*. We are of opinion, therefore, that there is nothing in the Vatandars Act which takes away the power of the Civil Court to make such a declaration as the lower appeal Court has made in this case.

It was, however, said that as the vatan consisted exclusively of a cash allowance by Government, this was a suit relating to a "money grant" within the contemplation of s. 4 of the Pensions Act, XXIII of 1871, and one which the Civil Court cannot entertain. This objection, it is to be remarked, was unsuccessfully urged in *Ramachandra Dabholkar* v. *Anant Sat Shenvi* (1) under precisely similar circumstances. As the Vatandars Act itself precludes the suit being entertained except for the purpose of declaring the plaintiffs' status as vatandars, it cannot, we think, in its restricted form be regarded as a suit relating to a grant of money within the meaning of the above section. We must, therefore, confirm the decree with costs on appellants.

Decree confirmed.

---

18 B. 520.

[520] APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice and Mr. Justice Bayley.

SOIRU PADMANABH RANGAPPA (*Original Defendant No.* 2), *Appellant v.* NARAYANRAO BIN VITHALRAO AND ANOTHER (*Original Plaintiff and Defendant No.* 1), *Respondent.** [31st August, 1893.]

Practice--Procedure—Appeal—Appeal between co-defendants—Hindu law—Joint family—Manager—Loan to Manager—Family purpose—Presumption—Evidence—Burden of proof.

Where a Subordinate Judge dealt with a case at the hearing as raising not only a question between the plaintiff and defendants, but also as between the defendants,

Held, that one of the defendants could appeal against the decree as between himself and the other defendant.

Gudadhar Banerjee v. *Mussamat Mun Mohunee Dossea* (2) and *Atma Ram* v. *Balkishen* (3) distinguished.

There is no presumption that a loan contracted by the manager of a joint Hindu family has been contracted for a family purpose.

[**Appl.**, 7 Bom. L.R. 172 (173); **R.**, 21 B. 808 (815); 27 B. 157=4 Bom. L.R. 968 (970); 25 C. 565 (569); 31 C. 643 (644)=8 C.W.N. 495; 28 M. 229 (235)=15 M.L.J. 212; 16 C.P.L.R. 42 (44); 12 O.C. 260; **Cons.**, 3 N.L.R. 85 (87); **D.**, 34 A. 135=9 A.L.J. 54=13 Ind. Cas. 34.]

---

* Second Appeal, No. 261 of 1892.

(1) 8 B. 25. (2) 7 W.R. 366. (3) 5 A. 266.

1893
AUG. 31.

APPELLATE CIVIL.

18 B. 520.

SECOND APPEAL from the decision of Arthur H. Unwin, District Judge of Kanara.

Suit against two brothers (defendants Nos. 1 and 2) to recover money due on a promissory note passed by the elder of them (defendant No. 1) to the plaintiff for money borrowed by him as manager of his family. The plaintiff alleged that the two defendants were joint; loan was obtained by defendant No. 1 for trading purposes and for the family.

The first defendant did not appear, and the second defendant pleaded that there was no necessity for the loan, and alleged fraud and collusion between the plaintiff and the first defendant.

The Subordinate Judge passed a decree against the first defendant, but dismissed the suit as against defendant No. 2, and he ordered that his costs should be paid by defendant No. 1.

The first defendant appealed, and on appeal the District Judge raised an issue as to whether the debt contracted by defendant No. 1 was for other than family purposes. He required the second defendant to prove this issue. and found that he had failed to do [521] so. He varied the lower Court's decree by awarding plaintiff's claim against both defendants, one-half to be paid by each, and ordering the second defendant to pay all costs throughout.

The second defendant filed a second appeal.

N. G. Chandavarkar for the appellant (defendant No. 2).—In this suit the plaintiff claimed against us. The Subordinate Judge as against us dismissed his suit, but passed a decree against the first defendant. The plaintiff did not appeal as against us. It was the first defendant who appealed. His appeal is against the plaintiff, and resists plaintiff's claim against him. The first defendant could not appeal against the second defendant, and on the appeal brought by the first defendant against the plaintiff the District Judge had no power to vary the decree and make an order against the second defendant—*Greesh Chunder Singh* v. *Gour Mohun* (1); *Gudadhar* v. *Mun Mohuuee Dossea* (2) and *Atma Ram* v. *Balkishen*(3). The District Judge was, therefore, wrong in requiring the second defendant to prove the issue raised by him. The plaintiff alleged the debt to be a family debt, and the burden of proof lay on him.

Shamrao Vithal, for respondent No. 2 (the first defendant).—The defendants set up different cases in the lower Court, and the Judge found against us, and directed us to pay the costs of defendant No. 2. Under these circumstances we had a right to appeal and join defendant No. 2 as a respondent to the appeal. In filing the appeal our object was to get the finding of the Subordinate Judge, namely, that the debt was not a family debt, set aside. The cases relied on are, therefore, distinguishable.

No doubt, proper issues have not been framed; still the judgment clearly shows that the Judge has considered the whole of the evidence adduced by the parties, and that after a careful consideration he has come to the conclusion that defendant No. 2 has failed to prove his case.

D. K. Gandhi, for respondent No. 1 (plaintiff).

JUDGMENT.

SARGENT, C. J.—A preliminary objection has been taken that defendant No. 1 could not appeal as between himself and defendant No. 2. The Subordinate Judge's judgment, however, shows that he dealt with the

(1) 7 W.R. 49. (2) 7 W.R. 366. (3) 5 A. 266.

case at the hearing as if it raised not only [522] a question between the plaintiff and defendants, but also one between the defendants, as his decree directs defendant No. 1 to pay defendant No. 2's costs. This distinguishes the case from cases of *Gudadhar Banerjee* v. *Mussamat Mun Mohunee Dossea* (1) and *Atma Ram* v. *Balkishen* (2).

But we think that we cannot accept the finding of the lower appeal Court on the issue whether the debt was for a family purpose. It has raised the issue in a form, and dealt with the evidence in a manner, which clearly implies that it considered the *onus* lay on the second defendant to show that the loan was not for a family purpose. This is a mistake, as there is no presumption, as the District Judge would appear to think, that a loan contracted by a manager of a Hindu family is for a family purpose. We must, therefore, without intending to express any opinion on the merits, reverse the decree and send back the case for a fresh decision by the lower appeal Court, having regard to the above remarks. Costs to abide the result.

Decree reversed and case sent back.

---

18 B. 522.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Bayley.

GOVIND BALVANT SHIVNEKAR (*Original Applicant*), *Applicant v.* LAKSHMAN BIN NANA TELI (*Original Opponent*), *Opponent.**

[5th September, 1893.]

Civil Procedure Code (Act XIV of 1882), s. 335—Principal and agent—Joint managers—Mortgage by one of such managers—Sale by mortgagee in execution of decree on mortgage and dispossession of the other manager—Application for restoration of possession by other joint manager.

Kushambhat, the owner of certain property, gave the management of it to his three nephews, Govind, Gajanan and Narayan. Gajanan mortgaged the property to Kamalchand, who sued on the mortgage and got a decree. In execution of the decree the property was sold and purchased by Lakshman who was put in possession by the Court. Govind, one of the managers, then applied for possession under s. 335 of the Civil Procedure Code (Act XIV of 1882), alleging that he had been wrongfully dispossessed.

Held, that the mortgagee Kamalchand got no title to the property by his mortgage from Gajanan against the real owner Kushambhat; and Govind, who was in actual possession as his manager (whether or not there were others equally entitled to share in the management), was entitled to prevent the purchaser [523] Lakshman taking possession, and having been dispossessed had a claim to be restored to possession under s. 335 of the Civil Procedure Code (Act XIV of 1882).

APPLICATION under the extraordinary jurisdiction (s. 622 of the Civil Procedure Code, Act XIV of 1882) against an order passed by Rao Saheb N. V. Atre, Subordinate Judge of Baramati.

This was an application under s. 335 of the Civil Procedure Code (Act XIV of 1882) to be restored to the possession of certain land.

The land belonged to one Kushambhat, who gave the management of it to his three nephews, Govind, Gajanan and Narayan. Gajanan alone,

---

* Application No. 29 of 1893 under extraordinary jurisdiction.

(1) 7 W.R. 366. (2) 5 A. 266.

1893
SEP. 5.
APPELLATE CIVIL.
18 B. 522.

however, mortgaged it to one Kamalchand Gujar, who obtained a decree on the mortgage against him, and in execution the land was sold and was purchased by Lakshman bin Nana Teli, the opponent, who obtained possession through the Court. The applicant Govind had originally been a party to the suit brought by the mortgagee Kamalchand, but his name was afterwards struck off. After the purchaser Lakshman was put in possession, Govind applied to the Subordinate Judge under s. 335 of the Civil Procedure Code (Act XIV of 1882), to be restored to possession, alleging that he had been in possession and had been wrongfully dispossessed. Lakshman answered that it was Gajanan, the judgment-debtor, and not Govind who had been in possession, and that Govind was not entitled to recover the land. The Subordinate Judge rejected Govind's application on the following grounds :—

"It seems that the petitioner was joined as one of the defendants in the suit brought against Gajanan on the mortgage-bond. The summons was served upon him. He was thus aware of the suit brought against him, and yet he has not taken any step to assert that the land did not belong to Gajanan. His name was struck off, and a consent-decree was passed against Gajanan alone. In execution of the decree the land was sold by the Collector. The petitioner did not urge his title to the land, as there is nothing to show that he put forward any objection to the sale. Subsequently to the sale, possession was given to the purchaser, and yet the petitioner seems to have remained quiescent. This conduct of the petitioner goes strongly against him.

[524] "It is alleged that the land belongs to one Kushambhat, uncle of petitioner. Petitioner and his brothers are equally entitled to the land of their uncle, and I see no reason why petitioner should have the preference.

"If the land does not belong to petitioner, he has no leg to stand upon. It is Kushambhat who is entitled to apply or sue for recovering the land. Kushambhat gave its management to his nephews, as would appear from the mortgage and rent-notes, and not to Govindbhat alone, as alleged by him. Thus I am of opinion that the three brothers have equal rights, and so one cannot claim to hold it exclusively. Kushambhat's rights, whatsoever they may be, would not be prejudiced by these proceedings.

"I, therefore, think it but just to hold that petitioner is not entitled to present possession."

Against this order Govind applied under the extraordinary jurisdiction of the High Court and obtained a *rule nisi*, calling upon the opponent Lakshman to show cause why the order of refusal should not be set aside.

Dhondu Moroba Sanzgiri appeared for the opponent to show cause.

Daji Abaji Khare, *contra*, in support of the rule. He relied upon *Balaji Anant* v. *Ganesh Janardan* (1).

JUDGMENT.

SARGENT, C. J.—The Court has found that the property belongs to Kushambhat, the applicant's uncle, and that it was given by him into the management of his three nephews, the applicant, the mortgagor Gajanan, and Narayan. The opponent, therefore, acquired no title to the property by his mortgage from Gajanan as against the real owner Kushambhat, and the applicant, who was in actual possession as his

(1) 5 B. 500.

manager (whether or no, there may be others equally entitled to share in the management), was entitled to resist the opponent's taking possession, and having been dispossessed had a claim to be restored to possession under s. 335. We must, therefore, reverse the order of the Court below and direct that applicant be put into possession. Applicant to have his costs of this application from the opponent.

Order reversed.

1893
SEP. 5.
APPELLATE CIVIL.
18 B. 522.

---

18 B. 525.

[525] APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Bayley.

GANGADHAR HARI KARKARE (*Original Defendant*), *Appellant v.* MORBHAT PUROHIT AND ANOTHER (*Original Plaintiffs*), *Respondents.**

[6th September, 1893.]

Inamdar—Inam village—Suit by an inamdar against a khot to recover balance of land revenue—Assessment—Survey made by the British Government—Collector's certificate—Change in rate of assessment—Pensions Act (XXIII of 1871), s. 4†—Jurisdiction of Civil Courts—Revenue Jurisdiction Act (Bom. Act X of 1876), s. 4, sub-cl. (b)‡—Land Revenue Code (Bom. Act V of 1879), s. 216, cls. (a), (b) and (c)§—Village partially alienated.

In a suit by an inamdar of a village against a khot to recover rent in kind (according to the market rate at the time of payment), the defendant (khot) contended (1) that he was only liable to pay cash assessment as fixed by the survey made by the British Government, which was at a lower rate than he had previously paid; (2) that the suit was barred for want of Collector's certificate under s. 4 of the Pensions Act (XXIII of 1871), and (3) that the Civil Court had **[526]** no jurisdiction to entertain the suit under the Revenue Jurisdiction Act (Bom. Act X of 1876), s. 4, sub-cl. (*b*), and the Land Revenue Code (Bom. Act V of 1879), s. 216, sub-cl. (*b*).

---

* Second Appeal No. 98 of 1892.

† Section 4 of the Pensions Act (XXIII of 1871):—

4. Except as hereinafter provided, no Civil Court shall entertain any suit relating to any pension or grant of money or land revenue conferred or made by the British or any former Government, whatever may have been the consideration for any such pension or grant, and whatever may have been the nature of the payment, claim, or right for which such pension or grant may have been substituted.

‡ Sub-cl. (*b*) of s. 4 of the Revenue Jurisdiction Act (Bom. Act X of 1876):—

4. Subject to the exceptions hereinafter appearing, no Civil Court shall exercise jurisdiction as to any of the following matters.

(*a*) * * * *

(*b*) objections—

to the amount or incidence of any assessment of land-revenue authorized by Government, or

to the mode of assessment, or to the principle on which such assessment is fixed, or

to the validity or effect of the notification of survey or settlement, or of any notification determining the period of settlement.

§ Section 216, cls. (*a*), (*b*) and (*c*) of the Land Revenue Code (Bom. Act V of 1879):—

Save as is provided in s. 111 and hereinafter in this section, the provisions of chap. VIII to X of this Act shall not be applied to any alienated village except for the purposes of fixing the boundaries of any such village, and of determining any disputes relating thereto. But the provisions of the said chapter shall be applicable to—

(*a*) all unalienated lands situated within the limits of an alienated village;

(*b*) villages of which a definite share is alienated, but of which the remaining share is unalienated;

(*c*) alienated villages the holders of which are entitled to a certain amount of the revenue, but of which the excess, if any, above such amount belongs to Government.

But it shall be lawful for the Governor in Council, on an application being made by the holder of any such village to that effect, to authorize the extension of all or any of the provisions of the said chapters to any such village.

1893
SEP. 6.

APPEL-
LATE
CIVIL.

18 B. 525.

Held, that as there was no objection by either party to the amount or incidence of assessment of land revenue fixed by Government, and the question being whether the khot was liable to pay to the inamdar *maktas* or assessment, the suit was not taken away from the cognizance of Civil Courts by the Revenue Jurisdiction Act (Bom. Act X of 1876), s. 4, sub-cl. (*b*).

Held, further, that the Court was not precluded from entertaining the suit for want of Collector's certificate under the Pensions Act (XXIII of 1871), s. 4, because the original grant passed the lands, and because it is the original grant which determines whether the Pensions Act is applicable, and not the actual right which the grantee, as a matter of fact, may have enjoyed by it.

Held, further, that the payment which the khot had been making to the inamdar before the time of the British survey was in the nature of assessment or rating by Government, but *held* also that the plaintiffs were entitled to the old assessment as claimed by them. It was plain that in cases falling within sub-cls. (*a*) and (*e*) of s. 216 of the Land Revenue Code, Bombay Act V of 1879, the inamdar's interest in the assessment would not be affected by the application of chaps. VIII to X of that Act. He would still get the old assessment in the alienated lands in the village in the former case and the same amount of assessment in the latter, and the same must have been the intention in cases contemplated by sub-cl. (*b*).

The "holder of the village" in the concluding para. of s. 216 must be read as meaning the "holder of the assessment or any part thereof of an alienated village."

[R., 29 B. 480 (490)=7 Bom. L.R. 497.]

SECOND appeal from the decision of Rao Bahadur Kashinath B. Marathe, First Class Subordinate Judge of Ratnagiri, with appellate powers.

Suit by the inamdar of a village to recover rent from the khot.

[527] This action was brought by plaintiffs Morbhat bin Narayanbhat and Moro Bapuji Ketkar to recover from the defendant a balance of rent for the inam village of Ranzankond for the years 1885-1886 to 1887-1888, with interest. It was alleged that the first plaintiff was inamdar Purohit (priest), and the second plaintiff was mortgagee in possession of the *inam*; that they as inamdars were entitled to recover rents in specie and kind from the defendant to the extent specified in the plaint; that the defendant paid these amounts until 1884-85, but subsequently would only pay cash rent at rates specified by the survey officers. The plaintiffs stated that they never consented to a survey being made, and they claimed to be entitled to the rent that had always been paid. They further stated that they had been assisted by the Revenue Court in collecting what they could, and that they brought the present suit for the balance which remained due.

The defendant Gangadhar Hari Karkare pleaded (*inter alia*) that the first plaintiff having formerly received such revenues as were fixed by the Peshwa, he was now bound to accept such revenue as was fixed by the Survey Department of the British Government which had succeeded the Peshwa's Government; that a suit would not lie without a certificate of the Collector under the Pensions Act, and that the plaintiff ought to have deducted from the amount of his claim the quit-rent which was paid to Government by the defendant.

The Subordinate Judge found that the defendant was liable to pay the rent according to the *paimash* (survey) (*i.e.*, the new rate) and not according to the *mamul* (old) rates; that Rs. 176-11-3 only were recoverable by plaintiffs from defendant, of which Rs. 160-10-8 had already been recovered by the former. He, therefore, allowed the claim to the extent of Rs. 16-0-7 with costs in proportion.

On appeal by the plaintiffs the Judge held that the inamdar plaintiff was entitled to recover rent according to *mamul* (old) and not the survey rate. He, therefore, varied the decree of the Subordinate Judge and awarded the whole of the claim, namely, Rs. 260-0-0, with costs in both Courts.

[528] The following is an extract from the Judge's judgment, which gives the history of the case and the pleadings of the parties :—

"The plaintiff was inamdar of five *konds* (tracts of land) under two *sanads* (Exs. 48 and 49) granted by the Chhatrapati of Satara. Of these, $4\frac{1}{2}$ *konds* were resumed, only a half of one being left to the grantee's descendants, the other half being commuted by the Government into a grant of a fixed quantity of paddy (5 maunds). The khot defendant is held liable, and admits his liability to pay rent for the former half *kond* on account of his having established by long arduous litigation (*vide* Ex. 37) his right to manage the *inam* lands. The defendant paid up to 1884-85 a fixed amount of rent in kind, valued according to the market rate at the time of payment under a ruling of the High Court, I.L.R., 8 Bom. 234. This rent in kind was fixed by Parasharampant's survey in 1787-88 A.D. The British Government effected a fresh survey of the *inam* lands in the year 1886-87 (*vide* Ex. 30) under the Revenue Code (Bom. Act V of 1879), s. 216, and decided that the *inam* lands were liable to a cash assessment of Rs. 58-14-5 per year (Ex. 30). The defendant contends on the strength of this survey that he is no longer liable to pay the money value of rent in kind fixed by Parasharampant's survey. The question now is, whether the defendant is bound to pay rent according to the old or new survey. The plaintiff urges he received till late the rent according to the old survey and not according to the new survey to which he never consented, inasmuch as it reduced the amount of rent. The plaintiff urges that as a gift of lands was made to his ancestor, and as his right to rent arises from the gift of lands, the Government having parted with their interest in certain lands under *sanads* they have no right to interfere with the amount of rent that he has received from long time. The plaintiff quotes I.L.R. 1 Bom. 523, in support of his contention. The defendant replies that the *sanads* in the present case have been declared inoperative as regards the enjoyment of lands mentioned in them, and the inamdar is declared entitled to a fixed assessment (*vide* Ex. 37.)."

The defendant preferred a second appeal.

Mahadeo Chimnaji Apte, for the appellant (defendant).—The defendant is the khot of the village in question. The plaintiff as inamdar seeks to recover a certain sum from the defendant as the amount of land revenue. The Civil Court had no jurisdiction to entertain the suit under s. 4, cl. (*b*) of the Revenue Jurisdiction Act (Bom. Act X of 1876). Further, the suit must fail, because the plaintiff has not obtained a certificate from the Collector, which is necessary for the maintenance of such a suit under the Pensions Act (XXIII of 1871)—*Janardhan Bhaskar* v. *The Secretary of State* (1); *Vyankaji Balkrishna* v. *Sarjerav Apajirav* (2); *Jijaji* v. *Balkrishna* (3).

[529] As to the rate, we contend that the Peshwa's Government having formerly fixed the amount of assessment, the British Government, which has succeeded that Government, is now entitled to fix it.

The plaintiffs' ancestors originally acquired five hamlets in five different villages from the Satara Government. No doubt, the original grant

(1) 14 B. 573. (2) L. J. (1891) p. 276. (3) 17 B. 169.

1893
SEP. 6.
APPEL-
LATE
CIVIL.
18 B. 525.

purported to be a grant of lands, but the grantees really got only the land revenue and not the lands. The lands were occupied by tenants with occupancy rights. It is impossible that when the *sanads* were granted to the plaintiffs' ancestor the lands were unoccupied. Therefore, what the plaintiffs' ancestors really acquired by the *sanads* was the land revenue. The plaintiffs are now merely the alienees of the Government revenue, and Dr. Pollen also having come to that conclusion on a former occasion in connection with a dispute between the parties (in Appeal No. 361 of 1873), the question is now *res judicata*.

The plaintiff can recover from the khot only that which the khot can recover from the tenants under the existing law. The inamdar plaintiff wishes to levy the *mamul* rates because those rates were higher than they are now under the British survey. But the tenants do not pay the dues according to the old rates. They pay at the new rate fixed by the British survey. Therefore, if the plaintiff be allowed to recover the *mamul* rent from us, we shall have to pay the difference ourselves.

Out of the five hamlets originally granted to the plaintiffs' ancestors, only half a hamlet has remained alienated and the four and a half have now become unalienated lands. These, therefore, fall under the operation of s. 216 (*b*) of the Land Revenue Code (Bom. Act V of 1879), and that being so, chaps. VIII to X of that Code apply. If, therefore, half of the hamlet which became unalienated came under the operation of the Land Revenue Code, the other half, which remained alienated, must needs be subject to it. The Judge, therefore, has no authority to come to the conclusion that the plaintiff is not bound by the survey rates because he had not consented to the survey, or that there was **[530]** any contractual relationship between the ancestors of the parties. We are the khot of village in our own right.

Vasudeo Gopal Bhandarkar with *Vasudeo J. Kirtikar* (Government Pleader), for the respondent (plaintiff No. 1) :—It was not necessary for the plaintiff to produce the Collector's certificate under the Pensions Act for the maintenance of the suit. According to the *sanads*, the grant to our ancestors was not a grant of land revenue, but of the land itself. A certificate under the Pensions Act is necessary when the grant is a grant of land revenue. The *sanads* do not show that there was any person on the land when the grant was made, nor is there evidence in the case that it was already in the occupation of any one prior to the grant. It is true that we have been getting only the revenue; but, in order to determine whether a certificate is necessary under the Pensions Act, the nature of the original grant must be taken into consideration; any subsequent change in it will not make any difference—*Babaji Hari* v. *Rajaram Ballal* (1); *Ravji Narayan* v. *Dadaji Bapuji* (2).

Further, our claim is recognized by the Government, inasmuch as we hold a *sanad* under the Summary Settlement Act (Bombay Act VII of 1863) and that being so, we are entitled to bring the suit under s. 9 of the Pensions Act even without the Collector's certificate. The *sanad* admits our title to the land.

The point with regard to the certificate under the Pensions Act is taken for the first time in second appeal; and if the Court comes to the conclusion that a certificate is necessary, an opportunity should be given us to produce it.

---

(1) 1 B. 75.

(2) 1 B. 523.

The other point urged was that of jurisdiction under the Revenue Jurisdiction Act (Bombay Act X of 1876), s. 4, cl. (*b*). That clause does not apply, because there is no dispute now as to the amount or the incidence of assessment. We claim in the present suit only the balance of *inam* dues. Even supposing that the above section is applicable, still our claim would be saved under s. 5 of the Act.

The main question is, whether we can recover the same *inam* dues as we did before the survey, or whether we are entitled **[531]** only to the survey rates which are less. The Land Revenue Code (Bombay Act V of 1879) does not impose any condition upon us. Section 216, cl. (*b*), was relied on. Government may survey lands in a village of which a definite share is alienated, as in the present case, to an inamdar. For the purposes of account and other matters it may be necessary for the Government to survey the unalienated portion. But there is no obligation on the inamdar to accept the survey rates in connection with the portion which is alienated to him. Even after the survey the inamdar has to pay to Government the same dues which he had to pay before. Section 217 applies to villages which are alienated in their entirety. Under s. 218, which applies to the present case, the inamdar is entitled to retain all his former rights. The only section that refers to alienated villages in chap. VIII is s. 111; therefore the other sections were not intended to apply to alienated villages, but to unalienated villages. There are also other indications in that chapter which show that the chapter is intended to apply to unalienated villages.

Government has to survey the whole village including the alienated portion, because they have to fix the *judi* (quit-rent) for that portion; but the survey rates are levied on the unalienated portion only. It is only when the entire village is alienated that survey is introduced with the inamdar's consent. But when a portion of a village is alienated, the survey is made without the inamdar's consent, because the unalienated portion remains with Government.

JUDGMENT.

SARGENT, C.J.—The question in this case is whether the defendant is bound to pay the amount of rent in kind according (to the market-rate at the time of payment) as fixed by the Parasharampant's survey in 1787-88 A.D., or the cash assessment of Rs. 58-14-5, per year, as fixed by the survey made by the British Government in 1886-87. The defendant contends that he is liable only for the latter.

It has been contended before us that the Court has no jurisdiction to try the suit, as it relates to the amount or incidence of assessment or land revenue authorised by Government, which **[532]** is taken away from the cognizance of the Civil Courts by Act X of 1876, s. 4, sub-cl. (*b*). But here there is no objection by either party to the amount or incidence of the assessment fixed by Government for the entire *khond*. The vital question between the inamdars and the khot is, whether the latter is liable to pay the former *maktas* or assessment.

It was said, however, that the suit related to a grant of money or land revenue, and the Civil Court was, therefore, precluded from entertaining it without a certificate of the Collector by s. 4 of the Pensions Act, XXIII of 1871. In *Ravji Narayan* v. *Dadaji Bapuji* (1), it was held by Sir M. Westropp, C.J., and Larpent, J., that it is the original grant

(1) 1 B. 523.

1893
SEP. 6.
APPELLATE CIVIL.
18 B. 525.

which determines whether the Pensions Act is applicable and not the actual rights which the grantee, as a matter of fact, may have enjoyed in it. It was argued, however, that in this case, although the original grant passed the lands in the several *khonds*, that grant had been commuted, in Angria's time, into a grant of the assessment only as regards the one-half of the *khond* which the inamdars were allowed to retain in *inam*. But we do not think that the proceedings in Angria's time can be regarded as effecting a substitution of any sort. It was an act of State by which Angria resumed the one-half of the village of Tural which was in Ratnagiri then, under Angria, which left the inamdar, with his *inam* rights, whatever they were, over the other half of the *khond*. In the Peshwa's time the question was only as to plaintiff's right to the five maunds of rice allowed to the Purohits out of the half of the *khond* seized by Angria, and the Peshwa ordered his revenue officers to continue it. We are of opinion, therefore, that having regard to the ruling in *Ravji Narayan* v. *Dadaji Bapuji* (1) which, we think, is correct, that the present case does not fall under the Pensions Act.

Proceeding then to the consideration of this second appeal, the first question is as to the nature of the payment which the defendant had been making to the plaintiffs before the new survey was introduced by Government. It has been treated by the Subordinate Judge as in the nature of assessment originally **[533]** fixed in kind by the Parashrampant's survey in 1787. On the other hand, it is regarded by the lower appeal Court as a fixed payment arising from a contractual relation between the ancestors of the parties. We think that the question must be regarded as already decided by the findings of Dr. Pollen in appeal No. 361 of 1873, which, as West, J., points out in his judgment in *Morbhat Purohit* v. *Gangadhar Karkare* (2), only left to be determined whether "the khot was liable to pay the fixed quantities of grain as a propietor subject to assessment or rating by the Government and paying the inamdar as assignee of the Government or as an officer or agent of the Government, carrying out its command in favour of the inamdar." In either of these characters it could be only as assessment that it would be payable by the khot. We think, therefore, that the payment by the defendant must be deemed to have been settled by Dr. Pollen's judgment as being of the nature of assessment or rating by Government.

The question, therefore, which remains for determination is, whether the introduction of the new survey has affected the amount of that payment. The defendant relies on s. 216, cl. (*b*), of the Land Revenue Act, V of 1879, which, he says, applies to a case like the present. The village of Tural comes under the description referred to in that sub-clause, but, we think, that the operations of the several sub-clauses to s. 216 must be confined to enabling Government, of its own will, to introduce the new survey, so far as it might affect any interest it still had in the assessment of the village, as in the case of cl. (*a*) where there are unalienated lands in the alienated village, or as in cl. (*b*) where a certain definite share of the village still remains unalienated, or lastly as in cl. (*c*) where the excess of the revenue (if any) after deducting a certain amount belongs to Government. In the cases contemplated by sub-cls. (*a*) and (*c*) it is plain that the inamdar would not be affected as regards his interest in the assessment by the application of chaps. VIII to X. He would still get the old assessment on the alienated lands in the village in the one case, and the same "amount" of assessment in the latter, and we think that the

(1) 1 B. 523.

(2) 8 B. 234 (237).

1893
SEP. 6.
APPEL-
LATE
CIVIL.
18 B. 525.

[534] same must have been the intention in the case contemplated by sub-cl. (*b*). The holder of the village in the concluding para. of s. 216 must, we think, be read as meaning the holder of the assessment or any part thereof of an alienated village.

We agree, therefore, with the conclusion arrived at by the lower appeal Court that the plaintiff is entitled to the sum claimed, but subject to the quit-rent and *judi* which, the Joint Subordinate Judge held, should be deducted, and against which no cross-objections were taken by the defendant before the lower appeal Court. The decree of the lower Court must, therefore, be confirmed subject to the above amendment. Appellant must pay respondents their costs of this appeal.

Decree confirmed subject to amendment.

---

18 B. 534.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Bayley.

VENKAJI SHRIDHAR, DECEASED, BY HIS SONS BALVANT AND OTHERS (*Original Defendants*), *Appellants v.* VISHNU BABAJI BERI AND ANOTHER (*Original Plaintiffs*), *Respondents.**

[7th September, 1893.]

Hindu law—Widow—Right of widow to sell property inherited from her husband—Reversioner—Suit by reversioner to set aside sale by widow—Burden of proof—Evidence.

B. having during his life-time mortgaged certain property the income of which was sufficient only to pay interest on a portion of the mortgage-debt, his widow after his death sold it before the mortgage-debt fell due. The reversioners sued to set aside the sale.

Held, that although there might have been no absolute necessity for the widow to sell the property to provide herself with maintenance, still as there was no other family property, the property in question must necessarily have been sold at the expiration of the time fixed by the mortgage, and the sale by the widow ought to be supported.

A widow like a manager of the family must be allowed a reasonable latitude in the exercise of her powers, provided she acts fairly to her expectant heirs.

[R., 36 B. 88=13 Bom. L.R. 860=12 Ind. Cas. 271; 8 C.L.J. 458 (464)=13 C.W.N. 201=4 Ind. Cas. 513.**]**

THIS was a second appeal from the decision of S. Tagore, District Judge of Sholapur-Bijapur.

Suit by reversioners to set aside the sale of a house by a widow.

[535] The house in question had been the property of one Baba Balaji, who died chidless, and his widow Lakshmibai took possession. The property had been mortgaged by Baba before his death, and in 1859, while the mortgage term had still two years to run, Lakshmibai sold the property to the defendant.

The plaintiffs sued as reversioners to set aside the sale, contending that it was without necessity, and, therefore, illegal. The defendant pleaded that the sale was valid, Lakshmibai having sold the house in order to pay her husband's debts.

The Subordinate Judge dismissed the suit, holding that it lay on the plaintiffs to show that the sale was improper and illegal, and that they had failed to do so.

---

* Second Appeal No. 247 of 1892.

1893
SEP. 7.
APPEL-LATE CIVIL.
18 B. 534.

On appeal, the District Judge reversed the decree, holding that the burden of proof lay on the defendant, and that it was for him to show that the property was sold under such circumstances as to justify a Hindu widow in alienating the immoveable property of her husband without the consent of his heirs. The District Judge remanded the case for decision on the merits. The following is an extract from the Judge's judgment:—

"It might be inferred from the documents produced in this case (Exs. 78, 79, 80), that the sale was made by Lakshmibai to pay her husband's debts and to procure maintenance for herself. Both these objects are such as would justify a sale by a Hindu widow; but a mere recital in a widow's deed of sale of the object is not enough to prove it: West and Buhler, Vol. I, Introduction, p. 102. It appears that the shop was mortgaged by Baba Balaji to one Devidas for Rs. 150 in 1854. Three years after Baba borrowed from Devidas a further sum of Rs. 50 on the mortgage of the same property. This mortgage was made for five years, but before the expiry of the period stipulated, the shop was sold by Lakshmibai to the defendants. It has not been shown that there was any necessity to sell the shop to pay off the mortgage-debt before the time fixed in the mortgage instrument.

"It is urged by the respondents' pleader that such necessity arose out of the necessity on the part of the widow of procuring her own maintenance; but I am not satisfied that the widow was [536] in such straitened circumstances as to be compelled to sell the property for the small sum of Rs. 81 on account of her maintenance. There is a preponderance of evidence to show that she was in easy circumstances. Defendants' own witness, No. 60, a relation of Lakshmibai, says that she occasionally lived with the witness, and the latter declares that he was ready to support the widow in case she chose to reside with him permanently. Upon the whole, I find that the defendants have failed to make out a case of necessity for the absolute alienation by the widow of her husband's estate."

On remand the Subordinate Judge allowed the plaintiff's claim.
On appeal by defendants the Judge confirmed the decree.
Defendants preferred a second appeal.

Ghanasham N. Nadkarni, for the appellants (defendants):—He relied upon *Chimnaji Govind Godbole* v. *Dinkar Dhondeo Godbole* (1).

Mahadeo Chimnaji Apte, for the respondents.

JUDGMENT.

SARGENT, C. J.—In this case the District Judge has found that the property had been mortgaged by the widow's husband in his life-time; but he has held there was no necessity for the widow's selling the mortgaged property two years before the mortgage-debt fell due, as the state of her circumstances did not imperatively require it to be done in order to provide herself with maintenance. But we think that a widow, like a manager of the family, must be allowed a reasonable latitude in the exercise of her powers, provided, as Mr. Justice West says in *Chimnaji Govind Godbole* v. *Dinkar Dhondev Godbole* (1), "she acts fairly to her expectant heirs." Here then, although there may have been no absolute necessity to sell to provide herself with maintenance, still, as there was no other family property, and the property in question must necessarily have been sold at the expiration of the time fixed by the mortgage, we think that the sale is one which

(1) 11 B. 320.

ought to be supported. The entire income of the property had been appropriated to the interest of part of the mortgage-debt, and 12 per cent. was running on the remaining [537] Rs. 50, which would necessarily have to be added to the principal when the entire mortgage-debt was paid off. The reversioners could, under the above circumstances, be in no way prejudiced by the widow's anticipating the date at which the mortgage-debt fell due.

We must, therefore, reverse the decree of the Court below and dismiss the plaint with costs on the plaintiffs throughout.

Decree reversed.

1893 SEP. 7. APPELLATE CIVIL. 18 B. 534.

18 B. 537.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Candy.

NATHU VALAD PANDU (*Original Plaintiff*), *Appellant v.* BUDHU VALAD BHIKA (*Original Defendant*), *Respondent.**

[7th September, 1893.]

Civil Procedure Code (Act XIV of 1882), s. 13 (1), expl. II, and s. 43—Suit for specific performance of a contract of sale and to execute a sale-deed—Sale-[538] *deed subsequently executed by the Court under s. 262 (2) of the Civil Procedure Code—Suit on sale-deed to recover possession.*

The plaintiff claiming specific performance of a contract of sale sued the defendant to compel him to execute a deed of sale, alleging that he had paid the

* Second Appeal No. 256 of 1892.

(1) Sections 13 and 43 of the Civil Procedure Code (Act XIV of 1882) ;—

13. *Res judicata.*—No Court shall try any suit or issue in which the matter directly and substantially in issue

has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court of jurisdiction competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and

has been heard and finally decided by such Court.

Explanation I.—The matter above referred to must in the former suit have been alleged by one party, and either denied or admitted, expressly or impliedly, by the other.

Explanation II.—Any matter which might and ought to have been made ground of defence or attack in the former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

* * * * * *

43. *Suit to include whole claim.*—Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of auction; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.

Relinquishment of part of claim.—If a plaintiff omit to sue in respect of, or intentionally relinquish, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.

Omission to sue for one of several remedies.—A person entitled to more than one remedy in respect of the same cause of action may sue for all or any of his remedies; but, if he omits (except with the leave of the Court obtained before the first hearing) to sue for any of such remedies, he shall not afterwards sue for the remedy so omitted.

For the purpose of this section an obligation and a collateral security for its performance shall be deemed to constitute but one cause of action.

Illustration.

A lets a house to *B* at a yearly rent of Rs. 1,200. The rent for the whole of the year 1881 and 1882 is due and unpaid. *A* sues *B* only for the rent due for 1882. *A* shall not afterwards sue *B* for the rent for 1881.

[illegible] (2) 262. *Form and effect of execution of conveyance by Court.*—The execution of a conveyance, or the endorsement of a negotiable instrument, by the Court under the last

1893
SEP. 7.

APPELLATE CIVIL.

18 B. 537.

purchase-money to the defendant and had obtained possession, but was subsequently dispossessed. The plaintiff had claimed the value of standing crop or damages for the same. The Court found that the plaintiff had paid the purchase-money, but had not got possession, and ordered defendant to execute a deed of sale. On failure of the defendant to do so, the Court executed a deed of sale in plaintiff's favour under s. 262 of the Civil Procedure Code (Act XIV of 1882). The plaintiff thereupon brought the present suit to recover possession on the strength of the deed of sale. Defendant pleaded that this second suit was barred under ss. 13 and 43 of the Civil Procedure Code.

Held, that s. 43 was not applicable and did not bar the present suit, because the alleged cause of action was not the breach of the contract, but a new and distinct one arising from the deed of sale which the defendant had contracted to pass.

Held, also, that s. 13, expl. II, was not applicable, because the object of that explanation would seem to be to compel the plaintiff to rely on all grounds which were open to him in support of the claim made by his plaint, which in the first suit was confined to obtaining a regular deed of sale.

[**Diss.**, 22 M. 24 (26)=8 M.L.J. 147; **F.**, 4 N.L.R. 14 (17); **Appl.**, 5 Ind. Cas. 439 (440)=13 O.C. 19; **Appr.**, 8 Ind. Cas. 9 (12); **R.**, 14 C.L.J. 159=11 Ind. Cas. 228; 15 M.L.T. 103; **Cons.**, 37 C. 57 (61)=14 C.W.N. 527=5 Ind. Cas. 205.]

SECOND appeal from the decision of A. Steward, District Judge of Khandesh.

Suit to recover possession of land. The land had been mortgaged by the defendant Budhu valad Bhika to one Sena Chowdari for [539] Rs. 1,550. On the 5th June, 1889, the defendant agreed to sell the land to the plaintiff for Rs. 1,550 which should be applied by the defendant in paying off the mortgage-debt. After it was paid off, the defendant was to execute a deed of sale to the plaintiff. In pursuance of the agreement, the plaintiff paid Rs. 1,550 to the defendant; but as the defendant failed to perform his part of the agreement by executing a deed of sale in plaintiff's favour, the plaintiff on the 5th October, 1889, filed a suit (No. 790 of 1889) against the defendant, praying, first, that either the defendant be directed to execute in his favour the sale deed in respect of the land as agreed upon, or that he be ordered to refund to the plaintiff the sum of Rs. 1,550 together with Rs. 100 as damages; and, secondly, that the crops standing on the land be delivered into plaintiff's possession, or that Rs. 200 be awarded as compensation for the same. The plaintiff further alleged that the land had been delivered into his possession, and he had sowed it on the 1st July, 1889, but that the defendant dispossessed him of the same, with the standing crops thereon, on the 15th September of the same year, and refused to execute the sale-deed.

The Court awarded the plaintiff's claim in respect of the sale deed, but disallowed his claim in respect of compensation, holding that he had not obtained possession of the land as alleged.

The defendant, however, did not execute the sale-deed as directed. The Court, therefore, executed the deed in plaintiff's favour on the 15th April, 1890, under s. 262 of the Civil Procedure Code (Act XIV of 1882).

The plaintiff now, relying on the sale-deed, brought the present suit to recover possession of the land.

The defendant contended that the suit was barred under ss. 13 and 43 of the Civil Procedure Code (Act XIV of 1882).

The Subordinate Judge overruled the defendant's pleas and awarded possession to the plaintiff.

---

preceding section may be in the following form: "C. D., Judge of the Court of (*or as the case may be*), for A. B., in suit by E. F., against A. B.," or in such other form as the High Court may from time to time prescribe, and shall have the same effect as the execution of the conveyance or endorsement of the instrument by the party ordered to execute or endorse the same.

1893
SEP. 7.
APPELLATE CIVIL.
18 B. 537.

On appeal by the defendant, the Judge reversed the decree, and rejected the claim, holding that it was barred under section [540] 43 of the Civil Procedure Code. He referred to *Abhiram Doss* v. *Sriram Doss* (1).

The plaintiff perferred a second appeal.

Vasudeo Gopal Bhandarkar, for the appellant (plaintiff).—The Judge dismissed our suit under s. 43 of the Code, because in our former suit we did not claim possession. In that suit we alleged that we were in possession and that we were dispossessed, and, therefore, in that suit we merely claimed the value of the crop. The Court found that our allegation as to possession was not proved; it, therefore, dismissed our suit for the value of the crop. The plaintiff's former suit was for the specific performance of the contract to convey, and it was not necessary to demand possession. That suit was on a different cause of action. The cause of action to recover mesne profits is different from the cause of action to recover possession. Section 43 is not applicable to the present case, and the Judge was wrong in holding that our present suit is barred because we did not ask for possession in the former suit—*Tirupati* v. *Narasimha* (2); *Lalessor Babui* v. *Janki Bibi* (3).

Mahadeo Chimnaji Apte (with *Mahadeo Vaman Bhat*), for the respondent (defendant):—We rely on ss. 13 and 43 of the Civil Procedure Code. In the former suit the plaintiff asked for possession of the standing crop sown by himself. When a person asks for possession of the standing crop sown by himself, his prayer virtually amounts to a prayer for possession of the land itself. If it did not, we submit he ought to have asked for possession in that suit, and having failed to do so, he cannot now sue on the same cause of action— Sections 13 (exp. II) and 43 of the Civil Procedure Code. A plaintiff cannot bring one suit for a title-deed and another for possession—*Anderson, Wright and Co.* v. *Kalagarla Surji Narain* (4); *Abhiram Doss* v. *Sriram Doss* (1).

[SARGENT, C.J.—The question is, whether the plaintiff, having got a conveyance, has got a fresh cause of action for possession ?]

[541] We submit not, because a conveyance is merely evidence of title.

[SARGENT, C.J., referred to *Kalidhun Chuttapadhya* v. *Shiba Nath Chuttapadhya* (5).]

In that case the first suit was for an account and the second for the result of the account, and, therefore, it was held that the second suit could be maintained. Our contention is supported by *Shib Kristo Dah* v. *Abdool Sobhan Chowdhry* (6).

Vasudeo Gopal Bhandarkar, in reply.—The words in s. 43 are "cause of action." In the present case the cause of action is different from that in the former one. In that suit the cause of action was the right to a conveyance. In the present suit, the cause of action is the right to possession. They, no doubt, are the result of the same transaction, but they are distinct, and separate suits are maintainable. The execution of the conveyance by the Court gave us a separate cause of action for the present suit.

JUDGMENT.

SARGENT, C.J.—The plaintiff sues to recover possession of the property in suit on the strength of a sale-deed executed in his favour

(1) 3 B.L.R. 421.
(2) 11 M. 210.
(3) 19 C. 615.
(4) 12 C. 339 (346).
(5) 8 C. 483.
(6) 15 W.R. 408.

1893
SEP. 7.

APPELLATE CIVIL.

18 B. 537.

on the 15th April, 1890, by the Court in execution of a decree passed against the defendant in suit No. 790 of 1889. The defendant pleaded that the suit was barred by ss. 13 and 43 of the Civil Procedure Code. The Joint Subordinate Judge held that it was not barred. The lower appeal Court held that it was barred under s. 43.

The previous suit, No. 790 of 1889, was one by the plaintiff for specific performance of an alleged contract of sale to him by defendant, by which the plaintiff was to pay Rs. 1,550, and the defendant undertook to execute a deed of conveyance to him. It was contended by Mr. Apte, for the respondent, that the plaintiff's present claim to be put into possession was part of the entire claim, which the plaintiff was then entitled to make in respect of the cause of action, *viz.*, the defendant's default in performing his contract. In that suit, the plaintiff alleged that he had paid the purchase-money and had been put into possession; but the Court found that he had paid the purchase-money but had never had possession, and Mr. Apte argued that s. 43 **[542]** must be applied as if the facts had been as found by the Court, and not as alleged in the plaint in that suit, and in that case he urged that the plaintiff's claim would have included not only this right to have a deed of sale executed, but also to be put into possession, and that the plaintiff, therefore, cannot now sue in respect of the latter portion of the claim. We think this contention is a valid one, so far as the claim to possession is based on the contract; but it does not dispose of the question as to the applicability of s. 43 to the present suit, where the alleged cause of action is not the breach of the contract, but a new and distinct one arising from the deed of sale itself, which the defendant had contracted to pass. It was also argued by Mr. Apte that s. 13, exp. II, applied to the present suit, but the object of that explanation would seem to be to compel the plaintiff to rely on all the grounds which were open to him in support of the claim made by his plaint, which in the first suit was confined to obtaining a regular deed of sale.

For the above reasons, we reverse the decree of the Court below and restore that of the Subordinate Judge, with costs on the respondent here and in the lower Court of appeal.

Decree reversed.

---

18 B. 542.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Bayley.

SHIVLAL KALIDAS AND OTHERS (*Original Plaintiffs*), *Applicants v.* JUMAKLAL NATHIJI DESAI, DECEASED, BY HIS HEIRS, HIS SONS MITHLAL AND ANOTHER (*Original Defendants*), *Opponents.**

[26th September, 1893.]

Decree—Amendment of decree—Civil Procedure Code (Act XIV of 1882), s. 206—Practice—Appeal.

In the lower appeal Court the plaintiff obtained a decree which directed parties to bear their own costs in proportion in both the Courts, while the judgment directed that the parties should bear each other's costs in proportion in both the Courts. The decree was confirmed by the High Court in cross second

* Civil Application No. 552 of 1892.

appeals without writing a judgment. There was no point taken in either of the appeals as to costs. The plaintiff subsequently applied to the High Court for the amendment of the decree under s. 206 of the Civil Procedure Code (Act XIV of 1882). It was contended for the defendant, that the application should have been made to the lower appeal Court.

Held, that the only decree which existed for the purposes of execution after the High Court confirmed the decree of the Court below was the decree of the High Court into **[548]** which that of the lower Court became incorporated. The application was, therefore, properly made to the High Court.

Held, further, that that being so, and there having been no appeal by either party against the order as to costs, the Court might properly look at the judgment of the Court below with a view to making the decree as to costs agree with it.

[F., 11 C.L.J. 155 (157)=5 Ind. Cas. 723; R., 6 C.L.J. 542 (543); 9 C.W.N. 605 (607); P.L. R. (1900), p. 529; 134 P.L.R. 1904.]

THIS was an application under s. 206 of the Civil Procedure Code (Act XIV of 1882) to amend the decree of Rao Bahadur Chunilal Maneklal, First Class Subordinate Judge of Ahmedabad with appellate powers.

The plaintiffs sued the defendants in the Court of the Subordinate Judge of Dohad and obtained a decree for Rs. 3,070-6-1 with costs and interest.

On appeal by the defendants, the First Class Subordinate Judge varied the decree by reducing the amount to Rs. 2,055-4-3 (Shiashi currency), and in the *judgment* directed the parties to bear *each other's* costs in proportion in both the Courts. But in the decree there was a discrepancy with respect to the order as to costs, the decretal order being "parties to bear *their own* costs in proportion in both the Courts."

Both plaintiffs and defendants preferred cross second appeals (No. 617 of 1890 and No. 15 of 1891) to the High Court, which confirmed the decree with costs. There was no point taken in either of the appeals with respect to the order as to costs.

The discrepancy between the judgment and the decree of the First Class Subordinate Judge with respect to costs having come to the notice of the plaintiffs, they now applied, under s. 206† **[544]** of the Civil Procedure Code (Act XIV of 1882) to amend the order in the decree, and obtained a *rule nisi* calling upon the defendants to show cause why the amendment should not be made.

Nagindas Tulsidas Marphatia, for the opponents (defendants), showed cause against the rule:—The application ought to have been made to the First Class Subordinate Judge. The High Court merely confirmed his decree. It is, therefore, the decree of the Subordinate Judge that requires the amendment, and he had jurisdiction to entertain the application —*Sundara* v. *Subbanna* (1); *Ram Saran* v. *Persidhar Rai* (2); see also

† Section 206 of the Civil Procedure Code (Act XIV of 1882):—

206. *Contents of decree.*—The decree must agree with the judgment: it shall contain the number of the suit, the names and description of the parties, and particulars of the claims as stated in the register, and shall specify clearly the relief granted or other determination of the suit.

The decree shall also state the amount of costs incurred in the suit, and by what parties, and in what proportions such costs are to be paid.

Power to amend decree.—If the decree is found to be at variance with the judgment, or if any clerical or arithmetical error be found in the decree, the Court shall, of its own motion or on that of any of the parties, amend the decree so as to bring it into conformity with the judgment, or to correct such error:

Provided that reasonable notice has been given to the parties or their pleaders of the proposed amendment.

(1) 9 M. 354. (2) 10 A. 51.

1893
SEP. 26.

APPELLATE CIVIL.

18 B. 542.

remarks of Mahmood, J., in *Muhammad Sulaiman Khan* v. *Muhammad Yar Khan* (1).

Goverdhanram M. Tripathi, for the applicant in support of the rule.—When the High Court confirmed the decree of the Subordinate Judge, the decree became the decree of the High Court. The only decree in existence being that of the High Court, we could not make our application to any other Court—*Sakhalchand* v. *Velchand* (2); *Bhanushankar* v. *Raghunathram* (3).

JUDGMENT.

SARGENT, C. J.—This is an application under s. 206 of the Civil Procedure Code to amend the decree of the Subordinate Judge with appellate powers directing that the parties are to bear their own costs in proportion in both the Courts as to make it agree with the judgment of that Court, which, it is said, directed that the parties should bear each other's costs in proportion in both the Courts. A preliminary objection has been taken that this application should have been made to the lower appeal Court. Such, no doubt, is the view taken by the Madras High Court in *Sundara* v. *Subbanna*(4) and by Mahmood, J., dissenting from Sir J. Edge, C.J. and Straight, J., in *Muhammad Sulaiman Khan* v. *Muhammad Yar Khan* (1). This Court, however, has always held that the only decree which exists for the purpose of execution after the High Court has confirmed the decree of **[545]** the Court below is the decree of this Court into which that of the lower Court becomes incorporated—*Sakkalchand Rikhawdas* v. *Velchand Ganesh Gujar* (2)—and if that be so, it is difficult to understand how, consistently with that ruling, the lower Court can have the power to amend the decree even under s. 206. To allow that Court to bring the decree into conformity with what it may consider to be its judgment, might lead, as pointed out by Sir J. Edge, C. J., in *Muhammad Sulaiman Khan* v. *Muhammad Yar Khan* (1), to its being essentially a different decree from that which the High Court intended to confirm. We think, therefore, that the application was properly made to this Court.

That being so, and there having been no appeal by either party against the order as to costs, this Court may properly look at the judgment of the Court below with a view to making the decree as to costs agree with it. The judgment directed that the parties should bear each other's costs in proportion. The decree directs that costs of the parties should be borne in proportion; but if that be understood as meaning by one another, which it my well be, then there is no disagreement between it and the order in the judgment. To make it, however, quite clear, and to avoid any question in execution, it would be right under s. 206, Civil Procedure Code, to substitute the words in Gujarati "*be koratman ek bijane sir*" (on each other in both Courts) for the words "*temne potpotane sir*" (on their own selves) after the words "*kharach pramanaman*" (costs in proportion) in the vernacular decree of the First Class Subordinate Judge, A. P., in appeal No. 149 of 1888, and that the costs be calculated accordingly in execution, and we accordingly direct this is to be done. Parties to pay their own costs of this application.

Decree amended.

(1) 11 A. 267 (274).
(2) P. J. (1893), p. 79.
(3) 2 B.H.C.R.A.C.J. 101.
(4) 9 M. 354.

18 B. 546 (F.B.).

1893
SEP. 26.

FULL BENCH.

18 B. 546 (F.B.).

[546] APPELLATE CIVIL FULL BENCH.

Before Sir Charles Sargent, Kt., Chief Justice, Mr. Justice Candy and Mr. Justice Fulton.

MANJUNATH MANGESHAYA BAINDUR (*Plaintiff*) *v.* MANGESH SHESHAGIRIAPA GOKARNKAR (*Defendant*).* [26th September, 1893.]

Stamp—Stamp Act I of 1879, *sch. II, art.* 13, *cl.* (*c*)—*Salt-pans—Lease.*

A counterpart of a lease of salt-pans held not to be exempt from stamp duty, as it did not purport to be a counterpart of a lease granted to a cultivator.

REFERENCE from Rao Saheb H. S. Phadnis, Subordinate Judge of Kumta in the Kanara District, under s. 49 of the Stamp Act (I of 1879).

The plaintiff let his salt-pans to the defendant and brought a suit on the agreement. At the hearing he tendered in evidence a counterpart of the lease or agreement which was not stamped. He contended that it was exempt from stamp duty under sch. II, art. 13 (*c*) of Act I of 1879.

The Subordinate Judge referred the following question to the High Court :—

"Is the counterpart of a lease of salt-pans exempted from stamp duty under Stamp Act I of 1879, sch. II, art. 13 ?"

The following is an extract from the reference :—

"Schedule II, art. 13 (*c*) of Act I of 1879 exempts counterpart of any lease granted to a cultivator ;" and the question is, whether the defendant can be considered a cultivator. It is admitted that the defendant took his lease for the production of salt in plaintiff's salt-pan. A cultivator, according to Webster, is a *tiller* of the soil ; while the production of salt requires no tilling. The Salt Act, XII of 1882, invariably uses the word 'manufacture of salt' and not 'cultivation of salt' to denote the production of salt. I am, therefore, of opinion that the exemption does not extend to leases of salt-pans."

[547] The following is a translation of the counterpart of the lease :—

"The 5th of May 1889 A.D. To Manjunath Mangeshaya Baindur, residing at Hanehalli, in the taluka of Kumta.

"(I) Mangesh Sheshagiri Gokarnkar Mogeri give in writing (this) *counterpart* lease of a salt-work. In the salt-work No. 56 situate in the saja of Nagrabail, you have a share of $1\frac{3}{4}$ chittas. This I have rented from you for this the current year of 1889 A.D. for a fixed rent settled at Rs. 142. This money I will pay you in full by the 30th of Magh in the current year Virodhi (19th of February, 1890) and obtain back this counterpart of lease with your endorsement (of payment on it). I will at my own expense hire a place and store in the salt produced in your salt-work."

ORDER.

FULTON, J. (SARGENT, C. J., CANDY, J., concurring).—As the document referred does not purport to be the counterpart of a lease granted to a cultivator, we agree with the Subordinate Judge in thinking that it is not exempted from stamp duty by cl. (*c*) of art. 13 of sch. II of the Indian Stamp Act, 1879.

Order accordingly.

* Civil Reference No. 6 of 1893.

1893
SEP. 28.

APPEL-
LATE
CIVIL.

18 B. 547

18 B. 547.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice and Mr. Justice Bayley.

KRISHNAJI NARAYAN POKSHE (*Original Plaintiff*), *Appellant v.* THE MUNICIPALITY OF TASGAON (*Original Defendant*), *Respondent.** [28th September, 1893.]

Municipality—District Municipality—Bombay Act VI of 1873, *s.* 33 †—*Building—Damages.*

Plaintiff having built a new wall on the site of an old wall including the old foundations, the Municipality pulled the wall down. Plaintiff thereupon sued the Municipality for damages. The Judge rejected the claim for damages.

Held, that the building of a new wall on the site of the old wall including the old foundations was not an addition to the existing building within the meaning of s. 33 of the District Municipal Act (Bombay Act VI of 1873). The Municipality was, therefore, liable in damages for any expenses which the plaintiff was put to by their pulling down the wall.

[R., 22 B. 230 (233); 23 B. 248 (249); Cons., 6 Ind. Cas. 431=6 N. L. R. 53 (62); D., 2 Bom. L. R. 572 (577).]

[548] SECOND appeal from the decision of J. W. Walker, District Judge of Satara.

This action was instituted by plaintiff Krishnaji Narayan Pokshe against the Municipality of Tasgaon in the Satara District to recover Rs. 48 on account of damages for pulling down a wall rebuilt by the plaintiff on the site of the old wall including the old foundations, and for an injunction restraining the defendant from obstructing the plaintiff in rebuilding the wall.

The defence of the Municipality was that the plaintiff had encroached upon the ground belonging to the defendant; that the defendant did not cause any damage to the plaintiff.

The Subordinate Judge found that the plaintiff's wall, which was partly pulled down by the Municipality, stood on its old foundation, and

---

* Second Appeal No. 308 of 1892.

† Section 33 of the District Municipal Act (Bom. Act VI of 1873):—

33. *Clause* 1.—Before beginning to erect any building, or to alter externally, or add to any existing building, the person intending so to build, alter or add, shall give to the Municipality notice thereof in writing, and shall furnish to them, if required to do so, a plan showing the levels at which the foundation and lowest floor of such building are proposed to be laid by reference to some level known to the Municipality, and all information they may require regarding the limits, design and materials of the proposed building, and the intended situation and construction of the drains, sewers, privies and cesspools (if any) to be used in connection therewith.

Clause 2.—Within one month after receiving such notice, the Municipality may in writing issue such orders not inconsistent with this Act as they think proper with reference to such building. If the Municipality fail to issue written orders, whether of approval or otherwise, with reference to such building within the said period, the person originally giving notice may proceed to erect the building in question in the manner proposed by him to the Municipality, provided such building be in accordance with the provisions of this Act.

Clause 3.—If such building be begun or made without the notice or without affording the information above prescribed, or in any manner contrary to the legal orders of the Municipality issued within the period aforesaid, or in any other respect contrary to the provisions of this Act, the person so building shall be liable to the penalty hereinafter provided, and the Municipality may, by written notice, require such building to be altered or demolished as they may deem necessary.

1893
SEP. 28.

APPELLATE CIVIL.

18 B. 547.

that the plaintiff did not appropriate any municipal ground. He, therefore, allowed the claim with interest at nine per cent. on Rs. 48.

On appeal by the defendant the Judge found that the plaintiff was entitled to rebuild the wall as it stood when it was partly removed by the defendant, but that he was not entitled to damages. He, therefore, varied the decree. In his judgment he made the following remarks.—

"The only other point is whether plaintiff should be allowed any damages for the pulling down a part of the wall which he [549] is now held entitled to rebuild. He was required to pull down the wall, by a notice of the Municipality, Ex. 54, under s. 33, cl. 3, of the Bombay District Municipal Act, on the ground that the wall had been made without due notice to the Municipality. Under s. 33, notice must be given 'before beginning to erect any building,' and the amended s. 3 provides that the word 'building' shall include a compound wall such as that in dispute. The High Court have held that a person who, without giving notice, merely re-erects on the same foundation a *part* of a wall which has fallen down does not contravene the provisions of s. 33 (Cr. Rg. No. 63 of 30th August, 1888, *Crown* v. *Tipanna*). But here the wall rebuilt was the whole wall along its entire length, and it is clearly necessary that notice should first be given in such a case to prevent disputes as to the original site. The portion of the wall which the Municipality held was an encroachment, was subsequently removed. It appears that the plaintiff was convicted for building without notice, and the conviction was set aside by the High Court, but the grounds for the decision do not appear. Under s. 33 the Municipality was entitled to remove the whole wall; the first notice was not strictly legal, as it required the wall to be removed within 24 hours, while the period under s. 75 of the Act should have been not less than 3 days or more than one month. This defect might prevent the conviction of the accused, or the power of the Municipality to recover the cost from the plaintiff, but would not bar the right of the Municipality to remove the wall as having been built without notice. In any case, the plaintiff has only himself to blame for disobeying the law, and he cannot recover damages. He has also made an unfounded claim to ground outside the wall. There is no question now raised as to the amount of the damages awarded by the lower Court if plaintiff were held entitled to recover damages. I should add that, in my opinion, there was no occasion for awarding interest on the sum awarded by the Court.

"I amend the decree of the lower Court and direct that the defendants be restrained from obstructing the plaintiff in rebuilding his wall to the width of one foot or up to the line at [550] which the wall stood when it was partly removed by defendants."

Plaintiff preferred a second appeal.

Mahadeo B. Chaubal for the appellant (plaintiff):—We rebuilt our wall on the old foundation; the Municipality was, therefore, wrong in pulling it down. The lower Court disallowed our claim for damages on the ground that we have not given notice of our claim to the Municipality. This is a wrong view of the law on the point. We erected the wall on the old foundation, and in such a case no notice is necessary.

The District Municipal Act requires that a notice should be given in the case of a new building. It has been held that in a case like the present no notice need be given under s. 33 of the Act—Criminal Review No. 421 of 1890, decided on the 6th February, 1890. The Municipality

1893
SEP. 28.
APPEL-
LATE
CIVIL.
18 B. 547.

had, on a former occasion, criminally prosecuted us, and even in that matter this Court held that no notice was necessary.

There was no appearance for the respondent (defendant).

ORDER.

SARGENT, C. J.—Both the Courts have found that the new wall was built on the sight of the old wall including the old foundations. Section 33 of Act VI of 1873, therefore, did not apply, as in point of fact according to the above finding there was no addition to any existing building. The Municipality would, therefore, be liable in damages for any expense the plaintiff may have been put to by their pulling down his wall. Those damages have been assessed at Rs. 48 by the Subordinate Judge, and no objection was taken to the amount in the lower Court of appeal by either party. We must, therefore, for clearness sake, amend the decree of the Court below by adding the words "on its old foundations" after the words "in rebuilding his wall" and also direct that the defendant do pay plaintiff Rs. 48. The plaintiff to have his costs throughout.

Decree amended.

---

18 B. 551.

[551] ORIGINAL CIVIL.

Before Mr. Justice Farran.

THE ADVOCATE GENERAL OF BOMBAY (*Plaintiff*) *v.* BAI PUNJABAI AND OTHERS (*Defendants*).* [18th June and 3rd July, 1894.]

Charity—Trust—Will—Deeds not carrying out will—Misapplication of funds—Mistake—Liability of trustee—Limitation—Fraud—Accounts when directed—Discretion of Court to order accounts—Jurisdiction of Court where charity established by will is outside the jurisdiction—Advocate General, right of—Advocate General barred by decree in prior suit brought by trustees of charity—Civil Procedure Code (XIV of 1882), s. 43.

One Bhimsi Ruttonsi, a Jain, died in February 1863, leaving a will. His widow Bai Punjabai (defendant No. 1) obtained letters of administration with the will annexed. The testator died possessed (*inter alia*) of a half share of certain property in Bombay known as the "Bhimpura property." The remaining half share belonged to two other persons, *viz.*, Hirji Dossa and Muddon Tejsi. By his will the testator directed that a moiety of the rental of his half share should be spent on the *sadharm* (charitable or religious) endowment of a temple at Jackhoo in Cutch, and the other moiety thereof in establishing two *sadavarats*, one at Jackhoo and the other in Palitana. He also set apart a sum of Rs. 1,26,000, of which Rs. 1,01,000 were to be expended in building a temple at Jackhoo, and the balance of Rs. 25,000 in erecting a market near the temple at Jackhoo, or, if that was impossible, it was to be spent in Palitana. The plaint complained that of the Rs. 1,26,000 about Rs. 60,000 had been spent in buying a property in Bombay, called the "school property," for the purpose of establishing a school there, and about Rs. 50,000 had been expended in erecting a temple at Jackhoo, but that nothing had been done with the balance, nor had a market been established at Jackhoo. All that had been done there was to erect three shops which cost about Rs. 2,000. The plaint further stated that in 1868 Bai Punjabai (defendant No. 1) had made over the "school property" and the "Bhimpura property" to three trustees on trusts, not strictly in accordance with the testator's will as above set forth. Under this deed the trustees were to apply one moiety of the net rents (1) in *Sadavarat* or alms-giving at Jackhoo and Palitana, ; (2) in feasting the caste people in Bombay and Jackhoo annually; (3) in the worship called *satarbhadi* at the *derasar* (temple) in

* Suit No. 108 of 1892.

1894
JULY 3.
ORIGINAL CIVIL.
18 B. 551.

Bombay and Jackhoo, and (4) in entertaining and clothing the *gorip* (poor) in Bombay and Jackhoo. Of the remaining moiety of the rents (5), one-half was to go to *sadharm* (charities) of the *derasar* (temple) at Jackhoo, and (6) the other half to charities at such places as the trustees should think fit.

In the following year, *viz.*, on 17th April, 1869, Bai Punjabai (defendant No. 1) and the owners of the other moiety of the "Bhimpura property" conveyed the whole of that property to trustees, who were to apply a moiety of the rents (which was to be considered as rent from Punjabai's share of the property) (1) in *sadavarat* and almsgiving at Jackhoo and Palitana; (2) in feasting the caste people in Bombay and Jackhoo annually on the anniversary of Bhimsi Ruttonsi's death; (3) in the worship of the **[552]** *derasar* called *satarbhadi*, and in the entertainment and clothing of the *gorip* (poor) in Bombay and Jackhoo. The deed also directed the application of the rents of the other moiety of the "Bhimpura property," part of which was to go to a temple at Tera in Cutch and part to another temple at Jackhoo. This later deed, it will be observed, omitted altogether trusts (5) and (6) of the earlier one of 1868 in favour of *sadharm* for the temple of Jackhoo and for *sadharm* generally. The trustees appointed by the two deeds were not the same, though some of the trustees of the first were also the trustees of the second. The second deed did not recite or in any way refer to the first. At the date of suit all the trustees named in the deeds were dead except the second defendant. By subsequent deeds, however, new trustees had been appointed, and they were all parties to the present suit. Defendants Nos. 2, 3, 4, 5, 6, and 7 were trustees of the Bhimpura property, and defendants Nos. 8, 9, 10 and 11 of the school property. The plaint filed on the 10th March, 1892, at the relation of two members of the Jain community of Cutch prayed that the charitable trusts of the testator's will might be carried out, and sought for accounts against the widow of the testator and the trustees of both the deeds, and for a scheme, &c.

Held, that the High Court of Bombay had jurisdiction to make a decree declaring the trusts upon which the trustees of the deed of October, 1868, held the property comprised in that deed and for rectifying the deed in accordance with such declaration, but that the Court could not go further in settling a scheme.

Semble, when money is bequeathed for the purpose of founding a charity outside the jurisdiction, the Court hands the money to the trustees named by the testator, leaving it to the Courts of the country in which the charity is to be established to settle the scheme.

Held, also, that the suit was not barred by limitation. It was not one for rectification of the deed of 1868, but rather one against Punjabai (defendant No. 1) and her assigns the trustees of the deed of 1868 and 1869 for the purpose of following the trust property in their hands and having it applied to the proper purposes of the trust, and, therefore, came within s. 10 of the Limitation Act (XV of 1877).

Charges of fraud and dishonesty made against trustees of a charity must be established at the hearing of the case, and cannot be allowed to be reserved and proved subsequently in the course of taking accounts.

Where the trust deed of a charity executed subsequently to the death of a testator under whose will the charity was established, does not strictly conform to the provisions of the will, it is not the practice of the Court, when the discrepancy has been made by mistake, to visit the past consequences of the mistake upon the trustees.

The plaintiff in this suit demanded an account from Bai Punjabai of the Bhimpura property from the testator's death to the execution of the deed of 13th October, 1868, and of the school-house property from the date of its purchase to the same time, and also an account against the trustees of the deed of 17th April, 1869, of the income of the Bhimpura property, and of its application.

Held, that accounts ought not to be required from Bai Punjabai. She had made over the property in question to trustees in 1868. There was no evidence that she had ever used any of the income for her own purposes, and the presumption was that she had faithfully discharged her duty. The account was probably barred by article **[553]** 120 of the Limitation Act (XV of 1877). The trustees of the deed of 1869 had paid over the income received by them to the trustees of the earlier deed of 1868, who were entitled to receive it; and, therefore, no account would be decreed against them.

The plaintiff further prayed for an account against the representatives of Rupsi Bharmal, who had been trustee of the deed of 1868 from the date of its execution to his death in 1889. Under a decree passed in a previous suit (No. 113

1894

JULY 3.

ORIGINAL CIVIL.

18 B. 551.

of 1889), dated 10th August, 1893, brought by the trustees, they had received from Rupsi's estate the balance which in that suit they had claimed to be due from him to the charity. In that suit the trustees had not asked for an account against him.

Held, that the Advocate General as plaintiff in the present suit was barred by the decree in that suit under s. 43 of the Civil Procedure Code (XIV of 1882). The trustees having then omitted to ask for an account could not sue again. The Advocate General represented the same interests as they did, and was, therefore, equally bound. Even, however, if that were not the case, the Court in the exercise of its discretion would not direct the account asked for.

[R., 20 B. 495 (499) ; 21 B. 257 (264) ; 32 B. 364=10 Bom. L.R. 117 (123).]

THE plaint in this case was filed by the Advocate General of Bombay at the relation of Hirji Hansraj, Khimji Vardhman and Jaitha Maneck, who were leading members of the Jain Jackhoo Dossa Oswal caste of Cutch residing at Bombay.

The plaint stated that one Bhimsi Ruttonsi, a member of the above caste, died on the 3rd February, 1863, leaving a will dated 31st January, 1863, and letters of administration with the will annexed were granted to his widow Bai Punjabai (the first defendant) on the 20th July, 1866.

The said testator died possessed of a half share of a certain property in Bombay, known as the "Bhimpura property," which half share yielded an annual rental of about Rs. 2,500. The other half share belonged to Hirji Dossa and Muddon Tejsi. By his will the testator directed that a moiety of the rental of his half share should be spent on the *sadharam* (charitable or religious) endowment of the *derasar* (temple) of Jackhoo in Cutch and the other moiety in establishing two *sadavarats*, one in the town of Jackhoo and the other in Sri Palitana. He also set apart a sum of Rs. 1,26,000, of which Rs. 1,01,000 were to be expended in building a temple at Jackhoo, and the balance of Rs. 25,000 to be spent in erecting a market near the temple at Jackhoo, or, if that was impossible, to be spent in Sri Palitana.

The plaint stated that the relators believed that of the Rs. 1,26,000 set apart by the testator, about Rs. 60,000 had been [554] spent in purchasing a property in Bombay (called the "school property") for the purpose of establishing there a school, and about Rs. 50,000 had been expended in erecting a temple at Jackhoo, but nothing had been done with the balance, nor had a market been established at Jackhoo. All that had been done there was to erect three shops, which did not cost more than Rs. 2,000.

It was further alleged that, after obtaining letters of administration, Bai Punjabai (the first defendant) had at first handed over the management of the testator's estate to the testator's brother Jewraj Ruttonsi, who continued to manage for a short time until he became insolvent. On his insolvency, Bai Punjabai (defendant No. 1) had caused a certain deed, purporting to be a trust-deed, to be prepared and executed, by which she purported to convey, as absolute owner in her own right, the "school property" and the half share in the "Bhimpura property" to trustees for purposes duly set forth. The said deed was executed by her on the 13th October, 1868.

On the 17th April, 1869, a second deed was executed by her, as owner in her own right, of the testator's said half share of the "Bhimpura property," and by the owners of the other half share of it. By this deed the whole of the said "Bhimpura property" was vested in trustees on trusts, more or less similar to those created by the first deed. The trustees, however, of the two deeds were not the same, though some of

1894
JULY 3.
ORIGINAL CIVIL.
18 B. 551.

the trustees of the first were also trustees of the second ; nor did the second deed recite or in any way refer to the first.

The trustees named in the said two deeds were all dead at the date of suit except Walji Natha (the second defendant). By subsequent deeds, however, new trustees had been appointed, and these were all parties to the present suit. The defendants Nos. 2, 3, 4, 5, 6 and 7 were trustees of the "Bhimpura property," and defendants Nos. 8, 9, 10 and 11 were the trustees of the "school property."

The plaint further stated that by the testator's will, as by the said two trust-deeds, it was provided that money for certain purposes was to be sent to Jackhoo, but that none whatever had **[555]** been sent there for several years. It complained that no *sadavarat* had been established at Sri Palitana, and only a very small sum had been sent each year by the trustees for the *sadavarat* at Jackhoo.

One Rupsi Madan *alias* Bharmal was from the first a trustee of both deeds and continued a trustee until his death in 1889. It was he who chiefly collected the rents of both the "school property" and the "Bhimpura property" and kept the books of account, and the relators charged that during his management he and the testator's widow Bai Punjabai (defendant No. 1) had misappropriated and converted to their own use the greater part of the income of both these properties amounting to Rs. 40,000 or thereabouts. Rupsi Madan (*alias* Bharmal) being dead at the date of suit, his heirs, Dhanji Kessowji and Dhanbai, were made parties (defendants Nos. 12 and 13).

The plaint stated that the relators had been advised that it was doubtful whether the said trust-deeds were good and effectual dispositions of the property which they purported to dispose of: that many of the trusts thereof were not in accordance with the directions of the will and were consequently void, and they desired that the Court should decide how far the deeds were valid, and should provide for the proper administration of the religious and charitable trusts created by the will. They, therefore, prayed for a declaration as to what were the charitable devises and gifts of the will ; for an account against the first defendant and, if necessary, for administration of the testator's estate ; for a scheme for the management of the several charities created by the testator ; for an account against the trustee defendants, and that the heirs of Rupsi Madan *alias* Bharmal (defendants Nos. 12 and 13) should be ordered to pay what should be found due from his estate; for an injunction and receiver, &c.

The defendants denied all the allegations made against them and pleaded limitation.

The issues raised (*inter alia*) the following points :—

(1) Whether the trust-deeds were not executed *bona fide*, and whether, even if not in strict accordance with the testator's will, the Court would now interfere ?

[556] (2) Whether the trust moneys had not been properly expended, and whether, even if misapplied by mistake, the Court would order a refund after so long a lapse of time ?

(3) Whether there was not a misjoinder of causes of action in the suit ?

(4) Whether the proceedings in a former suit (No. 113 of 1892) were not a bar to this suit, wholly or in part ?

(5) The general issue.

Lang (Advocate General) and *Anderson* for the plaintiff.

Inverarity and *Rivett-Carnac* for defendant No. 1.

1894
JULY 3.
ORIGINAL CIVIL.
18 B. 551.

Scott and *Lowndes* for defendants Nos. 2, 3, 6, 11.
Inverarity and *Robertson* for defendants Nos. 4, 5, 7, 9, 10.
Inverarity and *Scott* for defendant No. 13.
Defendants Nos. 8, 12, 14 did not appear.

Inverarity for first and other defendants:—There is a misjoinder of causes of action. The plaintiff repudiates the trust deeds. He, therefore, cannot join the trustees of those deeds with Punjabai, and sue them all together. He cannot approbate and reprobate. Nor can he join two sets of trustees under two separate deeds in one suit. By the deeds the trustees are given a large discretion in expending the trust money which the Court will not interfere with. Punjabai as administratrix acted *bona fide* in executing the trust deeds—*Advocate General* v. *Vishvanath*(1); Tudor on Charities (3rd Ed.), p. 1—11; *Goodman* v. *Mayor of Saltash*(2); *Andrews* v. *M'Guffog*(3); Tudor on Charities (3rd Ed.), p. 302.

The suit against Punjabai is barred by limitation. She is not a trustee within s. 10 of the Limitation Act (XV of 1877)—*Kathiawar Trading Co.* v. *Virchand*(4). The trustees accepted the trusts declared in the deeds executed by Bai Punjabai. There is no allegation of fraud or breach of trust against them. An account is also sought against Rupsi Bharmal whose representatives have been made parties. But Rupsi's liability in respect of these matters has been already ascertained in suit No. 113 of **[557]** 1892, in which the trustees of the charity were plaintiffs, and his estate was ordered to pay a certain sum. The question of his liability is *res judicata* and cannot be re-opened in this suit. The Advocate General and the trustees of the charity represent the same interests. Whatever binds them binds him. In the former suit they omitted to ask for an account against Rupsi Bharmal, and they could not ask for it now: see s. 43 of the Civil Procedure Code. Neither, therefore, can the Advocate General, who has no independent right: Tudor on Charities (3rd Ed.), p. 295; *Attorney General* v. *Cullum*(5). As to the trusts of the deed, Tudor on Charities (3rd Ed.), p. 127; *Mayor of Lyons* v. *Advocate General* (6); *Attorney General* v. *Caius College* (7); *Attorney General* v. *Shearman*(8).

Lang (Advocate General) for plaintiff:—The trusts of the deeds are at variance with the trusts of the will: Tudar on Charities (3rd Ed.), p. 309. Trustees must be ordered to account—*Attorney General* v. *Earl of Stamford*(9); *Attorney General* v. *Exeter*(10).

JUDGMENT.

3rd July, 1894. FARRAN, J.—It will be convenient, before stating the nature of the pleadings and the questions which arise for decision, to refer to certain main facts which are not in dispute between the parties.

Ruttonsi Bhimsi, by his will dated the 31st of January, 1863, directed that one-fourth of the income of a certain property called the "Bhimpura property," in which he had a half-share, should appertain to the *sadharm* account of the *derasar* at Jackhoo in Cutch, and the remaining one-fourth share should be kept for his *sadharm* account, out of which two *sadavarats* were to be established, one in Jackhoo and one in Palitana. He also directed that the amount of the *devdharm* and *sadharm* money should be Rs. 1,26,000—Rs. 1,01,000 for *devdharm* and Rs. 25,000 for *sadharm*.

(1) 1 B.H.C.R. App., 9. (2) 7 Ap. Ca. 633 (642). (3) 11 Ap. Ca. 313.
(4) 18 B. 119. (5) 1 Keen. 104. (6) 1 Ap. Ca. 91.
(7) 2 Keen. 150 (163). (8) 2 Beav. 104. (9) 1 Ph. 747.
(10) Jacob, 443.

It will be necessary to refer more in detail to these charitable bequests hereafter. He appointed his wife, the defendant Punjabai, the heiress of his whole property after his death, and Hirji Dossa and Bojraj Devsi *upris* over her.

[558] The testator was of the Jain religion. Jackhoo in Cutch was his native town. He had built a temple there in his life-time. He died in February, 1863. At the time of his death he was reputed to be and was, in fact, a very wealthy man, but the greater part of his money was employed in the firm of Hirji Bhimsi & Co., in which he was a partner. The firm failed in Samvat 1925 (1864-1865), and the whole of his capital embarked in it was lost, and decrees for considerable amounts were passed against his widow Punjabai in consequence of her connection with the firm.

Soon after the death of the testator, Punjabai expended the Rs. 1,26,000. She purchased a house, now called the "school house," and laid out the balance in erecting and adorning a temple at Jackhoo, close to the temple built by the testator. The Advocate-General in his opening speech stated that he did not quarrel with this expenditure or ask for an account of it.

On the 13th October, 1868, Punjabai by a deed of that date conveyed the "school-house" and the testator's moiety of the "Bhimpura property" to Ramji Jehta, Rupsi Bharmal and Vardhman Punsi in trust for charitable and pious purposes in the indenture more particularly described. The trusts of the net rents were:—

(1) As to one moiety to apply the same in *sadavarat* or almsgiving at Jackhoo and Palitana, and in feasting the caste people in Bombay and Jackhoo annually on the anniversary of the death of Bhimsi Ruttonsi, in the worship called *satarbhadi* at the *derasars* in Bombay and Jackhoo, and in the entertainment and clothing of the *gorip* in Bombay and Jackhoo.

(2) As to one-fourth part, to apply the same towards *sadharm* charities of the *derasar* at Jackhoo.

(3) As to the remaining fourth part, to apply the same towards *sadharm* (charities) at such places as the trustees should think fit.

On the 17th of April, 1869, Punjabai and the owners of the remaining moiety of the "Bhimpura property," *viz.*, Hirji Dossa and Muddon Tejsi, who were each entitled to one-fourth share therein, conveyed without reference to the deed of the 13th October, 1868, the Bhimpura estate to Ramji Jetha, Rupsi **[559]** Bharmal, Lalji Kessow, Nagsi Kirpal, Jaitha Muddon and Velji Nathu in trust:—

(1) As to one moiety of the net rents, which was to be considered as derived from the share of Punjabai, to apply the same in *sadavarat* or alms-giving at Jackhoo and Palitana, in feasting the caste people in Bombay and Jackhoo annually on the anniversary of the death of Bhimsi Ruttonsi, in the worship of *derasar* called *satarbhadi*, and in the entertainment and clothing of the *gorip* in Bombay and Jackhoo.

(2) As to one-fourth part of the net rents, which was to be considered as derived from the share of Hirji Dossa, to apply the same for the benefit of a certain temple of Tera in Cutch.

(3) As to the remaining fourth part of the net rents, which was to be considered as derived from the share of Muddon Tejsi, to apply the same for the benefit of another temple at Jackhoo in Cutch.

It will be seen that the trusts (2) and (3) in favour of *sadharm* for the temple of Jackhoo and for *sadharm* generally, declared in the indenture of

1894
JULY 3.
ORIGINAL CIVIL.
18 B. 551.

October, 1868, are omitted in the later indenture. It is submitted on behalf of Punjabai—and her evidence tends to support the submission—that this omission arose from an error or oversight. It is not necessary to decide this absolutely, for Punjabai having divested herself of all interest in the Bhimpura property by the deed of October, 1868, and having declared the trusts defined by that deed, could not convey the same property to other trustees upon different or less extensive trusts, nor could she indeed validly convey it at all. The first two trustees of the later deed, being the same persons as the first two trustees of the earlier deed, had notice of the contents of the earlier deed, and through them, I think, that all the trustees of the later deed had similar notice. As to Punjabai's half share in the rents and profits of the "Bhimpura property," the trustees of the later deed were, therefore, bound to hand them over to the trustees of the earlier deed, who were legally entitled to them. Had they refused to do so, the trustees of the earlier deed could have recovered them as money received to their use. This will be an important circumstance when I come to consider the question of account.

[560] The second deed seems to have been intended as machinery for the more easy management and collection of rents of the Bhimpura estate, having regard to the sub-division of interests therein. It was evidently so regarded by the original trustees. The Bhimpura rents were collected, and its repairs were effected in common by one trustee of the deed of 1869 acting on behalf of all. At the close of each year the net rents were divided into four parts, of which two were made over to Rupsi Bharmal and Ramji Jetha on behalf of what I may call Punjabai's charities, while the remaining two-fourths were made over—one-fourth each—to the two trustees who were supposed to represent the charities of Hirji Dossa and Muddon Tejsi respectively. The half share received by Punjabai's trustees was brought into the account kept by the trustees of the deed of October, 1868. It must, therefore, be taken that the "school-house" and "Bhimpura" properties have been held since 1868 upon the trusts declared by the deed of October, 1868, by the trustees of that deed, though the rents of the Bhimpura estate have been, in fact, collected by the trustees of the later deed.

It is not denied that the trusts declared by the deed of October, 1868, are not in strict accordance with the directions contained in the will of Bhimsi Ruttonsi, and that the Court, if its aid had been invoked in time, and if it has jurisdiction in the matter, might properly have been called upon to ascertain the trusts of the will and those declared by the deed so as to bring them into accordance with the wishes of the testator, and for that purpose to frame a scheme. This is the main object of the suit. Such relief is prayed for in paragraphs (*a*) and (*d*) of the prayer of the plaint. Issues 2 and 22 raise the questions (1) as to whether the suit is not too late, and (2) as to whether the Court will undertake the administration of a trust to be executed in foreign territories. The question whether the Advocate-General can sue on behalf of the charities in question, is not directly or indirectly raised in the pleadings or issues, nor was it alluded to in argument. I must take it, therefore, that his right to sue is not disputed. See *Re Frazer* (1).

[561] First as to jurisdiction: The properties which are admitted to be held in charitable trusts are in Bombay, and the trustees of such properties are also in Bombay. The *derasar* at Jackhoo, one of the

(1) 22 Ch. D. 827.

1894
JULY 3.
ORIGINAL CIVIL.
18 B. 551.

admitted objects of the trusts, complains (through the Advocate-General) that the deed under which the trustees hold does not correctly define the trusts created in its favour by the testator, and prays the Court to declare this and to rectify the deed. On principle I can see no objection to the Court granting this relief. How does the case stand upon the authorities ? I do not think that a strictly analogous case has arisen or could arise in England. The cases referred to in Tudor on Charitable Trusts (3rd Ed.), p. 157, notes (*m*) (*n*) and (*o*), are all cases of bequests of money *to found a charity* in territories out of the jurisdiction of the Court. What the Court in such cases does, is to hand the money to the trustees named by the testator, leaving it to the Courts of the country in which the charity is to be carried out, to settle the scheme in accordance with which the trustee is to deal with the money. They certainly do not decide that if the trustee for a charity abroad does not carry out the trusts in favour of such charity, the Court will not assist the charity, the trustee and the fund being in England. In a very recent case, where a fund was bequeathed to a trustee in trust for the benefit of the blind in Inverness Shire, the Supreme Court in London directed the Attorney-General to apply to the Court of Session in Edinborough to settle a scheme for its administration with a view to handing over the fund to the trustees indicated in such scheme, and thus in effect applied the money to the purpose indicated by the testator—*Re Frazer* (1). The case of *The Mayor of Lyons* v. *East India Company* (2) is, I think, direct authority for the making of a decree declaring the trusts upon which the trustees of the deed of October, 1868, held the properties comprised in that deed and for rectifying the deed in accordance with such declaration. I do not think that I ought, upon the authorities, to go further in the way of settling a scheme in this case.

Secondly, as to lapse of time: Independently of the Law of Limitation, I do not think that Courts in England have ever refused to stop the improper application of funds of a charity however **[562]** long the misapplication has continued—*Attorney General* v. *St. John's Hospital, Bedford* (3) ; Tudor's Charitable Trusts (3rd Ed.), p. 299. In the Limitation Act (XV of 1877) there is no specific article, that I can find, which is applicable to the present suit; but if it is not excluded from the Limitation Law by s. 10 of the Act, art. 120 would no doubt apply to it. This would give the Advocate General six years to sue for a rectification of the deed of 1868 from the time when his cause of action arose. The Advocate General, however, contends that this is not the nature of the case, but that it is a suit against Punjabai and her assigns, the trustees of the deeds of 1868 and 1869, for the purpose of following the trust property in their hands and having it applied to the proper purposes of the trust. He relies, in support of his contention, on the judgment of the Privy Council in *Balwant Rao* v. *Purun Mal* (4). I think that his contention is correct. If the deed had provided that half of the income of the premises was to be paid to Punjabai, it seems to me that the tenth section of the Act must have applied. Does it make any difference if the income is directed to be applied in part to some charitable object not within the scope of the original trust ? I am of opinion that it does not. It is not like the case of a lease improperly granted, where the statute begins to run in favour of the lessee from the date of the lease—*Magdalen College* v. *Attorney General* (5). It is the case of a volunteer holding trust lands to whom the statute does not apply,

---

(1) 22 Ch. D. 827.
(2) 1 M. I. A. 175.
(3) 2 De G. J. and S. 621.
(4) 10 I.A. 90.
(5) 6 H. L. C. 189.

1894
JULY 3.
ORIGINAL CIVIL.
18 B. 551.

and in whose case notice is immaterial. The question is not free from difficulty, but I have come to the conclusion that the suit is not time-barred.

There is not much difficulty in declaring the trusts of the will of Bhimsi Ruttonsi and in indicating the lines of amendment required to bring the deeds into conformity with the declaration. As to the Bhimpura property, the will directs that half the net income of the testator's moiety is to be held in trust for *sadharm* account of the *derasar* at Jackhoo, and the other half of such income is to be held in trust for *sadharm* account generally, and that out of such last mentioned *sadharm* account, *sadavarats* are to be established at Jackhoo and Palitana. **[563]** Subject, therefore, to the establishments of such *sadavarats* the half of the net rents of the moiety of Bhimpura are applicable to *sadharm* generally. Of the Rs. 1,26,000 set apart for *devdharm* and *sadharm*, divided into Rs. 1,01,000 for *devdharm* and Rs. 25,000 for *sadharm*, Rs. 65,000 in round numbers have been already spent in *devdharm* works, which I think is properly applicable to the *devdharm* fund. The school-house represents the remaining Rs. 61,000. Its rents are applicable in the proportion of 36 to 25 to *devdharm* and *sadharm* objects respectively. When the funds are permanently invested, there does not appear to be any practical difference between these objects.

The important question is, whether the feasting of the caste upon the anniversary of the death of Ruttonsi Bhimsi can be legitimately kept up out of the net income of the charity property not specifically appropriated. If it can, the provisions of the deed of 1868 will require but little modification. Mr. Inverarity argued in favour of this contention very ingeniously. He started with the proposition that *sadharm* meant, as translated in the will, religious or charitable purpose. He cited authorities to show that a trust for the benefit of a particular class of the inhabitants of a parish or town was a charitable trust—*Goodman* v. *Mayor of Saltash*(1), and then drew the conclusion that the feeding of the caste on the anniversary in question was a charitable trust, and that the *sadharm* fund was, therefore, applicable to it. The reasoning is, I think, rather too fanciful. It starts with the assumption that *sadharm* is the equivalent of the English word "charitable" as judicially interpreted. This is really begging the question. If it is, his argument is correct. The argument fails if it is not. The real inquiry should be whether a Jain in the position of Ruttonsi Bhimsi could reasonably he held to include such feasting within the expression of *sadharm*. In the 12th clause of his will he directs as follows:—"In the *derasar* in the town of Jackhoo in Cutch and in Bombay, *satarbhadi puja* is to be performed and our caste is to be annually feasted one day each and every year." He sets apart no fund for this purpose. Linking the feasting of the caste with a particular worship seems to indicate that he placed them in the same category. As he set apart no fund for these purposes, it may not unreasonably be **[564]** supposed that the clause is a further direction as to how part of his *sadharm* is to be expended. That was apparently the construction which Punjabai and her *upris* put upon the will more than twenty-eight years ago—a construction which has been acted upon ever since, and which, therefore, ought not to be lightly disregarded. To do so now would be to defeat one particular object which the testator had in view in order to further an object which he expressed only in general terms, both being

(1) 7 App. Ca. 633 (642).

1894
JULY 3.
ORIGINAL CIVIL.
18 B. 551.

charitable. I have not evidence before me sufficient to enable me to determine whether the testator can be intended to have used "*sadharm*" in such a sense as to include this feast. I shall hear further evidence upon the point before I rectify the deed in accordance with this judgment. As to the deed of 1869, it will be sufficient if it is altered by striking out the particular charitable trust as to Punjabai's moiety, and directing that moiety of the rents to be held on the trusts of the deed of 1868 as amended by this decree.

I now come to the charges made in the plaint against the trustees and Punjabai, and to the accounts which are prayed for. It is objected that the plaint in this respect is multifarious. I do not consider that it is open to that objection, but I need not decide it. The decree which I shall make will not err in that respect.

Para. 11 of the plaint states that the trustee Rupsi Madan *alias* Bharmal chiefly collected the rents and profits of the charitable properties and kept the account relating thereto, and the relators charge that during his management the said Rupsi Madan and with his aid and connivance the defendant Bai Punjabai misappropriated and converted to their own use the greater part of the income of the said properties amounting to the sum of Rs. 40,000.

Issues 7 and 21 were raised on behalf of Punjabai and the representatives of Rupsi Madan respectively to challenge that charge. The Advocate General closed his case without offering a particle of evidence in support of it; but during the address of Mr. Inverarity, who was counsel for Punjabai and Rupsi Madan's representatives, he stated that he had called no evidence about the accounts, as the Court had intimated that it would not itself take the accounts. I allowed him at the close of Mr. Inverarity's **[565]** address to call such evidence as he might be advised. That which he called was of the most unsubstantial nature upon which to base so grave and serious a charge. (His Lordship discussed the evidence upon this point and continued :—)

Under these circumstances I must hold that the charge of fraud and dishonesty against Punjabai and Rupsi Bharmal has not been established. The Advocate General urges that, if the accounts are taken, he may still be able to establish it. Such a charge, however, if put forward, must be established at the hearing, and cannot be allowed to be reserved—*Lalbhai* v. *Kavasji* (1). I must, therefore, find the 7th and 21st issues in the negative. The plaint, in so far as it charges fraud and dishonesty against Punjabai and Rupsi Madan, will stand dismissed with costs.

Now as to the accounts. Admittedly the expenditure of the charitable income has not been in exact conformity with the will of Bhimsi Ruttonsi; but, if the deed of October, 1868, and the expenditure under it do not strictly conform to his directions I consider that this was the result of a *bona fide* mistake on the part of Punjabai, and it is not the practice of the Court to visit the past consequences of such a mistake upon the trustees of a charity—*Attorney General* v. *Wax Chandlers Co.* (2); *Andrews* v. *M'Guffog* (3); Tudor on Charitable Trusts (3rd Ed.), p. 303. For the consequences, therefore, of her execution of the deed of October, 1868, not being in accordance with Bhimsi Ruttonsi's will, no accounts will be directed against Punjabai, nor *a fortiori* against the trustees appointed under that deed, whose duty it was to carry out its provisions. The Advocate General in the course of Mr. Inverarity's address admitted the application

(1) 8 B.H.C.R. 209 (214). (2) L.R. 6 H.L. 1. (3) 11 Ap. Ca. 313.

1894
JULY 3.
ORIGINAL CIVIL.
18 B. 551

of this principle, and said that he would be content if the accounts were taken, so that the trustees of the several deeds, including Punjabai, should account on the footing of their own deeds.

The accounts which the Advocate General eventually insisted were—

(1) An account against Punjabai of the income of the "Bhimpura property" from the death of Bhimsi Ruttonsi to the execution [566] of the deed of the 13th October, 1868, and of the income of the "school-house property" from the date of its purchase to the same time;

(2) An account against the trustees of the deed of 17th April, 1869, of the income of Bhimsi Ruttonsi's moiety of the "Bhimpura property," and of its application;

(3) An account against the trustees of the deed of 13th October, 1868, of the income of both properties and of its expenditure according to the trusts of the deed. As I understood him, Punjabai was to render, or be liable upon, this account with the trustees of the deed.

I deal with them in order:

(1) It appears to me that it would, at this distance of time, be a hardship, amounting to a positive injustice, to direct Punjabai to bring in the first mentioned accounts even if, having regard to the Law of Limitation, I have the power to do so. She made over the property to trustees in 1868. Down to then she says that her *upris* managed the property under her directions, and she swears that an anna of its income she never used for her own purposes. There is no evidence to the contrary to show that she did. The presumption, under the circumstances, is that she faithfully discharged her duty, and no account should be directed against her—*Attorney General* v. *Earl of Stamford*(1). I am inclined to think, however, that such an account is barred under art. 120 of the Limitation Act, even admitting that she was, as I consider that she was, a trustee in whom the trust property was vested as the heiress appointed by the will of Bhimsi Ruttonsi. The evidence does not afford any ground for supposing that Punjabai has trust property in her hands which it is sought to follow. The claim is now reduced to a simple claim against her as trustee for an account of income and disbursement and for the balance, if any. It falls within the ruling in *Saroda* v. *Brojo Nath*(2) followed in *Shapurji* v. *Bhikaiji* (3). The remarks of the Judges in *Metropolitan Bank* v. *Heiron*(4) do not militate against this view. Cotton, L.J., there assumes a [567] fund in the hands of a trustee and his waste or misapplication of it. These two facts proved, time, in England, does not bar the suit. These facts are not both proved here. In the absence of proof of dishonesty and fraud, no account can be directed against Punjabai in conjunction with the trustees of the deeds which she has executed, even if hers have been the hands, of which there is no proof, to administer the funds of the charities—*Attorney General* v. *Chesterfield* (5). No account will, therefore, be directed.

(2) The remarks which I have made in an early part of my judgment dispose of the second account. Regular accounts of the income of the "Bhimpura property" have been kept and adjusted each year, and the share of the net income appertaining to Bhimsi Ruttonsi's charities has been from time to time made over to Rupsi Bharmal. With the receipt of these sums from time to time the trustees of the deed of 1868 will be charged, and, as far as the trustees of the deed of 1869 are concerned, the

---

(1) 1 Ph. 747. (2) 5 C. 910. (3) 10 B. 242.
(4) 5 Ex. Div., 319. (5) 18 Beav. 596.

1894
JULY 3.
ORIGINAL CIVIL.
18 B. 551.

matter ends there and an account is unnecessary. The defendants Nos. 2, 3, 4 and 11 are the present trustees of that deed, who are not also trustees of the deed of 1868. No account will be decreed against them. Two of them desire to retire. They can do so on taking the proper steps.

(3) The real difficulty is as to whether an account should be directed against the trustees of the deed of 1868 and as to the nature of such an account if it be directed.

The original trustees of the deed are all dead. Vardhman Punsi died on 10th November, 1880; Ramji Jetha died in 1885. Rupsi Bharmal then remained the sole surviving trustee, and continued so until his death on the 10th March, 1889. By an order of Court dated 26th August, 1889, the defendants Jethabhai Vardhman, Damji Ramji, Khetsi Jetha and Tejpal Coresi were appointed trustees of the deed, and are now its trustees. Since their appointment there has been considerable litigation in reference to the "school-house property." There can be no objection to directing them to bring in the account, so that on further directions the exact state of the funds may be known. It is not suggested **[568]** that there is any difficulty in bringing in this account, or that these trustees have not done what they could to carry out the trusts of their deed. Their accounts will be a mere matter of form from the date of their appointment. The representatives of Vardhman Punsi and Ramji Jetha respectively, as such, have not been made parties to these proceedings, so that the account which the Advocate General presses for, is an account against the representatives of Rupsi Bharmal. Ought I to grant it? It is admitted that it is a matter for the exercise of the discretion of the Court as to how far back the accounts should be directed. If directed here it would have to embrace the whole period from 1868, because, in order to arrive at the balance in any particular year to start with, the accounts of the preceding years would have to be investigated. Since the death of Rupsi the trustees of the deed have received from his estate the balance which they considered to be due from him to the charity. The decree awarding them that relief was passed in suit No. 113 of 1892, and is dated 10th August, 1893. The proceedings in that suit are relied upon as a bar to this claim. The trustees in that suit could have asked for an account, and did not. They omitted to sue in respect of that portion of their claim, and under s. 43 of the Code of Civil Procedure could not now sue in respect of it. The Advocate General, it is urged, represents the same interests as the trustees, and he is equally barred with them in now asserting his claim to an account. I am, I confess, much struck with this reasoning, and do not at present see the answer to it. The trustees and the Advocate General both represent the Jain community; the Advocate General has no right independent of that community—*Magdalen College* v. *Attorney General* (1). The trustees represent the *derasar*, and so does the Advocate General. It is not suggested that there was any fraud or collusion in the obtaining of the decree in suit No. 113 of 1892. The defendants in that suit objected to a decree being passed against them on the ground that this suit upon the same cause of action was then pending. The Advocate General was himself counsel for the plaintiffs in that suit, and notwithstanding the defendant's plea pressed for a decree. I hold that the decree in suit No. 113 of **[569]** 1892 is a bar to the present claim of the Advocate General against the representatives of Rupsi Bharmal.

(1) 4 H. L. C. 189.

1894

JULY 3.

ORIGINAL CIVIL.

18 B. 551.

Assuming, however, that I am wrong in that view, I still consider that I ought not to direct the accounts. I must consider the evidence laid before me, and having done so I think that it would not benefit the charities to direct this account. So far as I can judge, it would result in nothing of importance even if a few errors were detected in the accounts. It would be a long and costly account, and at this distance of time the books would be the only evidence in the case. The Court can see now pretty nearly what they would show. The cost of taking the account would most probably fall on the charity. On the whole I think that I am exercising a wise discretion in refusing to open up these accounts. I must decree accordingly.

The minutes of the decree will declare that the trusts declared by the deeds of 1868 and 1869 are not in accordance with the directions declared in the will of Bhimsi Ruttonsi, and that they ought to be amended so as to bring them into accordance with such last-mentioned direction.

Declare that the trusts declared by the will of Bhimsi Ruttonsi as set out in the judgment, and let the Judge in chamber rectify the deeds so as to bring them into accord with the trusts as declared by the judgment. Declare that the charges of fraud and dishonesty made against Punjabai and Rupsi Bharmal respectively have not been established.

Let an account be taken of the net income and profits of the properties comprised in the deed of 1868 and of all other moneys which have come to the hands of the defendants, the present trustees of the deed of 1868, as such trustees, and let it be ascertained what sum they now hold as such trustees.

The relators to pay the costs of the defendants Punjabai and Rupsi Bharmal's representatives occasioned by the charges of fraud and dishonesty and of the claim for an account against them and to pay their own costs on these heads. The Advocate General to have his general costs, except as aforesaid, paid out of the trust funds.

[570] The trustees of the deed of 1869 to have their costs out of the trust funds taxed as between attorney and client.

The trustees of the deed of 1868 to have their costs out of such funds taxed as between attorney and client.

Decree accordingly.

Attorneys for plaintiffs :— Messrs. *Ardesir, Hormasji and Dinshaw.*

Attorneys for defendants:—Messrs. *Payne, Gilbert and Sayani*, Messrs. *Little, Smith, Nicholson and Bowen*, and Messrs. *Wadia and Gandhi.*

18 B. 570=Chitty's S. C.C.R. 409.

1894
JULY 20.

ORIGINAL CIVIL.

18 B 570= Chitty's S. C. C. R. 409.

ORIGINAL CIVIL.

Before Bayley, C. J. (Acting), and Mr. Justice Farran.

GANESDAS RAMNARAYAN AND OTHERS, (*Plaintiffs*) *v.* LACHMINARAYAN AND OTHERS (*Defendants*).* [29th June and 20th July, 1894.]

Hundi—Shah jog hundi—Shah jog hundi *endorsed to a particular person—Stolen* hundi *—Payment by drawee without inquiry to wrong person—Liability of drawee to lawful owner of* hundi.

On the 8th December, 1893, the plaintiff at Sholapore having bought *a shah jog hundi* there, drawn upon the defendants in Bombay, endorsed it to Ramrukh Ramkisson and sent it by post to him for collection. In course of its transmission it was stolen, and the name of Ramrukh Ramkisson was expunged, and another name, *viz.*, that of Dwarkadas Lalji, was substituted. On the 9th December, 1893, the *hundi* was presented for payment to the defendants in Bombay by a person giving his name as Dwarkadas Lalji, and the defendants paid it without inquiry as to the responsibility or position of the person to whom they paid it. The plaintiff sued the defendants for value of the *hundi*.

Held—(1) that the defendants were guilty of conversion of the *hundi* and were liable to the plaintiff, the lawful owner thereof, in trover.

(2) that the *hundi* continued to be *shah jog* after being endorsed to a particular person.

[F., 9 C.W.N. 841; **R.**, 5 C.W.N. 313 (317); 16 Bom. L.R. 434=25 Ind. Cas. 52.**]**

CASE stated for the opinion of the High Court under s. 69 of the Presidency Small Cause Courts Act (XV of 1882) by C. W. Chitty, Chief Judge.

The plaintiff having bought at Sholapur a *shah jog hundi* drawn upon the defendant at Bombay endorsed it to his agent at Bombay, Ramrukh Ramkisson, and sent it by post to him for collection. In course of its transmission it was stolen, and the **[571]** name of Ramrukh Ramkisson was expunged, and another name, *viz.*, that of Dwarkadas Lalji, was substituted in its place. On the 9th December, 1893, the *hundi* was presented for payment to the defendants in Bombay by a person giving his name as Dwarkadas Lalji, and the defendants thereupon without inquiry paid it. The plaintiffs in this suit sought to recover the value of the *hundi* from the defendants.

The following is a full statement of the facts as stated in the judgment of the Chief Judge:—

On the 8th December, 1893, the plaintiffs' firm at Sholapur bought a *shah jog hundi* at that place and paid full value for the same. It was then endorsed in favour of Ramrukh Ramkisson, the plaintiff's agent in Bombay, for realization, and on the same day sent to him by post. At the same time a post card was sent advising the despatch of the *hundi*. Neither letter nor post card arrived at their destination. Not hearing of their arrival, the plaintiffs' firm sent a second post card, in reply to which their agent stated that no *hundi* was received. The plaintiffs at Sholapur thereupon on the 14th December, 1893, went to the drawer and demanded a *petha*. The drawer, however, having by that time received the *khoka* from the defendant, declined to give a *petha*. The plaintiffs' man then came to Bombay to make inquiries. It then appeared that the *hundi* had been presented to the defendant on the 9th December, 1893, by some person giving his name as Dwarkadas Lalji and giving an address in

* Small Cause Court Reference No. $\frac{22}{1734}$ of 1894.

1894
JULY 20.
ORIGINAL CIVIL.
18 B. 570 = Chitty's S. C. C. R. 409.

Hanuman Gully, and that the defendant had sent the money there by his man, who had paid it to some one whom he took to be the cashier of the said Dwarkadas Lalji. On the defendant's man going there again with the plaintiffs' man, no trace of any person known as Dwarkadas Lalji could be found, nor were his whereabouts discovered. It was quite clear that the *hundi* was stolen or intercepted during transit and the name of Ramrukh Ramkisson expunged and that of Dwarkadas Lalji substituted. The defendant admittedly paid the amount of the *hundi* without inquiry as to the respectability or position of the person to whom he paid.

The above facts having been proved, the Chief Judge gave his judgment as follows :—

[572] "I have no hesitation in adhering to my former finding that the old established custom still prevails, and that a defendant cannot avoid liability in respect of a *shah jog hundi* which he has paid, unless he can show that he has paid it to *shah*. The only question is whether in this case the *hundi* being specially endorsed makes any difference. No doubt the effect of the endorsement would be to restrict payment to the indorsee or some one claiming through him; but this cannot, in my opinion, render the words *shah jog* nugatory, and I think payment could only be made to such endorsee after due inquiry to see whether or not he was *shah*. This view is borne out by the case of *Thakur Das* v. *Futteh Mull* (1), and is also in accordance, to a certain extent, with the view taken by the defendant's own witnesses, who say they never look to the endorsement but only to the body of the *hundi*. No authority has been quoted in support of the proposition that a *shah jog hundi* loses its character as such, by being endorsed in favour of a particular person.

"As to whether the acts of the defendant amounted to a conversion of the *hundi*, I think that there can be no doubt. By accepting it, paying the amount to a person not entitled to it, and receiving the *khoka* and forwarding it to the drawer, the defendant clearly converted the *hundi* to his own use and deprived the plaintiff, the lawful owner of the *hundi*, of his right in it. The plaintiff can, therefore, sue him in trover.

"The charges of negligence on the part of the plaintiff are unsupported by any evidence, and must fail. In my opinion, the plaintiffs acted with all due diligence, and however soon they communicated with the defendants it would have been of no avail, as the *hundi* was paid on the 9th December, 1893, the very next day after its despatch. In my opinion, also the defendant is deserving of blame in not paying more attention to the endorsement on the *hundi*, a cursory glance at which would show that it had been tampered with, something expunged, and the name of Dwarkadas Lalji written over. Under these circumstances I must pass a decree for the plaintiffs for Rs. 1,010 and costs, and certify Rs. 135 as the professional costs of the plaintiff's attorney. At the request of the defendant I make my judgment contingent on the opinion of the High Court."

The following was the case stated for the High Court :—

"1. This was a suit brought by the plaintiffs as the last *bona fide* holders for value of a *hundi* for Rs. 1,000 to recover that sum and interest from the defendants, who were the drawer and drawee of the said *hundi*.

"2. On reading the plaint I was of opinion that there was no cause of action therein disclosed against the first defendant, the drawer of the *hundi*, and acting on the suggestion of the Court, the plaintiffs' attorney

(1) 7 B. L. R. 275.

1894
JULY 20.
ORIGINAL CIVIL.
18 B. 570 = Chitty's S. C. C. R. 409.

accordingly withdrew his claim as against the first defendant, and the suit proceeded against the drawee alone, who is hereafter called the defendant.

[573] "3. The facts of the case are fully set out in my judgment, copy of which is hereto annexed, and to which for brevity's sake I crave leave to refer.

"4. I was of opinion, on the evidence, that there had been no such change in the custom of merchants with regard to paying *shah jog hundi* as the defendant alleged, but that the custom as stated in the case reported at 6 Bom. H. C. Rep. 24, still obtained and is in force, and that such a *hundi* was only payable to a person who was *shah*, of which fact it is necessary for the payee to satisfy himself before he can safely make payment.

"5. I was of opinion that in this case the defendant having admittedly paid the amount of this *hundi*, without any inquiry, to a person who was not *shah*, and having received the *khoka* with an endorsement of payment, and having returned the same to the drawer, had been guilty of conversion of the said *hundi* and was liable to the plaintiffs, the lawful owners thereof, in trover (see *Lovell* v. *Martin* (1).

"6. It did not, in my opinion, alter the character of the *hundi* that it was endorsed for realization in favour of a particular individual. That fact could not, I thought, absolve the defendant of the duty which would otherwise lie upon him of making inquiries as to the respectability and position of the payee (see *Thakur Das* v. *Futteh Mull* (2)).

"7. Under these circumstances I held that the defendant had converted the *hundi* to his use, for which act he was answerable to the plaintiffs. I, therefore, passed a decree against him for Rs. 1,010 (the amount of the said *hundi* and two months' interest at the rate of 6 per cent. per annum) and costs, and certified Rs. 135 as the professional costs of the plaintiff's attorney. At the request of the defendant's pleader I made my judgment contingent on the opinion of the High Court.

"8. The defendant's pleader formulated the following questions:—

"(i) Whether the circumstances of the case amount to a conversion of the *hundi* on the part of the defendant?

[574] "(ii) If yes, whether the defendant is liable to refund to the plaintiffs the amount of the *hundi*?

"(iii) Whether (the *hundi* being payable by endorsement to Dwarkadas Lalji), the defendant is not discharged by such payment?

"(iv) Whether the *hundi* continued to be a *shah jog hundi* after being endorsed to a particular person?

"(v) Whether the drawee's omission to detect the alteration is such negligence on his part as to render him liable to the plaintiffs?

"Whether there was any privity of contract between plaintiffs, who were the payees of the *hundi*, and the defendant, the drawee, who had not accepted in their favour?

"9. The first question appeared to me to be a question rather of fact than of law, but otherwise unobjectionable.

"The second question depends on the answer given to the first.

"To the third and fourth questions I have no objection.

"The points raised by the fifth and sixth questions were not decided by me, as on the view which I took of the case it appeared to be unnecessary. I apprehend, therefore, that their Lordships will not answer them, unless their opinion on the point of conversion should be contrary to mine.

---

(1) 4 Taunt, 799.

(3) 7 B. L. R. 275.

1894
JULY 20.
ORIGINAL CIVIL.
18 B 570 = Chitty's S. C. C R. 409.

In case that may be so, I should perhaps mention that, in my opinion, and as a point of fact, the defendant was negligent in not detecting the forged endorsement on the *hundi*, inasmuch as it is apparent, on the most cursory glance, that some name has been expunged and the name of Dwarkadas Lalji written over it in a handwriting different to that of the rest of the endorsement.

"10. With these remarks I leave the case in their Lordships' hands. The defendant has deposited in Court the amount of the decree and costs, together with Rs. 50 to meet the costs of reference."

Lang and *Scott*, for the second defendant:—The question is whether the drawee who has not accepted is liable to the holder and endorsee. It is not a question of his liability to the drawer. We say there is no privity of contract between the plaintiff and the **[575]** defendant. We contend that the judgment in *Davlatram* v. *Bulakidas* (1) applies to the case where a *hundi* without endorsement is presented for payment. It is only then that the obligation to inquire into the solvency and respectability of the *shah* arises. But there is no such obligation where, as in this case, the name of the person actually presenting the *hundi* appears endorsed upon it. The only obligation in such a case is to see that the person so named in the *hundi* is the person presenting it. That person is then the *shah*. No further inquiry need be made. We rely on the case of *Thakur Das* v. *Futteh Mull* (2). They also cited *Sulleman Hussein* v. *The New Oriental Bank Corporation* (3) and *Lovell* v. *Martin* (4).

There was no negligence on the defendants' part, inasmuch as they ascertained that the name of the person who presented the *hundi* was the name endorsed on it. He referred to s. 85 of the Negotiable Instruments Act and s. 59 of the English Act 16 and 17 Vict., c. 59.

[FARRAN, J.—You must read the whole of the Negotiable Instruments Act with reference to s. 2. Local usage is not affected.]

Inverarity, for plaintiff:—The plaintiff is found to be the lawful holder of the *hundi*. He as lawful holder endorsed it to his agent for collection. It was stolen, and an endorsement was forged on it. A forged endorsement is a nullity; Chalmers on Bills of Exchange, p. 63—80. The *hundi* is to be regarded as if there was no name in it.

Dwarkadas Lalji was never the *shah* to whom payment was to be made. He referred to *Thakur Das* v. *Futteh Mull* (2); Byles on Bills of Exchange, p. 346. The Negotiable Instruments Act is to be read with ss. 6, 7 and 10 and s. 85. The defendant's honesty is irrelevant: Pollock on Torts, 310-311; *Hollins* v. *Fowler* (5).

Cur. adv. vult.

JUDGMENT.

[576] *July* 20. BAYLEY, C. J.—From the case stated by the Chief Judge of the Court of Small Causes, Bombay, it appears that on the 8th December, 1893, the plaintiffs' firm at Sholapur having bought a *shah jog hundi* for Rs. 1,000, and paid full value for it, endorsed it in favour of Ramrukh Ramkisson, their agent in Bombay, for realization, and on the same day, sent it to him by post. At the same time a post card was sent advising the despatch of the *hundi*. Neither letter nor post card arrived at its destination. The *hundi* had been stolen or intercepted during the

(1) 6 B. H. C. R. O.C.J. 24.
(2) 7 B. L. R. 275 (278, 302).
(3) 15 B. 267.
(4) 4 Taunt, 799.
(5) L.R. 7 H. L. 757.

1894
JULY 20.

ORIGINAL CIVIL.

18 B 570 = Chitty's S. C. C. R. 409.

transit, the name of Ramrukh Ramkisson expunged, and that of Dwarkadas Lalji substituted. Not hearing of its arrival, the plaintiffs' firm sent a second post card, in reply to which their agent stated that no *hundi* had been received. The plaintiffs at Sholapur, thereupon, on the 14th December, 1893, went to the drawer and demanded a *petha*. (duplicate). The drawer, however, having by that time received the *khoka* (receipted *hundi*) from the defendant declined to give a *petha*. The plaintiffs' man then came to Bombay to make inquiries, and it then appeared that the *hundi* had been presented to the defendant on the 9th December, 1893, by some person giving his name as Dwarkadas Lalji and giving an address in Hanuman Gully, and that defendant had sent the money there by his man, who paid it to some one whom he took to be the cashier of Dwarkadas Lalji. On defendant's man going there again with plaintiffs' man, no trace of any person known as Dwarkadas Lalji could be found, nor was his whereabouts discovered.

The Chief Judge was of opinion that defendant having admittedly paid the amount of the *hundi* without any inquiry to a person who was not *shah*, and having received the *khoka* with an endorsement of payment, and having returned the same to the drawer, had been guilty of conversion of the *hundi*, and was liable to the plaintiffs, the lawful owners thereof, in trover. He was also of opinion that it did not alter the character of the *hundi* that it was endorsed for realization in favour of a particular individual, and that that fact could not absolve the defendant of the duty which would otherwise lie upon him of making inquiries as to the respectability and position of the payee.

[577] The *hundi*, which is in the Marvadi language and character, is not made payable to any particular person by name, but, according to the translation annexed to the proceedings, states: "Immediately on the receipt of the *hundi* please pay the money in *hundi* currency to the *shah*."

Now the meaning of *hundis* made payable to *shah* and the usage in regard to such documents among native merchants on this side of India was very fully considered in a case which came before Sir Joseph Arnould in 1869 in which a large body of evidence was given on the subject—*Davlatram* v. *Bulakhidas* (1); and, as s. 1 of "the Negotiable Instruments Act, 1881" (Act XXVI of 1881) states that nothing in that Act contained affects any local usage relating to any instrument in an oriental language, unless such usages are excluded by any words in the body of the instrument which indicate an intention that the legal relations of the parties thereto shall be governed by that Act, and no such words are to be found in the *hundi* in question, the usage proved as well as the decision in that case afford a guide of which this Court can avail itself in the determination of the points submitted for our consideration by the Chief Judge of the Small Causes Court.

In his very able judgment in that case Sir Joseph Arnould said (p. 25) that "*hundis* made payable to *shah*, *shah jogi*, differ from bills of exchange in one very material circumstance, amongst others, that, as a general rule, the acceptance of the drawee is not written across them, so as thereby to give them an additional degree of mercantile credit, and to that extent make it just to impose an additional degree of liability on the acceptor," and "that as a general rule *hundis* are very frequently not presented for acceptance before they are presented for payment, before, that is, they are either due or overdue." "It is also stated," said the learned

(1) 6 B. H. C. R. O. C. J. 24.

1894
JULY 20.
——
ORIGINAL CIVIL.
——
18 B 570 = Chitty's S.C.C.R. 409.

Judge, "that the name of the *shah* or person who has bought or holds the *hundi* must always be endorsed on it, before it is presented." At p. 27, he says: "It will be convenient to advert to those points in which both parties substantially agree. And first as to the very important point of the meaning attached in the Hindu mercantile world to the formula 'Payable to *shah*.' Now the result of the evidence on both sides [578] as to this point, supported by the learned etymological evidence of Mr. Balaji Pandurang, is clearly this, that *shah* means a responsible and respectable person, a man of worth and substance known in the bazar. A *hundi* payable to *shah* is paid on the responsibility of the *shah*. If he be not known to the drawee, inquiry is to be made about him, and the amount of the *hundi* is not paid till that inquiry is satisfactorily answered, or till some one known to the drawee is found to identify him or speak to his responsibility."

The defendant was well aware of the existence of this usage, as it was alleged on his behalf at the hearing that the custom of merchants had changed with respect to the necessity which previously existed of making due inquiries before payment of a *shah jog hundi*, but the Chief Judge states that the defendant had entirely failed to prove any such change of custom, and that his witnesses called for that purpose were utterly unreliable.

The Advocate General, who appeared for the defendant in the argument in this Court, relied upon a dictum of Sir Barnes Peacock, C. J., reported in VII Bengal L. R. 289, note III, to the effect that the *hundi* in that case would pass at any rate prior to acceptance by delivery. The *hundi* there was drawn in Bombay on a firm in Calcutta and was payable fifty-one days after date in favour of Sewdas Damoni. The case was decided in 1865, four years before the decision of Sir J. Arnould, and it is difficult from the report to discover whether the *hundi* there was or was not a *shah jogi hundi*. The words *shah jogi* or *shah* do not occur anywhere in the report, and if the *hundi* in that case was not a *shah jogi* one, the expression of opinion of Sir Barnes Peacock would be extra judicial and of no binding authority. In a case which came before the Appellate Court at Calcutta in 1871—*Thakur Das* v. *Futteh Mull* (1) the dictum of Sir Barnes Peacock, C. J., was relied on, on behalf of the defendant, but the Court said that it was not clear how that expression of opinion was pertinent to the case before the Court, and that it supposed that the Court never meant to lay down that under Hindu law every one who took the *hundi*, even though he obtained it by fraud, would be treated as a "*shah jog*." The Judges said p. 302: "then who answers to the term '*shah jog*' unless it be the person designated by real (not fictitious) endorsements? [579] And when a Hindu maker or rightful owner of a *hundi* payable in terms to the *shah jog* endorses it as sold or sent to A, he obviously means to pass the right of dealing with the *hundi* to A alone (p. 303)" . . . . . "I certainly am not aware (said Phear, J., in delivering the judgment of the Court) of any rule of Hindu law, customary or otherwise, which would have the effect of making the word '*shah jog*' mean payable to bearer, quite independently of the endorsements" (p. 304).

Reliance was also placed on behalf of the defendant on s. 85 of the Negotiable Instruments Act, 1881. That section says: "Where a cheque payable to order purports to be endorsed by or on behalf of the payee, the drawee is discharged by payment in due course." Assuming that that

(1) 7 B. L. R. 275.

1894
JULY 20.
ORIGINAL CIVIL.
18 B 570 = Chitty's S. C. C. R. 409.

section might be applicable to a Marvadi *hundi*, the *hundi* in the present case, we may remark, is not a cheque, and is not payable to order, but to the *shah*. By s. 6 a cheque is defined to be a bill of exchange drawn on a specified banker; a bill of exchange is by s. 5 stated to be an instrument directing a certain person to pay a certain sum of money to or to the order of a certain person or to the bearer of the instrument whereas this *hundi* is payable to the *shah*, and, as already noticed, Sir Joseph Arnould points out how bills of exchange differ from *hundis* like the one now in question. Then by s. 85 the drawee is discharged only "by payment in due course." And by s. 10 "payment in due course means payment without negligence to any person in possession thereof under circumstances which do not afford a reasonable ground for believing that he is not entitled to receive payment of the amount therein mentioned."

In the present case, payment to Dwarkadas Lalji was not "payment in due course," as the defendant was bound by the custom of Hindu merchants to make inquiries as to the person who presented the *hundi* to him for payment, and the Chief Judge has found that the defendant admittedly paid the amount of the *hundi* without inquiry as to the respectability or position of the person to whom he paid; and, moreover, he found as a fact that the defendant was negligent in not detecting the forged endorsement on the *hundi*, inasmuch as it was apparent on the most cursory glance that some name has been expunged and the name of Dwarkadas Lalji written over it in a handwriting [580] different to that of the rest of the endorsement. He also found that the defendants' own witnesses said that they never looked to the endorsement, but only to the body of the *hundi*. The Chief Judge added that no authority had been quoted to him, nor was any cited to us, in support of the proposition that a *shah jogi hundi* loses its character as such by being endorsed in favour of a particular person. We think that the Chief Judge was justified in holding, upon the authority of *Lovell* v. *Martin* (1), that the defendants had been guilty of conversion of the *hundi* and were liable to the plaintiffs, the lawful owners thereof, in trover.

A similar point was decided in April, 1894, in England. There the payee of a crossed cheque specially endorsed it to the plaintiff and posted it to him. A stranger, having obtained possession of the cheque during the course of transmission, obliterated the endorsement to the plaintiff, and having substituted a special endorsement to himself, presented it at the defendants' bank and requested them to collect it for him. They did so, and handed the money over to him. In an action brought by the plaintiffs for conversion, it was held that the defendants were liable for the amount of the cheque—*Kleinwort Sons & Co.* v. *Comptoir National D'Escompte De Paris* (2).

We, therefore, agree with the view taken by the Chief Judge and answer the questions he had submitted to this Court thus:—We hold—(1) That the circumstances of the case amount to a conversion of the *hundi* on the part of the defendant. (2) That the defendant is liable to refund to the plaintiffs the amount of the *hundi*. (3) That (the *hundi* being payable by endorsement to Dwarkadas Lalji) the defendant is not discharged by such payment. (4) That the *hundi* continued to be a *shah jogi hundi* after being endorsed to a particular person. It is unnecessary to return any

(1) 4 Taunt, 799.

(2) (1894) 2 Q.B. 157.

1894
JULY 20.

ORIGINAL CIVIL.

answers to the fifth and sixth questions. The costs of this reference will be costs in the case to be taxed on the original side of this Court.

Attorneys for the plaintiffs :—Messrs. *Little, Smith, Nicholson and Bowen.*

Attorneys for the defendants :—Messrs. *Bhaishankar and Kanga.*

18 B. 570 = Chitty's S. C. C. R. 409.

18 B. 581.

[581] CRIMINAL REVISION.

Before Mr. Justice Candy and Mr. Justice Fulton.

In re DEVJI VALAD BHAVANI AND ANOTHER.* [11th September, 1893.]

Criminal Procedure Code (Act X of 1882), ss. 478 and 195—Civil Procedure Code (XIV of 1882), ss. 278, 273—Inquiry into claim to attached property—Civil Court's power to commit the party making such claim or his witness on a charge of forgery and perjury—Subsequent civil suit by claimant to establish his right to the property—Stay of Criminal proceedings pending civil litigation.

It is not an invariable rule that criminal proceedings should be stayed during the pendency of civil litigation regarding the same subject-matter.

Certain property was attached in execution of a decree. Thereupon accused No. 1 applied to have the attachment raised, on the ground that he had purchased the property from the judgment-debtor under a sale-deed executed long before the date of the attachment. In the summary inquiry which was made under s. 278 of the Code of Civil Procedure (Act XIV of 1882), he produced the sale-deed, and accused No. 2 was called as his witness and supported his claim. The Subordinate Judge found that the deed was a forgery, and rejected the claim. Proceeding then under s. 478 of the Code of Criminal Procedure (Act X of 1882) he held the inquiry directed by that section, and committed both the accused to the Sessions Court on charges of perjury and forgery. During the pendency of the inquiry under s. 478, the accused No. 1 filed a civil suit to establish the genuineness of the sale-deed and set aside the attachment. He also applied to the High Court to quash the commitment or stay the criminal proceedings pending the disposal of the civil suit.

Held, refusing the application, that the mere fact that a regular suit was filed to establish the genuineness of the sale-deed was not a sufficient ground for quashing the commitment, or for adjourning the trial pending the hearing of the civil suit.

Held, also, that the power given to a Civil Court under chap. XXXV of the Code of Criminal Procedure (Act X of 1882) to take action regarding "any offence referred to in s. 195" is not ordinarily restricted, in regard to offences relating to documents, to such offences only when committed by a party to the proceeding in which the document was given in evidence. It extends also to such offences when committed by a witness of the party.

[F., 1 Bom. Cr. Cas. 212 = 14 Bom. L.R. 968 = 13 Cr. L.J. 848 = 17 Ind. Cas. 720; R., 26 B. 785 (790); 23 C. 610 (613, 620); 31 C. 858 (861); 34 C. 848 = 6 C L.J. 531 = 11 C.W.N. 712 (714) = 5 Cr.L. J. 480; 37 C. 250 = 10 C.L.J. 564 = 14 C.W.N. 330 = 11 Cr L.J. 37 = 4 Ind. Cas. 710; 32 M. 49 (57) = 9 Cr.L.J. 41 = 19 M.L.J. 42 = 4 M.L.T. 404; 15 C.W.N. 565 = 12 Cr. L.J. 101 = 9 Ind. Cas. 577; D., 30 M. 226 (227) = 6 Cr. L.J. 131.]

THIS was an application under s. 435 of the Code of Criminal Procedure (Act X of 1882).

Certain property was attached in execution of a decree. Thereupon Devji valad Bhavani (accused No. 1) applied, under s. 278 of the Code of Civil Procedure, to have the attachment raised, alleging that the property attached had been previously sold [582] to him by the judgment-debtor by a deed of sale dated 10th September, 1892.

* Criminal Revision No. 214 of 1893.

1893
SEP. 11.
CRIMINAL REVISION.
18 B. 581.

In the summary inquiry which followed, accused No. 2 was examined as witness for Devji (accused No. 1). He stated that he had attested the sale-deed, and also passed a receipt for part of the purchase-money on behalf of the others (the judgment-debtors).

The Subordinate Judge, who investigated the claim, under s. 278, was of opinion that the sale-deed was a fabrication, and that it was fabricated for the purpose of saving the property from being taken in execution. He, therefore, on 28th June, 1893, disallowed the claim, and at once proceeded to hold an inquiry, under s. 478 of the Code of Criminal Procedure (X of 1882), as to whether the accused should be committed for trial on the charge of forgery, &c.

Pending this inquiry, Devji (accused No. 1) on 3rd July, 1893, filed a suit, under s. 283 of the Code of Civil Procedure (XIV of 1882), to establish his title to the attached property, relying on the sale-deed of the 10th September, 1892.

On the 5th July, 1893, the Subordinate Judge completed the inquiry under s. 478 of the Criminal Procedure Code, and committed the accused to the Court of Session,—accused No. 1 on charges framed under ss. 467, 468, 471, 114, 193 and 207 of the Indian Penal Code (XLV of 1860), and accused No. 2 under s. 467 and 193 of the Penal Code.

Thereupon both the accused applied to the Sessions Court to quash the order of committal in respect of the charges under ss. 467, 468 and 114 of the Penal Code, and to stay further proceedings in respect of the other charges pending the disposal of the Civil suit which accused No. 1 had filed under s. 283 of the Code of Civil Procedure. This application was rejected by the Sessions Judge.

The accused then applied to the High Court under its revisional jurisdiction.

The High Court sent for the record and proceedings of the case.

[583] *Inverarity* (with him *M. B. Choubal*), for the accused :—The lower Court ought to have stayed all criminal proceedings against the accused till the decision of the Civil suit which is brought by accused No. 1. To carry on criminal proceedings during the pendency of the civil suit has the effect of intimidating witnesses. And this Court has often acted on the principle that criminal proceedings should not go on during the pendency of the civil litigation—*In re Shri Nana Maharaj* (1). The Subordinate Judge was mistaken in framing charges under ss. 467, 468 and 471 of the Penal Code. There was really no forgery. Execution of the sale-deed is admitted. The allegation is that the sale is a colourable transaction intended merely to secure the proprety from attachment. That does not make the deed a forgery. As regards accused No. 2, he was not a party to the investigation under s. 278 of the Code of Civil Procedure. He was only a witness in that proceeding. Chapter XXXV of the Code of Criminal Procedure (X of 1882) is not, therefore, applicable in his case. Section 476 of the Code authorizes a Court to make an inquiry into those offences only which are referred to in s. 495. And s. 195, cl. (*c*), refers to offences in respect of documents which are committed by a "*party* to any proceeding." The word "party" does not include a *witness* in such proceedings. It is, therefore, clear that with respect to accused No. 2 the Subordinate Judge had no authority to hold an inquiry under s. 478 of the Code of Criminal Procedure, or commit him to the Sessions Court on a charge of forgery.

(1) 16 B. 729.

1893

SEP. 11.

CRIMINAL REVISION.

18 B. 581.

Rao Saheb *Vasudev J. Kirtikar*, Government Pleader, for the Crown :—The civil proceedings out of which the present prosecution has arisen, had come to an end before the inquiry under s. 478 of the Code of Criminal Procedure was begun. Pending this inquiry, the suit was brought under s. 283 of the Code of Civil Procedure. The object of this suit is simply to frustrate the criminal prosecution. Under s. 478 of the Code of Criminal Procedure the Subordinate Judge had jurisdiction to hold a preliminary inquiry into the charges of perjury and forgery against both the accused. If the Judge **[584]** was satisfied that either the parties to the proceeding or their witnesses had committed perjury or any other offence against public justice, he was justified in directing a criminal prosecution—*In the matter of Mutty Lall Ghose* (1). When a Judge directs a criminal prosecution, the High Court has no power to set it aside—*Queen Empress* v. *Rachappa* (2). Nor should it stay the criminal proceedings pending the final decision of the civil suit—*In the matter of the petition of Ramprasad* (3). The word *forgery* is used as a generic term in s. 463 of the Indian Penal Code. It is used in a comprehensive sense in s. 195 of Act X of 1882, so as to embrace all species of forgery including the offence under s. 467 of the Penal Code. The order of committal on charges under ss. 467, 468 and 471 of the Code was, therefore, proper.

JUDGMENT.

CANDY, J.—No doubt this Court has often acted on the principle that criminal proceedings should not go on during the pendency of civil litigation regarding the same subject-matter. But we do not think that this is an invariable rule. Under the circumstances of the present case as recited by the Subordinate Judge there was no course open to him but to make inquiries, under chap. XXXV of the Criminal Procedure Code, regarding the genuineness of the transaction put forward by the party who applied to raise the attachment. The fact that a regular suit has now been filed to establish the genuineness of that transaction is not sufficient to enable this Court to quash the commitment regularly made by the Subordinate Judge to the Sessions Court, or to direct the trial to be adjourned pending the hearing of the civil suit, and possibly of an appeal and second appeal.

The Sessions Court being thus seized of the case, we do not think it expedient to go into the merits, or express any opinion whether the offences recited in the charges as drawn up by the Subordinate Judge are those which *prima facie*, according to the facts of the prosecution, would be the most appropriate to include in the indictment. It will be for the accused to make an application **[585]** if so advised, to the Sessions Judge requesting that they may be released on bail.

With regard to the contention that the commitment of the accused No. 2 is illegal in regard to any offence relating to documents because he was not a party but only a witness to the proceeding in the Civil Court, we think that the power given to the Civil Court under chap. XXXV of the Criminal Procedure Code to take action regarding " any offence referred to in s. 185 " is not ordinarily restricted, in regard to offences relating to documents, to such offences only when committed by a party to the proceeding in which the document was given in evidence. No doubt sanction is only requisite in such a case, prosecution of a witness for an

(1) 6 C. 308. (2) 13 B. 109. (3) B.L.R. Sup. Vol, 426.

offence relating to documents being permissible without sanction. But that would not invalidate a prosecution commenced on a sanction which included both a party and a witness. The offences referred to in s. 195 (*c*) are the offences described in s. 463 or punishable under ss. 471, 475 or 476 of the Indian Penal Code. The limitation that sanction only is necessary in regard to prosecution for these offences, when such offences have been committed by a party, does not limit the reference to the offences in s. 476, so as to make it legal for a Subordinate Judge to commit a party to the Sessions Court on charges of offences relating to documents, and illegal for him at the same time to commit a witness of the party on similar charges.

Application rejected.

---

18 B. 586.

[586] APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Bayley.

GANGADHARRAO VENKATESH AND OTHERS (*Original Plaintiffs*), *Appellants v.* SHIDRAMAPA BALAPA DESAI AND ANOTHER (*Original Defendants*) *Respondents.** [11th September, 1893.]

Limitation Act (*XV of* 1877), *s.* 19†—*Acknowledgment*—"*Signing*," *what amounts to.*

Certain letters admitting a debt were written by the authority of the debtor, who was a desai. The only words, however, of the letter which were actually in his own handwriting were the words "*guru samarth*" (the exalted preceptor is strong) at the beginning of each letter and the words "*kalave, bahut kay lihine, lobh karava hi vinanti*" (let this be known. What more need be written. Keep regard; this is the representation) at the end. It was proved by evidence that this was the usual mode of signing and authenticating letters and informal documents among the class to which the defendant belonged.

Held, that, by analogy, the writing of specified words by desais at the top and bottom of letters, which was shown to be the usual way, amongst persons of that class, of authenticating letters, was a "signing" within s. 19 of the Limitation Act (XV of 1877) and that the letter was a valid acknowledgment.

The ground upon which it is held that the mark of an illiterate debtor is a sufficient signature, is that the signing in such a manner as is usually adopted

---

* Second Appeal, No. 636 of 1890.

† Section 19 of the Limitation Act (XV of 1877):—

19. *Effect of acknowledgment in writing.*—If, before the expiration of the period prescribed for a suit or application in respect of any property or right, an acknowledgment of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed, or by some person through whom he derives title or liability, a new period of limitation, according to the nature of the original liability, shall be computed from the time when the acknowledgment was so signed.

When the writing containing the acknowledgment is undated, oral evidence may be given of the time when it was signed; but oral evidence of its contents shall not be received.

Explanation 1.—For the purpose of this section an acknowledgment may be sufficient, though it omits to specify the exact nature of the property or right, or avers that the time for payment, delivery, performance or enjoyment has not yet come, or is accompanied by a refusal to pay, deliver or perform or permit to enjoy, or is coupled with a claim to a set-off, or is addressed to a person other than the person entitled to the property or right.

Explanation 2.—In this section 'signed' means signed either personally or by an agent duly authorized in this behalf.

1893

SEP. 11.

APPELLATE CIVIL.

18 B. 586.

by the debtor with the view of showing that he intends to be bound by the document, renders the document effective as an acknowledgment under the section. Whether the circumstance of the debtor not signing his name, is the result of necessity as in the case of an illiterate debtor, or of custom as in the case of a class of debtors having a special status in the community, can be of no importance.

[Appl., 31 C. 1043=9 C.W.N. 83 (86).]

SECOND appeal from the decision of A. D. Pollen, District Judge of Belgaum.

[587] The plaintiff sued to recover the sum of Rs. 1,988, due on a bond executed by the father of the defendants on 17th July, 1878. The bond was payable by instalments, the first of which was to be paid on 30th November, 1878, and it provided that in default of payment of an instalment the whole sum should be recoverable.

The suit was filed on the 15th March, 1888, and claimed to recover the whole sum on the ground of default in paying the first instalment. In order to prevent the bar of limitation the plaintiff relied on certain letters addressed by the deceased defendant to the plaintiff's undivided brother. He contended that these letters were signed acknowledgments within the meaning of s. 19 of the Limitation Act (XV of 1877). The letters were all written by a third person in the defendant's name; and the question was whether they were "signed" by the defendant as required by the section. The letters began with the words "To the creditor from Rajeshri Desai." The only part of the letter, however, in the defendant's own writing were the words " *guru samarth*" (*i.e.*, the exalted preceptor is strong) which were written at the beginning, and the words *kalave, bahut kay lihine lobh karava hi vinanti*" (let this be known. What more need be written. Keep regard; this is the representation).

Evidence was given that this was the usual mode of signing and authenticating letters and informal documents by persons of the class to which the defendant belonged.

The Subordinate Judge held that the letters were sufficiently " signed," and that the suit was not barred. The following is an extract from his judgment.

"The next point is, whether the three letters of the Desai can be treated as acknowledgments as required by s. 19 of the Limitation Act. That section lays down that an acknowledgment must be in writing signed by the debtor or by an authorized agent. In ordinary language, the word 'signing' means, I apprehend, the affixing of his own name by the person signing at the end of a writing with the avowed intention that the writing sohuld be considered as issued under his authority and upon his responsibility. The judicial tribunals have extended this limited meaning by including also a mark made by an illiterate man (*Bheemangowda* v. *Eeranah*, 7 Mad. H. C. R. 358), and the autograph name of the debtor appearing in any part of the document (*Andarji* v. *Dulabh*, I. L. R., 5 Bom., 88), to be within the meaning of the word as [588] used in the Act. By parity of reasoning it may also be said that the affixing of certain specified letters by the debtor himself, by which he intends to give the same effect to the writing as by an actual and proper signature, is also within the sense of the word as used in the Act. The case, *Khwaja Muhammad* v. *Venkatarayar* (2 Mad. H. C. R., 79) lends some support to this view, though I have not the full report before me. In the present case the letters *kalave*, &., appear in the autograph of the Desai, and it is a well-known fact that persons of his class do generally use this mode of signing

in informal and private letters, and such letters are considered as equivalent to signing the full name. Moreover, the Desai's full name appears in the body of the communications, and their writer says that he indited them at the dictation of the Desai. I, therefore, find that the letters in question are sufficiently signed as to satisfy the requirements of the section."

In appeal by the defendants the Judge held the claim time-barred, and reversed the decree.

The following is the portion of his judgment which deals with the letters written by the Desai :—

"The letters 5, 6, 7, 8 are all open to the objection that neither in the body nor at foot are they signed by the debtor or by his agent duly authorized in that behalf. The letters are all written by a third person in the Desai's name, but they are not signed by the Desai. It is said that it is not usual for persons in the Desai's position to sign their names to letters. Instead of signing they write with their own hands certain formal words at the top and at the bottom of a letter. The words at the top of the above four letters are '*guru samarth*;' and the letters end with the formal words '*kalave, bahut kay lihine, lobh karava hi vinanti*;' and it is in evidence that these formal words are in the handwriting of the Desai or his widow. Now, the question arises whether the addition of these formal words in the handwriting of the debtor suffices to meet the requirements of s. 19 of the Limitation Act, which prescribes an acknowledgment made in writing signed by the debtor as being necessary to create a new period of limitation. The Subordinate Judge holds that the addition of the formal words specified above is equivalent to a signature. But on careful consideration of all the reported cases I am unable to agree with him. None of the cases under s. 19 or s. 20 of the Act go as far as this. There must be an autograph signature (which would include a mark in the case of an illiterate man) in some part of the document. A seal or other device, unless it bears the name of the person, would not be sufficient. The word 'sign' or 'signature' must, I take it, be construed in its ordinary and every-day sense. What the Legislature intended by the use of the word may be inferred from the definition given in the General Clauses Act of 1887, which shows that a person who can write must write his own name; and that a mark is only admissible in the case of a person who is unable to write. I cannot extend the meaning of the word 'sign' beyond that given to it in the reported decision; and I must hold that the letters 5, 6, 7 and 8 are not signed by the persons by whom they purport to be written, and, therefore, they have not the effect of giving a fresh starting point from these dates for the purpose of limitation."

The plaintiffs preferred a second appeal.

[589] *P. M. Mehta* (with *Mahadeo C. Apte*), appeared for the appellants (plaintiffs) :—The letters are sufficient acknowledgments of the debt. They were written, as is usual among persons of the class to which the Desai belongs, by his authority and are subscribed by him at the top and the bottom. Such subscription is tantamount to signature. Section 19 of the Limitation Act does not mean that in all cases the signature must be made by the debtor himself. He may authorize some one else to make his signature. Further, it is not necessary that the name should be formally subjoined—*Khwaja Muhammad* v. *Venkatarayar* (1). Though the name of the defendant is not in his handwriting, it appears at the top of each

(1) 2 M.H. C. R. 79.

1893
SEP. 11.

APPELLATE CIVIL.

18 B. 586.

letter, and his authority may be inferred—*Mathura Das* v. *Babu Lal* (1); *Darrell* v. *Evans* (2).

Inverarity (with *Vasudeo G. Bhandarkar*) for the respondents (defendants):—The Judge found that the words which the defendant has himself written at the top and bottom do not amount to his signature. The name of the defendant in the body of the letters is not in his handwriting. Had it been in his handwriting, it would have been considered to be his signature under the provisions of the Limitation Act—*Andarji* v. *Dulabh*(3).

JUDGMENT.

SARGENT, C. J.—The only question which has been argued in this second appeal is, whether the three letters of the Desai can be treated as acknowledgments as required by s. 19 of the Limitation Act. The body of those letters is admittedly written by a third person and begins with the words "To the creditor from Rajeshri Desai." At the top of the letters are the words "*guru samarth*," and the letters end with the formal words "*kalave, bahut kay lihine, lobh karava hi vinanti.*" These words are all found to be in the handwriting of the Desai himself, and the evidence shows that this is the usual mode of signing letters and informal documents, among the class to which the debtor belonged, with the view of authenticating such documents as the documents of the person so signing. The Subordinate Judge held that the requirements of the section were sufficiently complied with; but the District Judge held that the name of the debtor not being **[590]** found in the letters there was no signing as contemplated by the section, and, therefore, that the letters did not give a fresh starting point for the purposes of the statute.

The decision in *Bhimangowda* v. *Eeranah*(4) shows that the debtor's signature need not necessarily be by writing his name, and that the making his mark by an illiterate debtor at the foot of an acknowledgment makes it a valid one within the contemplation of the section. The ground of that decision must be that the "signing" in such manner as is usually adopted by the debtor with the view of showing that he intended to be bound by the document, renders the document effective as an acknowledgment under the section. It is on this ground indeed that it has also been held that the 'signing' (by which word in its ordinary acceptation is meant signing the name at the foot) may be by writing the name in any other part of the document, provided it be intended to operate as an acknowledgment by the party that it is his instrument—*Mathura Das* v. *Babu Lal*. Whether the circumstance of the debtor not signing his name is the result of necessity as in the case of the illiterate debtor, or of custom as in the case of a class of debtors having a special status in the community, can be of no importance. We agree, therefore, with the Subordinate Judge that by analogy the writing certain specified words by desais at the top and bottom of the letters which is admittedly the usual way, amongst persons of that class, of showing that the letter is to be regarded as written by their authority, is a 'signing' within the section. It is clear, on the findings of the Court below as to the part payments, that the suit would be in time if any one of the letters in question was a valid acknowledgment under the section, and we must, therefore, reverse the decree of the Court below and restore that of the Subordinate Judge. Costs on respondent here and in the Court below.

Decree reversed.

(1) 1 A. 683.
(2) 31 L. J. Exch. 337 (345).
(3) 5 B. 88.
(4) 7 M.H.C. R. 358.

18 B. 591.

1893
SEP. 18.

APPELLATE CIVIL.

[591] APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Bayley.

CHHOTALAL GOVINDRAM (*Original Plaintiff*), *Appellant v.* MATHUR KEVALRAM (*Original Defendant No.* 2), *Respondent.**

[18th September, 1893.]

18 B. 59

Mortgage—Redemption—Mortgage to a firm—Subsequent mortgage to one member of the firm for personal loan with stipulation for payment of new debt before prior mortgage-debt—Right to redeem first mortgage independently of later mortgage.

On the 13th July, 1877, a firm, of which defendants Nos. 1 to 4 were members, lent money to Nathu Narbheram on mortgage of certain property. Subsequently defendant No. 2 personally made a further loan to Nathu, who executed two *san* mortgage deeds to him of the same property containing stipulations that these bonds should be paid before the mortgage of July, 1877. Nathu died, and his widow and heir assigned the equity of redemption of the mortgage of July, 1877, to the plaintiff, who sued the defendants to redeem. The defendants contended that the plaintiff was bound to pay off the two later bonds as well as the original mortgage-debt.

Held, that the later loan by defendant No. 2 being a personal loan by him, the firm, as such, had no equity to insist on its being paid before the mortgage was redeemed, whatever right defendant No. 2 in his personal capacity might have. But in this suit, which was one to redeem the mortgage, he was a party as member of the firm, and not in his individual capacity, and he could not, therefore, resist the plaintiff's right to redeem on any ground based on the promise of the two bonds executed to himself.

THIS was a second appeal from the decision of Rao Bahadur Lalshankar Umiashankar, First Class Subordinate Judge of Ahmedabad with appellate powers.

Suit for redemption. One Nathu Narbheram mortgaged the land in question to defendants Nos. 1 to 4 for Rs. 337-4-0 by a registered deed dated 13th July, 1877.

On the 25th November, 1878, Nathu Narbheram obtained a further loan of Rs. 98 from defendant No. 2 (Mathur Kevalram) and executed to him two *san* mortgage-deeds each for Rs. 49, which stipulated for the payment of this *san* debt before the prior mortgage-debt.

Nathu Narbheram died, and on the 25th February, 1890, his widow assigned the equity of redemption of the mortgage of July, 1877, to the plaintiff, who now sued the defendants for redemption.

[592] The defendants contended that the plaintiff could not redeem this first mortgage without also paying off the two *san* mortgages.

The Subordinate Judge held that the two *san* mortgages were not proved, and ordered redemption of the first mortgage on payment, by the plaintiff, of Rs. 337-4-0 within three months from the date of the decree.

On appeal by defendants Nos. 1—4, the Judge found that the *san* mortgages (Exs. D and E) were proved, and that under the stipulation contained in those exhibits the plaintiff could not redeem the first mortgage without paying them off also. He, therefore, varied the decree, and directed the plaintiff to pay the mortgage-debt, Rs. 337-4-0, to defendants Nos. 1—4, and the *san* debt, Rs. 165-4-0, to defendant No. 2, Mathur Keval, within six months from the date of the decree, and to recover possession from the defendants of the mortgaged property free from all mortgage lien. In default, plaintiff to stand foreclosed.

* Second Appeal, No. 264 of 1892.

1893

SEP. 18.

APPELLATE CIVIL.

18 B. 591.

The plaintiff preferred a second appeal.

Sitanath Gopinath Ajinkya, for the appellant (plaintiff).—The plaintiff here is not the original mortgagor, but his assignee. He assigned to the plaintiff the equity of redemption of the mortgage of 1877. The equity of redemption which we got by that assignment is not affected by bonds passed by the mortgagor subsequently to the mortgage. Further, the original mortgage-bond was passed to the firm, while the subsequent bonds were passed to defendant No. 2, who is the munim of the firm. This distinguishes the present case from the case of *Hari Mahadaji* v. *Balambhat*(1).

[SARGENT, C. J.— But the munim is also the member of the firm.]

That is so; but in the case of the *san* mortgage-bonds he acted in his personal capacity, as shown by his taking these bonds in his own name and not in that of the firm. The amount secured by the bonds was a personal loan by him to be paid when the mortgagee demanded the mortgage-debt. The consideration of the bonds came from defendant No. 2 himself, while the mortgage **[593]** loan was paid from the funds of the firm. The condition that the debt to him should be paid before the mortgage-debt, clogs the equity of redemption, and, therefore, it should not be allowed.

Chimanlal H. Setalwad, for the respondent (defendant No. 2).—The question whether the subsequent loan was advanced from the funds of the firm or those of the munim is a question of fact not gone into by the lower Court. For the determination of the question the case will have to be sent down.

JUDGMENT.

SARGENT, C. J.—The *san* mortgage-bonds (Exs. D and E) were passed to Mathur Kevalram (defendant No. 2) in consideration of a personal loan, with a charge on the equity of redemption on the lands in question still remaining in the mortgagor Nathu Narbheram, and on the understanding that those loans were to be paid before the bond passed to the firm by the earlier mortgage (Ex. 45). This would not give the firm any equity to insist on bonds D and E being paid before the mortgage (Ex. 45) was redeemed, whatever right Mathur himself might have to insist on it. Mathur is a party to the suit as a member of the firm, and not in his individual capacity, and cannot, in this suit, which is one to redeem the mortgage (Ex. 45), resist the plaintiff's right to redeem for any reason based on the provisions of the other bonds (Exs. D and E).

We must, therefore, vary the decree by directing that plaintiff do redeem the land on payment of Rs. 337-4-0 to the defendants within six months from this day, and reverse so much of the decree as directs payment to defendant Mathur of Rs. 165-4-0. Appellant to have his costs of this appeal. Parties to pay their own costs in the Courts below.

Decree varied.

(1) 9 B. 233.

18 B. 594.

1893
SEP. 21.

APPELLATE CIVIL.

18 B 594.

[594] APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Bayley.

VITHOBA (*Original Opponent and Decree-holder*), *Applicant v.* ESAT (*Original Petitioner and Auction-Purchaser*), *Opponent.**

[21st September, 1893.]

Civil Procedure Code (XIV of 1882), ss. 313, 315 and 622—Execution—Execution sale—Auction-purchaser—Return of purchase-money when judgment-debtor found to have no saleable interest in property sold—Fact how found—Judgment-creditor to have notice—Party—Procedure.

One Vithoba obtained a decree against Bapu, and in execution sold certain land which was purchased by Esat, who got a certificate of sale, and obtained possession. Subsequently the land was claimed by one Bhowani, who sued Bapu (the judgment-debtor) and Esat (the auction-purchaser) to set aside the sale and establish his title to the land. He succeeded in his suit, and in execution got possession of the land. Thereupon Esat (the auction-purchaser) applied under s. 315 of the Civil Procedure Code (XIV of 1882) for a refund of his purchase-money, and the Subordinate Judge made an order directing Vithoba, the decree-holder, to repay it. Vithoba contended that he ought not to have been ordered to refund the money without having an opportunity of proving that the property had been properly sold in execution of his decree against Bapu, and that as he had not been made a party to Bhowani's suit he had had no opportunity of doing this. On application to the High Court,

Held, that the order of the Subordinate Judge for the restitution of the purchase-money was wrong. Section 315 provides that the purchase-money paid at an execution sale is to be returned when it is found that the judgment-debtor has no saleable interest in the property sold. It does not prescribe how the fact is to be ascertained, but the conclusion from s. 313 as well as from general principles is that it must be a finding on some proceedings to which the judgment-creditor was a party or at any rate of which he had notice. In the present case there was no finding on which the Subordinate Judge could base his order for the restitution of the purchase-money.

THIS was an application under the extraordinary jurisdiction of the High Court (s. 622, Civil Procedure Code, XIV of 1882) against the order of Rao Saheb S. M. Kale, Subordinate Judge of Malegaon in the Khandesh District.

Vithoba obtained a decree against Bapu, and on 3rd May, 1887, in execution, sold certain land belonging to Bapu. Esat (the present opponent) was the purchaser at the execution sale, and he got a certificate of sale on the 6th July, 1887, and obtained possession of the land. Subsequently one Bhowani valad Mahipat claimed the land and filed a suit (No. 244 of 1890) against Esat and Bapu (the judgment-debtor) to set aside the sale and establish **[595]** his title, and on the 6th June, 1891, he obtained a decree. On the 4th September, 1891, in execution of that decree he obtained possession. Esat (the above-mentioned auction-purchaser) thereupon applied on the 9th September, 1892, under s. 315 of the Civil Procedure Code (XIV of 1882) for a refund of the purchase-money which he had paid to Vithoba for the property at the auction-sale. Vithoba resisted the application on the ground that he had not been a party to Bhowani's suit (No. 244 of 1890), and that if he had been made a party he could have proved that the land was Bapu's and was rightly sold. The Subordinate Judge, however, ordered Vithoba to repay the purchase-money to Esat.

Vithoba thereupon applied to the High Court in its extraordinary jurisdiction, and obtained a rule calling on Esat (the auction-purchaser)

* Application No. 34 of 1893 under the extraordinary jurisdiction.

1893

SEP. 21.

APPELLATE CIVIL.

18 B. 594.

to show cause why the order of the Subordinate Judge should not be set aside.

Ganesh K. Deshmukh, for the applicant Vithoba, in support of the rule.—We sold the land in execution of our decree against Bapu and received the purchase-money. We are now ordered to refund the purchase-money under s. 315 of the Code, on the ground that Bapu, the judgment-debtor, had no interest in the property which we sold in execution of our decree against him. There is no evidence that he had no interest in it except the decree in Bhowani's suit (No. 244 of 1890). That decree is no evidence against us, as we were not a party to the suit. Further, we contend that, in all suits to set aside a sale held in execution of a decree, the decree-holder at whose instance the sale took place is a necessary party—*Bank of Hindustan, &c.* v. *Premchand* (1).

Mahadeo Chimnaji Apte appeared to show cause for Esat, the auction-purchaser.—The lower Court was right in ordering that the purchase-money we paid at the auction-sale should be refunded to us. The property we bought has been taken from us, the Court having declared, in Bhowani's suit, that it did not belong to Bapu. The auction-sale at which we bought was the act of the Court, and the Court should give back our money. The judgment-creditor Vithoba was not a necessary [596] party to Bhowani's suit—*Kishun Lal* v. *Muhammad Safdar Ali Khan* (2); *Sivarama* v. *Rama* (3); *Raghubar Dayal* v. *Bank of Upper India* (4).

The High Court cannot interfere with the order of refund made by the lower Court under s. 622 of the Civil Procedure Code, because there is no question of jurisdiction or material irregularity.

Ganesh Krishna Deshmukh in reply.—Under similar circumstances, the Court has interfered under s. 622—*Shri Vishvambhar Pandit* v. *Shri Vasudev Pandit* (5).

JUDGMENT.

SARGENT, C. J.—In this case a third person has established his right to the property as against the auction-purchaser, and the latter has taken execution proceedings against the judgment-creditor under s. 315 to recover his purchase-money. The question is, can he do so, the judgment-debtor having been found to have no saleable interest in the property in a suit to which he was not made a party, and of which he had no notice given him by the auction-purchaser.

Section 313, under which the purchaser at the auction sale moves in the matter for the purpose of setting aside the sale on the ground that the judgment-debtor has no saleable interest, read with s. 315, enables the auction-purchaser to get back his purchase money; but s. 313 expressly provides that the judgment-creditor should have had an opportunity of being heard before the sale is set aside. Section 315 provides for the return of the purchase-money, not only when the sale is set aside under s. 312 or s. 313, but also whenever it is found that the judgment-debtor had no saleable interest. It does not say how the finding is to be arrived at; but the conclusion from the language of s. 313, as well as from general principles, is that it must be a finding in some proceedings to which the judgment-creditor was a party or, at any rate, of which he had notice.

---

(1) 5 B.H.C.R. O.C.J. 83 (92). (2) 13 A. 383. (3) 8 M. 99.
(4) 5 A. 364. (5) 16 B. 708.

There was, therefore, in the present case no finding before the Court on which the Subordinate Judge could base his order for [597] the restoration of the purchase-money, and a proper case has, therefore, we think, been made out for the intervention of the Court in the exercise of its extraordinary jurisdiction. We must, therefore, reverse the order of the Subordinate Judge and send back the case to be disposed of according to law. Costs to follow the result.

Order reversed.

1893 SEP. 21. — APPELLATE CIVIL. — 18 B. 594.

---

18 B. 597.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Fulton.

GHELA ICHHARAM (*Original Defendant*), *Appellant v.* SANKALCHAND JETHA (*Original Plaintiff*), *Respondent.** [26th September, 1893.]

Res judicata—*Issue in previous suit—Unnecessary issue—Finding on an unnecessary issue inserted in decree—Appeal—Civil Procedure Code* (*XIV of* 1882), *s.* 13.

The plaintiff attached certain property in execution of a decree obtained by him against one Jamna, the widow of one Raichand. The defendant Ghela intervened and claimed the house as having been purchased by him from one Samal Nathu, to whom, he alleged, Jamna had sold it before the date of the decree against her. The plaintiff's attachment was removed, and the plaintiff thereupon brought a suit (No. 670 of 1886) to establish his right to sell the house in execution. The Court found that the house was not Jamna's, and dismissed the suit on that ground, but it also recorded a finding that the sales set up by the defendant were fraudulent and collusive. Subsequently the plaintiff obtained a decree against Mulji, the son of Raichand, and in execution again attached the house. The defendant again intervened, alleging that the house was his, and the attachment was removed. Thereupon the plaintiff filed this suit to establish his right to sell in execution. The defendant again pleaded that he was owner of the house by reason of the sales set up by him in the former suit. It was argued that these sales had been proved to be collusive and fraudulent in an issue raised in that suit, and that the defence in the present suit was, therefore, *res judicata*.

Held, that the defence was not *res judicata*. The former suit had been decided on the finding that the property in question was not Jamna's. The finding in that suit on the issue as to the sales to the defendant was not necessary for the determination of the suit.

Where an issue is not necessary for the decision of the suit in which it is raised, the decree couched in general terms does not cover the finding on that issue, nor can the insertion of such finding in the decree give it the force of *res judicata*. The Civil Procedure Code does not contemplate findings on issues being inserted in it (see ss. 2 and 6 and sch. IV) and there is no section in the Code which makes it necessary to appeal from the decree, because such finding has been inserted in it.

[**Appl.**, 35 B. 38 (40)=12 Bom. L.R. 766=7 Ind. Cas. 967; **R.**, 17 A. 174 (178)=15 A.W.N. 47; 22 B. 245 (250); 32 B. 315=10 Bom. L. R. 380 (384); 9 C.W.N. 60 (65); 9 Ind. Cas. 1030=120 P.L.R. 1911=101 P.W.R. 1911; 92 P.R. 1902 (**F.B.**)=16 P.L.R. 1903; **Expl.**, 25 B. 115 (124).]

[598] THIS was a second appeal from the decision of Gilmour McCorkell, District Judge of Ahmedabad.

Suit to establish the right to sell a house in execution of a decree.

One Raichand died, leaving behind him a widow Jamna and a son Mulji. After his death the plaintiff brought a suit (No. 1181 of 1880)

* Second Appeal No. 266 of 1892.

1893
SEP. 26.
APPELLATE CIVIL.
18 B. 597.

against Jamna alone as the representative of her deceased husband Raichand to recover a debt due by him. Mulji was not joined as a party to that suit. The suit was compromised, and a decree was passed in the terms of the compromise making Jamna personally liable for the debt. In execution of the decree the plaintiff attached a certain house as the property of Jamna. Thereupon the defendant Ghela Ichharam intervened, claiming the house as his, and praying for the removal of the attachment. He alleged that Jamna as the mother and guardian of Mulji had sold the house to one Samal by a registered deed dated the 11th December, 1879, and that he (the defendant) had purchased the house from Samal under a registered sale-deed dated the 8th August, 1882. The attachment was consequently removed.

The plaintiff then brought a suit (No. 670 of 1886) against the defendant to establish his right to sell the house as the property of Jamna. In that suit the defendant pleaded that he had been in possession of the house as owner, and that he had purchased it from Samal, to whom it had been sold by Jamna before the date of the decree. The suit was dismissed on the ground that Jamna had no interest in the house.

Other issues were, however, raised in the case with reference to the title set up by the defendant, and upon them the Court found that the sale-deeds to the defendant were fraudulent and without consideration.

Subsequently the plaintiff obtained a bond from Mulji in satisfaction of the decree against his mother Jamna, and brought a suit (No. 529 of 1890) upon it, and got a decree against Mulji. In execution of that decree the plaintiff again attached the house in dispute as the property of Mulji. That attachment was also removed on the defendant's application.

[599] The plaintiff then brought the present suit against the defendant to establish his right to sell the house in execution of his decree in suit No. 529 of 1890 against Mulji, alleging that the sales set up by the defendant were colourable and fraudulent transactions.

The First Class Subordinate Judge dismissed the suit, holding that the plaintiff's judgment-debtor Mulji had no saleable interest in the house at the time of the attachment: that the sales relied on by the defendant were not proved by the plaintiff to have been colourable and fraudulent, and that the plaintiff was not entitled to any relief. In his judgment the Subordinate Judge remarked that the finding of the Court in the previous suit (No. 670 of 1886), that the two sales were fraudulent and without consideration, was not necessary for the decision of the suit, and that the question was, therefore, not *res judicata*, and this finding could not prejudice the defendant who had succeeded in the present suit.

On appeal by the plaintiff the Judge held that the defence based upon the sale deeds set up by the defendant on which he rested his title, was *res judicata* by reason of the decision on the issues raised in suit No. 670 of 1886, and that the house was liable to be sold in execution of the plaintiff's decree. He, therefore, reversed the decree.

Defendant preferred a second appeal.

P. M. Mehta, with *Sitanath Gopinath Ajinkya*, for the appellant (defendant).—They cited *Thakur Magundeo* v. *Thakur Mahadeo Singh* (1); *Jamaitunnissa* v. *Lutfunnissa* (2).

Govardhanram M. Tripathi, for the respondent (plaintiff).—He cited *Krishna Behari Roy* v. *Brojeshwari Chowdrance* (3); *Niamut Khan* v. *Phadu*

(1) 18 C. 647. (2) 7 A. 606. (3) 2 I.A. 283.

Buldia (1); *Anusuyabai* v. *Sakharam Pandurang* (2); *Jamaitunnissa* v. *Lutfunnissa* (3) (remarks of Mahmood, J.)

1893
SEP. 26.

APPELLATE CIVIL.

18 B. 597.

JUDGMENT.

SARGENT, C. J.—The question raised by this second appeal is whether the District Judge was right in holding that the issue [600] whether the sale by Bai Jamna to Samal Nathu through whom defendant claims was collusive and fraudulent, was *res judicata* by the finding on that issue in Suit No. 670 of 1886 between the same parties. In that suit the present plaintiff sought for a declaration that the house in dispute was the property of his judgment-debtor Bai Jamna, against whom he obtained a personal decree, alleging that the sale by Bai Jamna to Samal Nathu, on which defendant relied, was collusive or fraudulent. The Subordinate Judge held that Bai Jamna had no interest in the house, and dismissed the plaint on that ground; but he also recorded a finding that the above sale was collusive and fraudulent.

The question whether a finding on an issue which was not necessary for the decision of the case, and not embodied in the decree, can be regarded as *res judicata* in a subsequent suit between the same parties, turns upon the language of s. 13 of the Civil Procedure Code and was very fully discussed by the Allahabad High Court on a reference to a Full Bench in *Jamaitunnissa* v. *Lutfunnissa* (3), Petheram, C. J., delivering the judgment of himself and Straight and Brodhurst, JJ., says: (pp. 610-11) "The decree, though in general terms, will stand good as finally deciding the issues raised by the pleadings upon which the ultimate determination of the cause and the decree itself actually rested. More than these the decree cannot cover, and we are clearly of opinion that the findings in a judgment upon matters which subsequently turn out to be immaterial to the grounds upon which a suit is finally disposed of as to the plaintiff's right to any portion of the relief sought by him as declared by the decree, amount to no more than *obiter dicta* and do not constitute a final decision of the kind contemplated by s. 13 of the Code." The question had already been virtually decided in the same sense in *Anusuyabai* v. *Sakharam Pandurang* (2) where West, J., says: "A point is not finally decided against any party who is not allowed the opportunity of questioning the decision" and "no appeal lies against a merely incidental decision by one who is not prejudiced by the concluding decision to which the partial ones are but subsidiary," meaning by 'subsidiary' a decision not necessary to the determination of the suit.

[601] Mahmood, J., who differed from the majority of the Court in *Jamaitunnissa* v. *Lutfunnissa* (3) as to the final conclusion, admitted that some findings on issues would not be *res judicata*. He says: (p. 622) "It is of course possible that when more than one issue arises in a suit, the answer to one issue may furnish a full basis for the disposal of the *whole* suit either by decreeing or dismissing it. In such a case it is perfectly conceivable, that, if the Court went on to record findings upon other issues not essential to the justification of the decree, such findings might be mere *obiter dicta* not having the force of *res judicata*. From such *obiter dicta* no appeal could lie," but he held that such was not the case in the suit before the Court, as the plaintiff sought "not only possession of the property but also the cancellation of the *wakfnama*" on which the

(1) 6 C. 319. (2) 7 B. 464. (3) 7 A. 606.

1893
SEP. 26.

APPELLATE CIVIL.

18 B. 597.

defendant relied, and the pleadings, therefore, as the learned Judge said, gave rise to two issues essential for the disposal of the suit.

The question, therefore, in this view turns upon the state of the pleadings. The case of *Krishna Behari Roy* v. *Brojeswari Chowdrance* (1) is a good illustration of this. There the plaintiff claiming to be the adopted son of the last owner sought to recover the land from the putnidars who had obtained leases from the widow, and the reversionary heirs intervened for the purpose of disputing the adoption. Both the Civil Courts of first instance and on appeals found in favour of the putnidars that the putnis could not be set aside, and dismissed the plaintiff's suit; but they also found against the intervener and in favour of the adoption, and the Privy Council held in the subsequent suit by the intervener to set aside the adoption that the issue as to the adoption was *res judicata* because it was a material issue which had been decided in the former suit. Their Lordships, as shown by the judgment, treated the suit before them as raising not only a question between the plaintiff and putnidars as to the validity of their putnis, but also a distinct question between the plaintiff and intervener as to validity of plaintiff's adoption. Again in *Radha Madhub Holdar* v. *Monohur Mukerji* (2), the Privy Council held that the question as to who **[602]** was the true representative of Matangini was the material issue in both suits, and, therefore, that the finding in the first suit operated as a bar to the second suit. Where, however, the defendant sets up two grounds of defence to the relief sought by the plaintiff and succeeds on one which causes the dismissal of the plaint, the decision on the other issue in the plaintiff's favour cannot be said to be material to the determination of the suit; it is, therefore, not *res judicata*, and no appeal would lie against it, because, as was remarked by the Privy Council in *Rajah Run Bahadoor Singh* v. *Mussumut Lachoo Koer* (3), "the decree was not based on it, but was made in spite of it." It must be admitted that it is impossible to reconcile the above view of the question with the decision of the Calcutta High Court in *Niamut Khan* v. *Phadu Buldia* (4) where it was laid down (p. 322) in the broadest terms that upon the proper construction of s. 13 of Act X of 1877, "when a material question," although immaterial for the purposes of the suit and although not embodied in the decree, "has been substantially tried and determined in a former suit, it cannot be tried again in any other suit between the same parties." That Full Bench ruling, however, has since the decision of the Privy Council in *Run Bahadur Singh* v. *Lucho Koer* (5) not been followed by the Calcutta High Court, as appears from the decisions in *Nundo Lall Bhuttacharjee* v. *Bidhoo Mookhy Debee* (6) and *Thakur Magundeo* v. *Thakur Mahadeo Singh* (7).

The right conclusion we think, on the language of s. 13 of the Civil Procedure Code (XIV of 1882) and the authorities, is that where the issue is not necessary for the decision of the suit, the decree couched in general terms does not cover the finding on that issue—nor indeed can such a finding by being expressly inserted in the decree acquire the force of *res judicata* which was wanting to it as part of the judgment of the Court. There is no section in the Code which makes it the more necessary to appeal from it, because it has been so inserted—Indeed the Code does not contemplate findings on issues being inserted in **[603]** it. See ss. 2 and 6, Civil Procedure Code, and the forms of decrees in fourth schedule.

---

(1) 2 I.A. 283. (2) 15 C. 756 (761). (3) 12 I.A. 23. (4) 6 C. 319.
(5) 11 C. 301. (6) 13 C. 17. (7) 18 C. 647 (651).

1893 SEP. 26. APPELLATE CIVIL. 18 B. 597.

Applying this view of the law to the present case, we have the defendant setting up two defences to the plaintiff's claim to have the house declared to be the property of his judgment-debtor Bai Jamna; 1st, that the house did not belong to Bai Jamna; 2nd, that it had been already sold to him by Bai Jamna and her son Mulji prior to the plaintiff's decree against Bai Jamna. The Court found that it was not Bai Jamna's property, but belonged to Mulji, and decided the suit on that finding; but it also recorded a finding on the 2nd issue, that the alleged sale to defendant was fraudulent and collusive. This finding was, therefore, not material in the sense of not being necessary for the determination of the suit, or, in other words, it was not covered by the general terms of the decree dismissing the plaintiff's suit.

We must, therefore, reverse the decree of the Court below and send back the case for a fresh decision having regard to the above remarks. Costs to abide the result.

Decree reversed.

---

18 B. 603.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Bayley.

NARAYAN DASAPPA (*Original Defendant No.* 3), *Appellant v.* ALI SAIBA AND OTHERS (*Original Plaintiff and Defendants Nos.* 1 *and* 2), *Respondents.** [2nd October, 1893.]

Landlord and tenant—Mulgeni *lease—Alienation by mulgenidar—Alienation contrary to the terms of the lease—Absence of any clause as to re-entry—Valid alienation—Suit by mulgar for possession.*

In the absence of any clause of re-entry in the event of alienation by the mulgenidar (permanent tenant) contrary to the terms of the lease, the mulgar (landlord) cannot treat the alienation as void and recover possession from the alienee.

[F., 21 B. 195 (197); **Cons.**, 26 M. 157 (161)=12 M.L.J. 189.**]**

SECOND appeal from the decision of Arthur H. Unwin, District Judge of Kanara.

[604] The plaintiff sued the defendant to recover possession of certain lands and arrears of rent. The plaintiff alleged that he had let the lands on *mulgeni* tenure to one Narna Kamti, who on the 12th June, 1873, passed a *kabulayat* to him agreeing to pay rent every year and undertaking not to alienate the lands and to surrender them to the plaintiff if he himself did not require them. The plaintiff stated that after Narna Kamti's death, defendants Nos. 1 and 2, who were his (Narna's) grandnephews and heirs, sold the lands to defendant No. 3 on the 3rd September, 1889, in violation of the terms of the *kabulayat*. He contended that the sale was void as against him, and had put an end to the *mulgeni* tenancy.

The first defendant pleaded that the stipulation in the *kabulayat* was penal and that plaintiff was not entitled to possession; that the *mulgeni* tenant right had been sold for a family debt to defendant No. 3, who was in possession of the lands and was liable to pay the arrears of rent.

---

* Second Appeal No. 394 of 1892.

1893
OCT. 2.
APPELLATE CIVIL.
18 B. 603.

The second defendant, a minor represented by his guardian, pleaded that the sale by the first defendant was not binding on him; that the plaintiff was not entitled to possession, and that the first defendant, who had possession, was the person liable to pay the arrears of rent.

The third defendant alleged that the sale to him was made for the family debts of defendants Nos. 1 and 2, and was, therefore, binding on both these defendants; that the conditions in the *kabulayat* were penal and could not be enforced; that the restraint on alienation affected only the first lessee and not his heirs, and that, therefore, the plaintiff was not entitled to eject him, and that he was liable to pay one year's rent, of which due notice was given to plaintiff, who had refused to accept it.

The Subordinate Judge held, following the decision in *Tamaya* v. *Timapa* (1), that the forfeiture clause in the lease could be relieved against, as it simply prohibited alienation by the lessee, but did not stipulate that the lease should terminate if any such alienation was made, nor did it give the lessor any right to eject **[605]** the lessee. He, therefore, passed a decree for arrears of rent only against all the defendants.

On appeal by the plaintiff the Judge found that the lease contained a clause of forfeiture or re-entry enforceable by plaintiff, provided he accepted "the position of the lessee's vendee." He, therefore, amended the decree in the following terms :—

"I, therefore, amend the lower Court's decree by awarding plaintiff's claim for possession also, provided that within six months from date he tendered to defendant No. 3 the amount which the latter has paid to defendant No. 1 for the *mulgeni* right in his property, and which defendant No. 3 must accept. On plaintiff's failure to tender this amount within six months, this part of the decree ceases to be enforceable, and therewith also plaintiff's claim to recover possession. Costs on defendants."

The following is an extract from the Judge's judgment :—

"There is an express stipulation both in the lease, of which Ex. A is a certified copy produced from the District Registrar's office, as well as in the *kabulayat*, Ex. 13, that if the lessee does not want the *mulgeni* holding, he must *surrender* (*wappisa*) it to the lessor, and then immediately follow words binding the lessee not to sell, mortgage, or alienate, &c., to any one but the lessor. This seems to distinguish the lease from that sued on in the case relied on by the Subordinate Judge. If defendants Nos. 1 and 2 desired to sell, they were clearly bound to treat with plaintiff only.

"Now in these days, when assessment payable by mulgars is liable to be enhanced to an amount exceeding the fixed rents payable to them by their mulgenidars, and when the struggles of mulgars to rid themselves of the *damnosa hereditas* which these permanent leases have entailed upon them form so large an item of the litigation of these Courts, the present plaintiff could never have expected that this *mulgeni* holding would be surrendered to him except for valuable consideration; he had secured not merely pre-emption, but *sole* emption, and was, I take it, bound by a correlative obligation to offer the lessee at any rate market value for this holding."

[606] The third defendant preferred a second appeal.

Narayan G. Chandavarkar, for the appellant (defendant No. 3).

Shamrav Vithal, for respondent (plaintiff).

(1) 7 B. 262.

JUDGMENT.

1893
OCT. 2.
APPELLATE CIVIL.
18 B. 603.

SARGENT, C.J.—The decision in *Tamaya* v. *Timapa Ganpaya* (1) with respect to the private sale by defendant No. 2 to defendant No. 5 in that case shows that in the absence of any clause of re-entry in the event of alienation by the mulgenidar contrary to the terms of the lease, the mulgar cannot treat the alienation as void and recover possession from the alienee. See also *Nil Madhab Sikdar* v. *Narattam Sikdar*(2). We must, therefore, reverse the decree of the Court below and restore that of the Subordinate Judge, with costs on plaintiff here and in the Court below.

Decree reversed.

---

18 B. 606.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Bayley.

JAGANNATH BRAKHBHAU (*Original Defendant*), *Applicant v.* J. E. SASSOON AND OTHERS (*Original Plaintiffs*), *Opponents.**

[3rd October, 1893.]

Practice—Procedure—Service of summons—Service by post—Return through the post of packet containing the summons endorsed "refused"—Evidence—Civil Procedure Code (Act XIV of 1882), ss. 82 and 622—Material irregularity.

A Small Cause Court having forwarded the summons to the defendant in a registered packet through the Post Office, the packet was returned endorsed 'refused,' the Small Cause Court held the service of the summons to be good service and passed an *ex parte* decree against the defendant.

Held, that the delivery of the summons by the post to a person who was not shown to be the defendant, was not good service.

[R., 29 M. 324 ; **D.**, 21 B. 412 (418) ; 35 B. 213=13 Bom. L R. 323=11 Ind. Cas. 351.]

APPLICATION under the extraordinary jurisdiction against the decision of Khan Bahadur C. M. Cursetji, one of the Judges of the Court of Small Causes at Bombay.

E. D. Sassoon and Company brought a suit (No. 23362 of 1892), in the Bombay Court of Small Causes against the applicant Jagannath Brakhbhau, residing at Kampti and Nagpur in British territory and trading at those places under the name of **[607]** Brakhbhau Jagannath, to recover the balance of an account. The summons in the suit was sent through the post office in a registered packet, but the packet was returned to the Court by the Post Office endorsed 'refused.'

On the day of hearing, the applicant failed to appear, and an *ex parte* decree was passed against him. Subsequently the applicant applied for restoration of the suit to the file, but the Court rejected the application, holding that under s. 82 of the Civil Procedure Code (Act XIV of 1882) the service through the post was sufficient.

The applicant thereupon applied under the extraordinary jurisdiction, and obtained a *rule nisi* calling upon the opponent to show cause why the *ex parte* decree should not be set aside.

Macpherson, with *Payne, Gilbert and Sayani*, appeared for the opponent to show cause.—The summons was originally served upon a

---

*Application No. 65 of 1893 under extraordinary jurisdiction.

(1) 7 B. 262.

(2) 17 C. 826 (828).

1893
OCT. 3.
APPELLATE CIVIL.
18 B. 606.

person who was said to be the agent of the applicant. On the day of hearing, this person appeared in Court and said that he was not the agent. The hearing was then adjourned, and a summons was sent in a registered packet addressed both to Kampti and Nagpur. The registered packet went to Kampti and came back with an endorsement that it was refused. The refusal to accept the packet was held by the Court to be a good service, and a decree was passed in our favour.

[BAYLEY, J.—There is nothing to show that the defendant himself refused to take the packet. The post peon may have presented the packet at the defendant's residence or place of business, and some one may have declined to take it.]

Section 114 of the Evidence Act (I of 1872) shows what presumption should be drawn in such a case.

Mahadeo Chimnaji Apte, for the applicant, in support of the rule, was not called upon.

JUDGMENT.

SARGENT, C. J.—The Small Cause Court has acted with material irregularity in treating the delivery of the summons by the post to a person, who was not shown to have been the defendant, as good service, and, therefore, in exercise of our extraordinary jurisdiction we must make the rule absolute, and reverse **[608]** the decree, and direct the Small Cause Court to proceed according to law.

Applicant to have his costs of and incidental to the rule.

Rule made absolute.

---

18 B. 608.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Bayley.

DAVE LILADHAR KASHRIRAM (*Original Applicant*), *Applicant* v. BAI PARVATI (*Original Opponent*), *Opponent.* * [4th October, 1893.]

Succession Certificate Act (VII of 1889), ss. 1 (4), 6 (a) and 7 (1)—Will, application for a certificate under—Validity of will—Hindu Wills Act (XXI of 1870).

Clause 4 of s. 1 of the Succession Certificate Act (VII of 1889) does not preclude an applicant from obtaining a certificate under the will of the deceased.

A will having been held to be genuine in a contest between the parties, and there being no suggestion that the will was one to which the Hindu Wills Act (XXI of 1870) applied.

Held, that the Court could not refuse to grant the certificate.

APPLICATION against the order of J. J. Heaton, Acting Joint Judge at Ahmedabad.

Applicant applied to the Court of the Subordinate Judge of Dholka for a certificate under Act VII of 1889 in respect of the estate of deceased Bhavanishankar Kurnashankar under a will alleged to have been passed by the deceased.

The opponent, who was the widow of the deceased, opposed the application on the ground that the will under which the applicant claimed the certificate was a forgery, and prayed that as she had preferred an

---

* Application No. 48 of 1893 under extraordinary jurisdiction.

appeal (No. 41 of 1892) against the decision of the Subordinate Judge in the matter of her application (Miscellaneous Application No. 21 of 1891) for a certificate under Act VII of 1889 in respect of the property of her deceased husband, the said Bhavanishankar, the case should be adjourned until the decision of the appeal.

The opponent's application for a certificate had been opposed by the present applicant and refused by the Subordinate Judge on the [609] ground that the two wills produced by the present applicant were proved.

On the present application the Subordinate Judge granted the certificate to the applicant, holding that his decision in Miscellaneous Application No. 21 of 1891 as to the genuineness of the will was binding on the parties.

In appeal No. 41 of 1892 the Acting Joint Judge of Ahmedabad upheld the decision of the Subordinate Judge, but on appeal in the present matter that officer set aside the order of the Subordinate Judge, granting the certificate to the applicant. His reasons are given in the following extract from his judgment:—

"Applicant relies on a will that is found to be legal and valid (see proceedings in appeal No. 41 of 1892 which is decided with this appeal). But certificates under Act VII of 1889 cannot be given with respect to any debt or security to which a right can be established * * * * by letters of administration with a copy of such a will annexed (s. 1 (4) of Act VII of 1889).

"On other grounds also I should refuse a certificate under Act VII of 1889 to any one claiming under a contested will and especially to one who is not the natural heir. The applicant here, Liladhar, is not natural heir of the deceased Bhavanishankar; the natural heir is his widow, the opponent. Liladhar claims under a will to the detriment of the natural heir; ordinary justice requires, therefore, that he should make good his position by legally proving the will and obtaining probate or letters of administration. The law provides a special procedure for this—a procedure that involves a full inquiry into any will that is contested, but which gives the holder of probate or letters of administration full powers in dealing with the property bequeathed.

The result here is that neither party can get a certificate under Act VII of 1889; and Liladhar will be driven to apply under Act V of 1881, as indeed he ought to have done long ago.

"Another objection to granting certificates under Act VII of 1889 to persons claiming under contested wills is that the claimants [610] would so obtain certificates by the payment of smaller stamp duties than would be required for probate or letters of administration."

Against this decision applicant applied to the High Court under s. 622 of the Code of Civil Procedure for the exercise of its extraordinary jurisdiction, and obtained a *rule nisi*.

Govardhhanram M. Tripathi, for the applicant.—In the Mofussil, Courts are bound to give certificate to collect debts. It is not necessary to obtain a probate—*Kalidas* v. *Bai Mahali* (1).

There was no appearance for the opponent.

JUDGMENT.

SARGENT, C. J.—The District Court had no ground for supposing that s. 1, cl. 4 of Act VII of 1889 precluded the applicant from obtaining a certificate under the Act. The petition states, as required by

(1) 16 B. 712.

1893
OCT. 4.
APPELLATE CIVIL.
18 B. 608.

s. 6 of the Act, that there was no impediment, under the above section, to the grant of the certificate; and there is no suggestion that the will was one to which the Hindu Wills Act applied. As to the validity of the will, *i.e.*, of "the right under which the petitioner claims," that is one of the averments in the petition (see s. 6 (*d*)) as to which the Court is to satisfy itself as provided by s. 7 (1); and the case of *Kalidas* v. *Bai Mahali* (1) shows that the Court cannot decline to do so; indeed, here the Court would appear to have already satisfied itself in appeal No. 41 of 1892.

We must, therefore, make the rule absolute and reverse the order of the Court below and restore that of the Subordinate Judge. Applicant to have his costs in the Court below.

Rule made absolute.

---

18 B. 611.

[611] APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Bayley.

GAVRISHANKAR PARABHURAM AND ANOTHER (*Original Defendants*), *Appellants* v. ATMARAM RAJARAM AND ANOTHER (*Original Plaintiffs*), *Respondents*.* [5th October, 1893.]

Hindu law—Partition—Property left undivided at the time of partition—Suit to recover share of the produce—Partition—Amendment of suit—Changing character of the suit.

The circumstance that there has been a partition between the members of a joint Hindu family does not, in the absence of any special agreement between them, alter their rights as to the property still undivided. As to this they continue to stand to one another in the relation of members of an undivided Hindu family.

A claim to a share of the produce of the property left undivided at a partition does not lie, because such a claim is based on the right to a particular share in the property itself which has no existence in the case of an undivided family.

A suit for a share of the produce or the property left undivided at a partition cannot be amended by making it a suit for partition without entirely changing its character.

[**R**, 23 B. 597 (601); 10 C.L.J. 503 (509) = 3 Ind. Cas. 247; 14 C.W.N. 221 (224) = 3 Ind. Cas. 9; 10 Ind. Cas. 967 = 4 S.L.R. 225; 15 M.C.C.R. 308 (309); 1 S.L.R. 133 (136); 2 S.L.R. 43.]

THIS was a second appeal from the decision of J. J. Heaton, Acting Joint Judge of Ahmedabad.

The plaintiffs sued in 1889 the defendants to recover Rs. 122-4-0 as their half-share in the produce, for three years prior to the suit, of a certain filed which they alleged was left undivided at the time of partition which was effected between themselves and the defendants in the year 1876-77.

The defendants admitted that the field was left undivided at the time of partition, but alleged that two days after the partition the plaintiffs had sold their share in it to the defendants. They also pleaded limitation.

In the course of the suit the plaintiffs and their pleader admitted that there was other undivided property besides the field in dispute.

---

* Second Appeal No. 329 of 1892.

(1) 16 B. 712.

The Subordinate Judge (Rao Saheb Vadilal T. Parekh) found that the plaintiffs had not sold their share in the field to the defendants, and awarded the claim to the extent of Rs. 59-2-4.

[612] The defendants appealed, contending (*inter alia*) that the suit for a share of the produce would not lie, and that the claim was time-barred. The Judge, however, confirmed the decree.

Defendants preferred a second appeal.

Govardhanram M. Tripathi, for the appellants (defendants).—The plaintiffs' case was that though the other family property was divided, the field in dispute was left joint. The burden of proof ought to have been thrown on them. When once a partition is effected, the presumption is that the whole property is divided.

It is admitted that there is other property still undivided besides that in dispute. That property ought to have been included in the present suit. There cannot be separate suits for partition of separate properties. The suit should be dismissed—*Trimbak Dixit* v. *Narayan Dixit* (1); *Parbati Churn Deb* v. *Ain-ud-deen* (2); *Haridas Sanyal* v. *Pran Nath Sanyal* (3); *Jogendra Nath* v. *Jugobundhu* (4); *Nanabhai* v. *Nathabhai* (5). The plaintiffs' remedy is to bring a suit for general partition. If they cannot sue for a share of a particular property, much less can they sue for a share of the produce of that property. Here they claim a share of the produce without asking for a partition of the property itself.

Manchabhai K. Choksi, for the respondents (plaintiffs).—There was a partition in the year 1876-77, and our share in the property which was divided and also in that which was left undivided was ascertained; and that being so, we are entitled to recover the produce of our share in the property in dispute. The cases relied on merely show that where there has been no partition, a suit for the recovery of a share in a particular property, or of the income of a particular property, will not lie. In order to constitute partition, it is not necessary to have actual division by metes and bounds. An agreement to divide is sufficient—*Anant Balacharya* v. *Damodhar Makund* (6). The property in dispute being left undivided at the time of the partition, an agreement to **[613]** divide it can be inferred, and then there can be no objection to award us our share in the produce. If our plaint is wrongly framed, it can be amended so as to convert the suit into one for partition—*Desai Chhagan* v. *Desai Parshotam* (7).

JUDGMENT.

SARGENT, C. J.—The plaintiffs' case is that the land in question was left undivided at the time of the partition of 1876-77, and they ask for three years' share of the produce of it in the hands of the defendants. The defendants by their written statement contended that the plaintiffs had sold their share to them, but both the Courts found the sale not proved. It was admitted, however, by the plaintiffs and their pleader that there was other undivided property besides that in suit, and the question is, whether under those circumstances, the present suit will lie.

The cases of *Trimbak Dixit* v. *Narayan Dixit* (1) and *Haridas* v. *Pran Nath* (3) apply. The circumstance that there had been a partition in 1876-77 would not, in the absence of any special agreement between the parties, alter their rights as to the property still undivided, as to which they would continue to stand to one another in the relation of members of

(1) 11 B.H.C.R. 69. (2) 7 C. 577. (3) 12 C. 566. (4) 14 C. 122.
(5) 7 B.H.C.R.A.C.J. 46. (6) 13 B. 25. (7) P. J. (1889), p. 166.

1893
OCT. 5.

APPELLATE CIVIL.

18 B. 611.

an undivided Hindu family, and no such agreement amounting to a partition of the fields in question is alleged by the plaintiffs. As to the claim to share in the produce, that must be based on the right to a particular share in the property itself which has no existence in the case of such a family.

We are of opinion, therefore, that the suit cannot lie to recover a portion of the produce, as the suit was not for partition of the field, but only to obtain a portion of the produce received by the defendant from it. *Desai Chhagan* v. *Desai Parshotam* (1) does not apply. The present suit cannot be amended by making it a suit for partition without entirely changing its character. We must, therefore, reverse the decree of the Court below and dismiss the plaint with costs of this appeal on the plaintiffs. Parties to pay their own costs in both the Courts below.

Decree reversed.

---

18 B. 614.

[614] APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Bayley.

FATECHAND HARCHAND (*Original Plaintiff*), *Applicant v.* KISAN (*Original Defendant No.* 1), *Opponent.** [10th October, 1893.]

Limitation— Acknowledgment— Stamp— Unstamped balance of account— Evidence— Stamp Act I of 1879, *s.* 34.

Though an unstamped acknowledgment cannot be "acted upon" as an acknowledgment of a particular sum being due, still it may be used for the collateral purpose of showing an acknowledgment of an existing liability in respect of goods sold.

[R., 19 M. 255; 11 C.L.J. 426=14 C.W.N 703 (708)=6 Ind. Cas. 549; **Doubted**, 21 B. 201 (204).]

APPLICATION under the extraordinary jurisdiction of the High Court (s. 622 of the Civil Procedure Code, Act XIV of 1882) against the decision of A. Steward, District Judge of Khandesh.

The plaintiff sued the defendant to recover Rs. 226-7 principal and Rs. 59-9-0 interest, alleging that the defendant at different times purchased piece-goods from him; that an account of the transaction had been made, and that the first defendant had taken the account of his *khata* and struck the balance in his own handwriting.

The defendants admitted the acknowledgment or account alleged by the plaintiffs, but pleaded part-payment to the plaintiffs' gumasta (agent) of Rs 115 and denied their liability to pay interest.

At the hearing a question arose as to whether the acknowledgment or account was admissible, being unstamped. See Stamp Act I of 1879, s. 34.

The Subordinate Judge (Rao Saheb K. S. Risvadkar) found that the part-payment alleged by the defendants was not proved; that out of the amount claimed, the plaintiff was entitled to recover only the amount of the principal, Rs. 226-7-0, and not interest, and that the claim was not

---

* Application No. 62 of 1893 under extraordinary jurisdiction.

(1) P. J. (1889), p. 166.

time-barred. He, therefore, allowed the claim to that extent. As to the document, the Judge said :—

"I do not think that the acknowledgment is intended to supply evidence of the debt in suit; for on an adjustment of [615] accounts between plaintiff and defendants, the latter simply thereby seem to acknowledge their liability in respect of the balance found due. I should think that the acknowledgment is only intended to renew the period of limitation, and hence I hold that it is not required to be stamped.

"The defendants' pleader further contends that the suit is improperly based on an acknowledgment. He argues that as an acknowledgment does not contain any promise, no suit can be based thereon. His argument is correct, but I cannot accede to his contention. I do not think from the recitals in the plaint, that this suit is based on the acknowledgment."

On appeal by defendant No. 1, the Judge reversed the decree and rejected the claim, holding that the acknowledgment was inadmissible in evidence for want of stamp, and that in the absence of the acknowledgment the claim was barred by limitation.

The suit being of the nature of a Small Cause Court suit, in which no second appeal is allowed, the plaintiff applied to the High Court under its extraordinary jurisdiction, and obtained a *rule nisi* calling upon defendant No. 1 to show cause why the decree of the Judge should not be set aside, contending that the Judge was wrong in excluding the acknowledgment, because it was not stamped.

Ghanasham Nilkant Nadkarni, appeared for the applicant (plaintiff) in support of the rule.—The acknowledgment is admissible although not stamped. It is merely an acknowledgment of the liability and not of the amount of the debt. It, therefore, does not require a stamp. Further, the Judge ought to have gone into the question of part-payment. If part-payment be held to be proved, our claim would be in time independently of the acknowledgment.

Manchubhai N. Choksi, for the opponent (defendant), showed cause :—The acknowledgment being unstamped is inadmissible in evidence—*Chenbasapa* v. *Lakshman* (1) ; Act I of 1879, s. 34. No penalty could be paid, because the document requires only one anna stamp. Even supposing that the acknowledgment [616] is admissible to prove liability to pay, still the plaintiff must fail, because he has not proved the amount of the liability.

JUDGMENT.

SARGENT, C.J.—We agree with the Joint Subordinate Judge that this suit is not brought on the acknowledgment (Ex. 13), but is a suit for goods sold and delivered, the claim in respect of which was not disputed at the trial by the defendants except as regards interest which was not allowed. The case of *Chenbasapa* v. *Lakshman* (1), which was a suit on the *hundis* improperly stamped, does not, therefore, apply.

As regards the question of limitation, Ex. 13, although for want of a proper stamp it could not be "acted upon" as an acknowledgment of a particular sum being due, might, we think, without violating the intention of the Stamp Act, be used for the collateral purpose of showing an acknowledgment of an existing liability in respect of goods sold.

(1) P. J. (1893), p. 224 ; 18 B. 369.

1893
OCT. 10.
APPELLATE CIVIL.
18 B. 614.

We must, therefore, in the exercise of our extraordinary jurisdiction reverse the decree of the Court below and restore that of the Joint Subordinate Judge. Applicant to have his costs here and in the Court below.

Decree reversed.

18 B. 616.

APPELLATE CIVIL.

Before Mr. Justice Candy and Mr. Justice Fulton.

CHUNILAL MANCHARAM (*Original Defendant*), *Appellant v.* MANISHANKAR ATMARAM (*Original Plaintiff*), *Respondent.**

[16th October, 1893].

Easements—Easements of necessity—Light and air—Severance of tenements by grantor—Implied grant—Implied reservation of easement—Derogation of grant—Reservation of easements of necessity—Injunction—Easement Act V of 1882, *s.* 13.

One Wallabh was the owner of a certain house behind which was a courtyard or *chok*, half, of which belonged to him and the other half to one Mancharam (the defendant's father), who owned a house close by. Two of the rear rooms of Wallabh's house abutted upon his portion of the *chok*, and had two doors opening out into the *chok*. In 1861, Wallabh sold (*inter alia*) his half of the *chok* to Mancharam. The conveyance contained no reservation of any rights over the [617] *chok* Wallabh having died in 1875-76, his widow Jamna sold his house to the plaintiff and shortly afterwards the defendant (Mancharam's son) put up a boarding on the *chok* which blocked up the above-mentioned doors of the plaintiff's house, and obstructed the light and air passing through them into the said two rear rooms. The plaintiff sued for an injunction.

Held, that as Wallabh had made an absolute sale to Mancharam of his portion of the *chok*, expressly reciting that he had reserved no interest in the *chok*, it would in the circumstances of this case be contrary to equity and good conscience to hold that he impliedly reserved a right of light and air over the *chok*, so as to prevent B. from building on the *chok* and thus obstructing the windows and doors in Wallabh's house overlooking the *chok*.

Held, also, that the case was not governed by s. 13, cl. (*c*) of the Easements Act (V of 1882), which was not extended to the Bombay Presidency till Act VIII of 1891 was passed.

[R., 16 C.L.J. 417 = 17 Ind. Cas. 966.]

SECOND appeal from the decision of J. B. Alcock, District Judge of Surat, in appeal No. 38 of 1891 of the district file.

Certain land which originally belonged jointly to Wallabh and Brijkuver was in 1839 partitioned equally between them. On the half share allotted to Wallabh stood his house which he had built two years before, *viz.*, in 1837, and immediately behind the house was a *chok*, or a courtyard, half of which came to him on the partition and the other half went to Brijkuver.

Subsequently Brijkuver sold her half of the land, including her share of the *chok*, to Mancharam (the defendant's father).

In 1861 Wallabh sold (*inter alia*) to Mancharam his (*i.e.*, the remaining) half of the *chok*, so that Mancharam was now owner of the entire *chok*. Wallabh, however, still retained the rest of the land and his house which he got at the partition. Two rear rooms of his house abutted on the *chok* and had two doors opening into it. The conveyance of his half

* Second Appeal No. 81 of 1892.

of the *chok* executed by Wallabh to Mancharam did not reserve any rights over the *chok*. The material part of the conveyance was as follows :—

"I have sold to you half the said *chok* appertaining to my share together with my interest in the *tanka* and the well, and put the same into your possession, for Rs. 50. From this day, therefore, you are to take into your possession the whole of the said *chok*, and use the said *chok* with the *tanka* and the well (therein). From this day I have nothing whatever to do with the *chok*, the *tanka*, and the well aforesaid."

In 1871 the defendant (Mancharam's son) built a shed on the part of the *chok* which had been brought from Wallabh in 1861, and subsequently built a loft over this shed.

[618] Wallabh died in 1875-76, and in 1883 his widow Jamna sold his house to the plaintiff.

The defendant subsequently put up a hoarding on the *chok* which completely barred the two doors of the above-mentioned two rear rooms of the plaintiff's house, which opened upon the *chok*.

In 1888 the plaintiff brought this suit praying that the defendant should be ordered to remove the hoarding and loft which obstructed the light and air passing to the northern door.

The defendant pleaded (*inter alia*) that neither the plaintiff nor his predecessors had ever acquired any title to the enjoyment of light and air through the doors and windows, and that the suit was time-barred.

The Subordinate Judge held that the plaintiff had not established a prescriptive right to the easement claimed. and rejected the plaintiff's claim *in toto*.

On appeal the District Judge found that what was claimed by the plaintiff was really an easement of necessity ; that the use of the doors in question and the enjoyment of light and air through them was necessary for the enjoyment of the plaintiff's house ; that Wallabh had been entitled to the easement claimed although he had sold his portion of the *chok* without reserving his rights, and that the plaintiff, who now stood in Wallabh's shoes, had the same rights. He, therefore, granted the relief sought by the plaintiff. In his judgment he said :—

"In his plaint plaintiff claimed a right of easement by prescription but in respect of any such right his suit would be barred under s. 26 of the Limitation Act. So at a subsequent stage he set up a claim of easement of necessity, and to that he is clearly entitled under s. 13 of the Easements Act, cl. (*c*).

"I have visited the place in dispute and found that light now enters the lower rooms of plaintiff's house only from the front door, there being houses on either side, and consequently no side windows. I happened to visit the house on a cloudy morning and found that it was scarcely possible to see at all in the two **[619]** inner rooms. Of course the opening of the two back doors, which are in dispute, would make a very material difference in the amount of light available, and these two doors are absolutely necessary for the proper use of plaintiff's lower rooms.....

"The two back doors being necessary for the enjoyment of the house after half of the (court) yard was sold, the transferor (Wallabh's widow) was entitled to the easement of light through these doors, and plaintiff, who stands in his shoes, is entitled to the same.

"I, therefore, vary the decree of the lower Court and award the relief asked for in respect of these two doors, *viz.*, injunction and removal of the hoarding only."

1893
OCT. 16.
APPELLATE CIVIL.
18 B. 616.

Against this decision the defendant appealed to the High Court. The question argued in appeal was whether the right to light and air over the *chok* was not impliedly reserved to himself by Wallabh in 1861 when he sold his half of the *chok* to the defendant's father Mancharam.

Govardhan M. Tripathi, for appellant (defendant).—The Easements Act (V of 1882) has no application to the present case. The Act was not extended to this Presidency till 1891, and by s. 2 of the Act it is expressly declared not to be retrospective. Prior to the Easements Act the rule was the same here as it is in England, that a vendor does not reserve easements of necessity by implication. He reserves them only if he does so in express terms—*Wheeldon* v. *Burrows* (1). *White* v. *Bass* (2); *Ellis* v. *Manchester Carriage Co.* (3); *Chunilal Nyahalchand* v. *Husein valad Habibula* (4); Goddard on Easements, pp. 258, 260 and 328. In the present case there is no express reservation of the easement claimed.

Motilal M. Munshi, for respondent (plaintiff):—The lower Court has found that the defendant has blocked up our windows and doors, and thereby completely darkened our inner rooms. The two back doors which open into the *chok* are absolutely necessary for the enjoyment of the house. We are, therefore, entitled to the easement claimed. The cases show that upon a severance of **[620]** tenements, easements used as of necessity will pass by implication of law—*Purshotam Sakharam* v. *Durgoji Tukaram* (5); *Ratanji* v. *Edalji* (6); *Morgan* v. *Kirby* (7). This being so, it must be held that when our portion of the *chok* was sold in 1861 to the appellant's father, our right to light and air over the *chok* was impliedly reserved to our vendor.

JUDGMENT.

CANDY, J.—Respondent not having pressed his cross-objections, the question before us is confined to the rear doors of plaintiff's house.

The land, on which the houses of the parties stand, originally belonged jointly to Brijkuver (defendant's grandmother) and Wallabh (husband of plaintiff's vendor). In June, 1839, Wallabh passed a release to Brijkuver in respect of a partition of the property. The *chok* or courtyard between the premises allotted to either party was divided half and half, but a small reservoir and well in the half share of the *chok* falling to Wallabh were kept joint. Brijkuver's son Mancharam (defendant's father) soon after 1839 purchased his mother's share of the property and built a house thereon. Wallabh's house was apparently built in 1837, and the two rear rooms abutting on his share of the *chok* had two doors opening out into the *chok*.

On 24th November, 1861, Wallabh sold to Mancharam his half share of the *chok* together with his interest in the reservoir and well. The conveyance contained no reservation of any rights whatever beyond that Mancharam might allow Wallabh to take water as long as he (Mancharam) pleased. Wallabh and Mancharam lived on amicable terms with each other, and it is not disputed that the latter allowed the former to open his rear doors and come into the *chok* and draw water.

About 1871 to 1873 (according to plaintiff's deposition in the present case) defendant built a shed over the portion of the *chok* purchased by him in 1861, and about 1875-76 he cut off the roof over the southern portion of

(1) 12 Ch. D. 31.
(2) 31 L.J. Ex. 283=7 H. & N. 722.
(3) 2 C.P.D. 13.
(4) P. J. (1886), p. 128.
(5) 14 B. 452.
(6) 8 B.H.C.R. O.C.J. 181.
(7) 2 M. 46.

this shed and built thereon a loft. Wallabh died about 1875-76, and his widow Jamna had disputes with defendant. Jamna accordingly in 1878 sued defendant for **[621]** possession of the half share of the *chok* next to her house, and for the removal of the shed erected by defendant. She failed in that suit, being met by the sale-deed executed by Wallabh in 1861. She then in 1883 sold her house to plaintiff, who was then sued by defendant claiming a right of pre-emption. Defendant lost that suit, and subsequently appears to have put up a hoarding completely barring the doors of plaintiff's rear rooms. Plaintiff then brought the present suit for an injunction, as regards the doors now in dispute, that defendant should remove the hoarding and the loft which obstruct the light and air passing to the southern door, and should remove the hoarding which obstructs the light and air passing to the northern door.

In the plaint plaintiff claimed to have a prescriptive right to light and air passing through both the doors; and his pleader also argued, in the course of the trial, that the severance of the tenements implied an easement of light and air to the doors.

The Subordinate Judge rejected the plaintiff's claim *in toto*, holding that no easement by prescription had been proved in respect of both the doors, and that on partition of the open land no equity had arisen in favour of the right of either party to any easement of light and air, the houses then not being in existence. The Subordinate Judge also found that (*a*) both doors had been effectively darkened by the shed and loft; (*b*) the hoarding still further darkened to a slight extent the northern door, but made no practical difference as regards the southern door, and that to allow plaintiff to open this southern door would practically give plaintiff ingress to a room of defendant's house; (*c*) defendant's witnesses were right when they spoke of the doors being chained on defendant's side since a long time; and plaintiff's witnesses were also right when they spoke to the doors having been opened, Wallabh having used the same as means of ingress and egress occasionally merely by the courtesy of his relative the defendant; (*d*) Wallabh had not claimed any right to light and air through these doors.

On appeal made by plaintiff to the District Court he urged: "My claim is not based on the right of continuous and apparent and necessary easement. Should the appeal Court hold necessary **[622]** to make an amendment accordingly, I should be allowed to do so, inasmuch as there is an admission of the defendant in the matter."

The District Judge found that "in his plaint plaintiff claimed a right of easement by prescription, but in respect of any such right his suit would be barred under s. 26 of the Limitation Act (XV of 1877). So at a subsequent stage he set up a claim of easement of necessity, and to that he is clearly entitled under s. 13 of the Easements Act, cl. (*c*)." The District Judge on a visit to the house on a cloudy morning found that it was scarcely possible to see at all in the two inner rooms. "Of course (he said) the opening of the two back doors which are in dispute would make a very material difference in the amount of light available, and these two doors are absolutely necessary for the proper use of plaintiff's lower rooms."

The District Judge also found that there was no satisfactory evidence of the two back doors having been closed from defendant's side for a long period, "and, as the Subordinate Judge has remarked, there is no mark on the doors to show for certain that there was ever any fastening on them. Defendant admits in his deposition that the doors were used for years after his father bought up that half of the court-yard which did not fall to

1893
OCT. 16.
APPELLATE CIVIL.
18 B. 616.

his share. The two back doors being necessary for the enjoyment of the house after that half of the yard was sold, the transferor was entitled to the easement of light through these doors, and plaintiff, who stands in his shoes, is entitled to the same." The District Judge, therefore, varied the decree of the lower Court and awarded part of the relief asked for in respect of the two doors, *viz.*, injunction and removal of the hoarding only. It is against this decree that defendant has made second appeal.

I am of opinion that the decree of the Subordinate Judge rejecting the plaintiff's claim was correct, and should be restored.

It seems clear that the District Judge was in error in disposing of the case under the Easements Act (V of 1882) which did not become law in the Bombay Presidency till Act VIII of 1891 was passed. By s. 2 of the Easements Act nothing contained in the Act shall be deemed to derogate from any right acquired, or **[623]** arising out of a relation created before the Act comes into force. We must, therefore, deal with the case quite apart from the provisions of the Easements Act. If the defendant in this case, before the suit was filed in 1888, had the right to deal as he liked with the portion of the *chok* purchased by him in 1861, then the plaintiff's case must fail. It is unnecessary to quote authority for the proposition that there being no special custom involved, we must be guided by the law of England. Mr. Whitley Stokes in his Introduction to the Easements Act (the Anglo-Indian Codes, Vol. I, p. 878) states that the law of England, being just, equitable and almost free from local peculiarities, has in many cases been held to regulate the subject in India. Many cases could also be quoted in which the same proposition is laid down.

Now, the law of England as set forth by the Court of appeal in 1879 in *Wheeldon* v. *Burrows* (1) must be regarded as settled law (Gale on Easements, 6th ed., p. 133). That law is (p. 49) that on the grant by the owner of a tenement of part of that tenement as it is then used and enjoyed if the grantor intends to reserve any right over the tenement granted, it is his duty to reserve it expressly in the grant. This rule (Thesiger, L.J., said) is subject to certain exceptions. "One of those exceptions is the well-known exception which attaches to cases of what are called ways of necessity; and I do not dispute for a moment there may be, and probably are, certain other exceptions, to which I shall refer before I close my observations upon this case." The Lord Justice showed that the rule in question was founded upon a maxim, which is as well established by authority as it is consonant to reason and common sense, *viz.*, that a grantor shall not derogate from his grant; and that the distinction between what has been called an implied grant and what is attempted to be established under the name of an implied reservation has existed almost as far back as we can trace the law upon the subject. The Lord Justice then showed that, putting aside the case of *Pyer* v. *Carter* (2), there has been no decision which in any way affects the principle laid down in clear and distinct terms by Lord Holt in *Tenant* v. *Goldwin* (3) that if the owner of a house and ground sells the ground and keeps the house, **[624]** without reserving the benefit of the lights, the vendee of the ground may build against the house. It was next shown by the Lord Justice that certain observations of the Judges of the Court of appeal in *Watts* v. *Kelson* (4) could not be taken as overruling the decision of Lord Westbury in *Suffield* v. *Brown* (5) which distinctly re-affirmed the rule as above stated. As illustrations

---

(1) 12 Ch. D. 31. (2) 1 H. and N. 916. (3) 2 Lord Raymond, 1089-1093.
(4) L.R. 6 Ch. 166 (174). (5) 4 De Gex J. and S. 185.

of the exceptions to the rule the Lord Justice quoted *Pinnington* v. *Galland* (1) and *Davies* v. *Sear* (2), both of which were decided on the basis that the easement impliedly reserved was a way of necessity. It was also suggested that *Pyer* v. *Carter* (3) and *Richards* v. *Rose* (4), could be supported on a similar basis of exception to the general rule, the easements in those cases being reciprocal and mutual. *Swansborough* v. *Coventry* (5) and *Compton* v. *Richards* (6) were quoted as illustrating a further exception to the general rule, *viz.*, where the conveyances of the land and houses were made as part and parcel of one transaction.

It is evident from a review of the above case of *Wheeldon* v. *Burrows* (7) that the exceptions to the rule, *i.e.*, ways of necessity, and such like easements of necessity can never include an easement of light. In *Currier's Company* v. *Corbett* (8) Vice-Chancellor Kindersley said: "It has been determined that if a person having a house on his land, the windows of which have existed for more than twenty years, sells a portion of the land, the purchaser may erect any buildings he pleases upon the lands so sold to him *however much* they may interfere with the light coming to the windows of the vendor's house. That seems clearly to be the law, though it must be admitted that this law, if carried to an extreme, would in some cases produce great and startling injustice."

The case itself of *Wheeldon* v. *Burrows* was one of lights. In the Court of appeal defendant's counsel said: "We claim to protect them (the lights) from a blocking up which will make the defendant's building *absolutely useless*." And yet the Court of **[625]** appeal held that it was not one of the exceptions to the general rule that a grantor cannot derogate from his own grant.

Wheeldon v. *Burrows* being admittedly settled law, it seems unnecessary to quote cases which were decided on the authority of the now overruled case of *Pyer* v. *Carter*, or on a mistaken idea of what was really decided in *Watts* v. *Kelson*. It is clear that under the circumstances of such a case as *Wheeldon* v. *Burrows*, the right to prevent windows being absolutely blocked cannot be treated as an easement of absolute necessity. It clearly was not so in the present case. The District Judge did not express disapproval of the finding of the Subordinate Judge that the shed and loft erected by defendant (according to plaintiff's showing) from 1871 to 1873 "effectively darkened" the two rear doors of Jamna's house. The house was clearly not rendered uninhabitable by the darkness of the two rear rooms. It is evident that if the Easements Act could be applied, the case would have to be tried under cl. (*d*) of s. 13. It is only the easements mentioned in cls. (*a*), (*c*) and (*e*) of s. 13 which are called "easements of necessity." These are evidently confined to easements of absolute necessity; and the word 'absolutely' is to be found in the drafts of the Bills of 1879 and 1881. In the Statement of Objects and Reasons of the Bill of 1879 it is mentioned that 'easements of necessity' were intended to mean not only the rights which are absolutely necessary for enjoying property, but also apparent and continuous, and easements necessary for enjoying property as it was enjoyed when it was separated by grant. But the Law Commission recommended (*Gazette of India*, 17th January, 1880) that easements of necessity strictly so called

---

(1) L.R. 9 Ex. 1 (12).
(2) L.R. 7 Eq. 427.
(3) 1 H. and N. 916.
(4) L.R. 9 Ex. 218.
(5) 9 Bing. 305.
(6) 1 Price 27.
(7) 12 Ch. D. 31.
(8) 2 Dr. and Sm. 360.

1893
OCT. 16.
APPELLATE CIVIL.
18 B. 616.

should be separated from those apparent and continuous easements which arise when a transfer is made, which are necessary for enjoying the thing transferred, or other immoveable property of the transferor, as it was enjoyed when the transfer took effect. This was accordingly done in the Bill of 1881, which is practically the same as the Act which is now law. Therefore, if the District Judge was at liberty to refer to the Easements Act, it is clear that he should have decided the case under cl. (*d*) of s. 13, and then, after considering the facts and evidence noted by the Subordinate Judge, he should **[626]** have found whether an intention contrary to the reservation was necessarily implied, and whether the easement of light and air over defendant's *chok* so impliedly reserved in the conveyance of 1861 had been extinguished before the plaintiff's suit was filed in 1888, and if not, whether he could grant an injunction removing the obstruction which prevents plaintiff from enjoying the use of the rear doors as they were enjoyed by Wallabh in 1861. It is apparent that the District Judge did not approach the case from this point of view. But, as shown above, it was not open to the District Judge to rely on the Easements Act at all.

It is no doubt anomalous that the Easements Act should have introduced such a marked variance from the English law. This is apparently due to the fact that Mr. W. Stokes, who drafted and introduced the Easements Bill in 1878, was of opinion that the English law "rests on a doubtful doctrine of Lord Holt's (see 2 Drew and Smale, 360)." The judgment of the Court of appeal in *Wheeldon* v. *Burrows* had not then been delivered, showing that the doctrine of Lord Holt was not doubtful, but had been laid down in clear and distinct terms, and was as well established by authority as it is consonant to reason and commonsense. The reference to 2 Drew and Smale, 360, is to the case above quoted of *Curriers Co.* v. *Corbett* in which Vice-Chancellor Kindersley, though stating that the law if carried to an extreme would in some cases produce great and startling injustice, yet held the law to be in no way doubtful, but quite clear. Since the decision of *Wheeldon* v. *Burrows* there is no room for doubt. In *Allen* v. *Taylor* (1) Jessel, M.R., said that it is "settled law that if a man who has a house and land, grants the land first, reserving the house, the purchaser of the land can block up the windows of the house."

It is not difficult to see how the Easements Act, s. 13, cl. (*d*), has become law. It is apparently based on the judgment of Mr. Justice Field in *Charu Surnokar* v. *Dokouri Chunder Thakur* (2). Mr. Whitley Stokes acknowledged the assistance given to him by that learned Judge in drafting the Bill which **[627]** became the Easements Act. In the judgment in the case just quoted it was said that the right claimed, "though not absolutely necessary to the enjoyment of the defendant's tenement, might be necessary for its enjoyment in the state in which it was at the time of severance; and in this case, if the easement were apparent and continuous, there would be a presumption that it passed with the defendant's tenement. This latter case is discussed in the books under the principle of the *disposition of the owner of two tenements* (*destination du pere de famille*). See Gale on Easements, 5th ed., pp. 96, 97 and following pages; and as to right of way, p. 103 note, p. 124 note, and *Pyer* v. *Carter* (1. H. and N. 922). This principle is just and fair and accords with commonsense. It is in consonance with the rule of justice, equity, and good conscience,

(1) 16 Ch. D. 355.

(2) 8 C. 956.

which must guide the Courts in the absence of positive direction by the Legislature."

But Lord Westbury in *Suffield* v. *Brown* (1) showed that this comparison of the disposition of the owner of two tenements to the *destination du pere de famille* is a mere fanciful analogy from which rules of law ought not to be derived. "And the analogy, if it be worth grave attention, fails in the case to be decided, for when the owner of two tenements sells and conveys one for an absolute estate therein, he puts an end, by contract, to the relation which he had himself created between the tenement sold and the adjoining tenement; and discharges the tenement so sold from any burthen imposed upon it during his joint occupation; and the condition of such tenement is thenceforth determined by the contract of alienation and not by the previous user of the vendor during such joint ownership" The Lord Chancellor then went on to notice the fallacy in the judgment of the Court of Exchequer in the case of *Pyer* v. *Carter* (2) which case was finally overruled in *Wheeldon* v. *Burrows* (3).

Applying these principles to the present case, it seems clear that since in 1861 Wallabh sold out and out to defendant's father his portion of the *chok*, expressly reciting that he reserved no interest in the reservoir or well, it would be contrary to equity and good conscience to hold that he impliedly reserved a right **[628]** of light and air over the *chok*, which would effectually prevent the purchaser from building on the *chok* so purchased, and thus obstructing the windows or doors in the vendor's house overlooking the *chok*. For these reasons, I would reverse the decree of the District Judge and restore that of the Subordinate Judge, with all costs on plaintiffs.

FULTON, J.—As the Easements Act was not in force in 1861 when the severance of tenements took place out of which the easement claimed by the respondent in this appeal is alleged to have arisen, the only principle which can guide this Court in determining whether the right to light and air through the doors in question was by implication reserved by the vendor when he sold the courtyard adjacent to those doors, is, as pointed out by Field, J., in *Charu Surnokar* v *Dokouri Ckunder Thakur* (4), that of equity and good conscience. In England it has been finally settled in *Wheeldon* v. *Burrows* (3) that on the sale of land adjoining a house, the right to light and air over that land to the windows of the house is not retained by the vendor unless expressly reserved. The law on the subject has been very lucidly explained by Jessel, M. R., in *Allen* v. *Taylor* (5) as follows:—"Where a man grants a house in which there are windows, neither he nor any body claiming under him can stop up the windows or destroy the lights. That is based on a principle that a man shall not derogate from his own grant; and it makes no difference whether he grants the house simply as a house or whether he grants the house with the windows or the lights thereto belonging. In both cases he grants with the apparent easements or *quasi* easements. All that is now I take it settled law. I take it also that it is equally settled law that if a man who has a house and land grants the land first reserving the house, the purchaser of that land can block up the windows of the house." In England thus the agreement under which the sale has taken place is construed more strictly against the vendor than against the vendee, but even

(1) 4 De Gex. J. and S. 185. (2) 1 H. and N. 916. (3) 12 Ch. D. 31.
(4) 8 C. 956. (5) 16 Ch. D. 355.

1893
OCT. 16.
APPELLATE CIVIL.
18 B. 616.

there this principle was seriously disputed in *Pyer* v. *Carter*(1) and it is, as stated in *Wheeldon* v. *Burrows*, subject to an exception in regard to ways [629] of necessity which are always held to be reserved by implication and possibly to other exceptions.

In India, on the other hand, when the Easements Act was passed, the principle on which *Pyer* v. *Carter* was decided was adopted, and by cls. (*a*), (*b*), (*c*) and (*d*) of s. 13 transferors and transferees were placed on exactly the same footing as regard the implied reservation or grant of easements whether of necessity, or apparent continuous and necessary for the enjoyment of the premises as they stood at the time of the transfer; and although this Act cannot affect transfers which took place before its introduction, I think it is hardly safe to hold that all such transfers are on this point governed by English law albeit they were effected in a country in which that law was not in force and in total ignorance of its provisions.

The general principle that a vendor cannot derogate from his own grant, or, in other words, that a party to a contract of sale cannot escape from the express terms to which he has agreed, is, as pointed out by Thesiger, L.J., in *Wheeldon* v. *Burrows*, consonant to reason and commonsense, but when once it is admitted that this principle is subject to certain exceptions it becomes, in the absence of any fixed law on the subject by which those exceptions are specified, a question of extreme nicety to decide what are the easements so necessary for the enjoyment of the building reserved that it would be contrary to equity and good conscience to believe that it was not intended to reserve them at the time of the sale. In England the law has been established by a series of decisions subject to which sales take place, but that is not the case in India. Two Indian decisions—those of *Charu Surnokar* v. *Dokouri Chunder Thakur* (2) and *Chunilal* v. *Husein* (3)—appear to go further than the English cases in this matter. The former of these has, it is true, been recently criticised by the Allahabad High Court in the case of *Wutzler* v. *Sharpe* (4), but whether it was rightly or wrongly decided it seems to me to be conceivable that even in regard to light and air a case might arise where to hold that the vendee of an adjacent land was entitled to render unless the vendor's house by building up against his [630] windows might be so obviously contrary to what was contemplated at the time of the sale and be productive, in the language of Kindersley, V. C., (2 Drew and Smale at p. 360), of such "great and startling injustice" that a Court not bound by any positive rule of law on the subject might in the exercise of equity and good conscience think it necessary to hold that an easement had been meant to be reserved.

But while unwilling to decide that prior to the introduction of the Easements Act there were any positive rules in force on this subject, I think that a vendor or his successor in title claiming such a reservation as is claimed in the present case must show either by reference to the urgent necessity of the easement or the conduct of the parties to the sale that it cannot reasonably have been intended by either of them to do otherwise than reserve to the vendor the right which he claims. In the present case the finding of the District Judge does not show that access of light and air through these doors is so indispensable for the use of the house that it must necessarily have been reserved, nor has there been any attempt made to show any conduct of the parties from which

(1) 1 H. and N. 916.
(2) 8 C. 956.
(3) P.J. (1886), p. 128.
(4) 15 A. 270.

the intention to make and allow such reservation can properly be inferred. The most that can be said is that the closing, in 1888, of these two doors makes the back rooms very inconvenient; but it is impossible in the circumstances of the case to say what was the intention of the vendor and vendee in reference to them. Such being the case, I think the plaintiff has failed to establish his claim, and I, therefore, concur with my learned colleague in reversing the decree of the District Judge and restoring that of the Subordinate Judge, with costs on the plaintiff throughout.

Decree reversed.

1893
OCT. 16.
APPELLATE CIVIL.
18 B. 616.

---

18 B. 631.

[631] ORIGINAL CIVIL.

Before Mr. Justice Bayley (Acting Chief Justice) and Mr. Justice Farran.

SUCCARAM MORARJI SHETAY AND OTHERS (*Appellants*) *v.* KALIDAS KALIANJI AND OTHERS, (*Respondents*).* [29th June and 6th July, 1894.]

Hindu law—Joint family—Manager—Widow—Minor sons—Sale by widow of immoveable property left by husband—Family necessity—Minor sons bound by sale—Deed of sale—Effect of conveyance how ascertained.

Ramji Shiva, a Hindu, died in debt leaving two minor sons. His widow, who after his death was the manager of the family, borrowed money for family purposes, and as security mortgaged some of the immoveable property left by her husband. She subsequently sold it and the Court held that the evidence showed that it was sold to pay off the family debts.

Held, that the minor sons were bound by the sale.

Held, also, that the effect of a conveyance of property sold by the manager of a family depends on the intention of the parties as gathered from the terms of the instrument and from the surrounding circumstances.

[R., 17 Ind. Cas. 609=23 M.L.J. 638=12 M.L.T. 547.]

APPEAL from an order made by Starling, J., on the 19th March, 1893, apportioning among the claimants thereto the sum of Rs. 25,408 8-6, which was the amount assessed as compensation for certain land (7,685 square yards), situate at Byculla in Bombay, taken up under the Land Acquisition Act (X of 1870). The matter had been referred to the Court by the Collector under s. 15 of the Act, in order that the sum to be paid to each claimant should be determined.

One of the points raised in the case, and the only one dealt with in this report, was whether a sale of land by the widow of a deceased owner (a Hindu) bound the interests of his minor son.

Two of the claimants in the case were Tatia Ramji Dhoble and Govind Ramji Dhoble, who were the sons of one Ramji Shivji Dhoble, deceased. They alleged that part of the land in question belonged to them as heirs of their father, and as owners of the land they claimed a share in the compensation awarded by the Collector.

Their claim was, however, contested by one Kalidas Kalianji, who alleged that on 12th December, 1884, by a duly registered deed of that date, Chimnabai (the widow of Ramji Shivji [632] Dhoble and the mother of Tatia and Govind), had sold this particular portion of the land

---

* Appeal No. 789.

1894
JULY 6.

ORIGINAL CIVIL.

18 B. 631.

in question to him (Kalidas) and his brother, who was now dead. He stated that Ramji Shivji had died about 1879, and that shortly afterwards he himself had lent money to the widow Chimnabai on mortgage of this land, which was finally sold by her to him and his brother in December, 1884. In his evidence he said :—

"Ramji Dhoble died in Bombay. I first advanced money to his widow in 1881—Rs. 300 in one sum—two years after Ramji's death. When I advanced the money on mortgage to Chimnabai, she wanted it to pay off the claims of a grain-dealer who had brought a suit against her. She told me that the grain-dealer, while her husband was ill, had made advances to her for necessaries, and afterwards for funeral expenses, and Rs. 900 was due to the grain-dealer. At that time she was maintaining the two sons of her husband, and the balance of the purchase-money was to pay a further amount to the grain-dealer, who had issued a writ against her. I afterwards advanced Rs. 250 more at the time of the writing, about three years after the first payment. I made the two advances. I did not trust to the widow alone, as there were decrees against her as representing her husband which she wanted to pay off. She told me there was a decree against her and if she did not pay she would have to go to jail. I was told by her Rs. 950 were due to Puna Assu in respect of the decree. I asked her to join her son in the conveyance, but she said that he was only a child. The Rs. 250 were paid before the Registrar."

The conveyance by Chimnabai to Kalidas and his brother Vasta was as follows :—

"There is my (piece of) land situated at Byculla on the Parel Road, being a part of land (known as that of) Sonabai, standing in the name of my husband, Ramji Shivji Dhoble, and wherein he had a sixteenth share. I had borrowed before Rupees three hundred on mortgaging the said (piece of) land. The same were borrowed on the 28th of February, 1881. I was not able to repay the same. I have, therefore, on receiving Rs. 550, sold this land, (*i.e.*) the sixteenth share therein, on which there are warehouses for storing hay. With regard to the receipt of this amount, Rs. 300 were received on a former mortgage and Rs. 250 have this day been received. Having received Rs. 550 in all I have sold the same land to you. The four boundaries thereof are as follows:—" (Boundaries stated.) "I have received Rs. 550, on having sold to you this land enclosed within the four boundaries thus particularised. You are to enjoy the said land from generation to generation. Neither have I nor have my heirs any claim whatever thereon. If any one should prefer (a claim) I will answer for the same. This deed of purchase (? sale) I have duly given in writing of my free will and pleasure and in sound mind and consciousness. The handwriting of Apaji Gopal Medhekar, residing in Bombay."

Vicaji (with *Anderson*), for the sons of Ramji :—The sale by the widow Chimnabai is only binding on her sons, who were then [633] minors, on two conditions: first, if there was a necessity for the sale of the land; secondly, if she purported to sell on their behalf and as representing her deceased husband's estate. As to necessity, it is not shown it existed: West and Buhler (3rd ed.), p. 611. As to the second condition, the deed states that the property belonged to her. She was, therefore, not acting as guardian of her sons or as representative of her husband's estate. She treated the land as her own, and acted adversely to her sons. She, therefore, cannot be held to have conveyed their interests: Mayne's Hindu Law (5th ed.), para. 196, and see cases cited

in note (*c*) ; *Bahur Ali* v. *Sookeea*(1). The purchaser knew the sons were interested and asked that they should join in the deed. She refused and dealt with the property as her own. The liabilities which she discharged with the money raised by the mortgage and sale of the land were her own personal liabilities.

Lang, Advocate General, (with *Scotf*), for the purchasers :— Ramji Dhoble admittedly died indebted. The liability to pay off his debts was no doubt transferred to the widow's personal account. It still remained *his* debt to be paid off ; and as manager of his estate she had authority to pay it, though for that purpose she gave to her husband's creditors the additional security of her own personal liability. That additional security did not do away with the legal necessity on her part to sell his property. The friends, moreover, who agreed to pay part of the debt, namely, Rs. 150, might be regarded in the position of sureties for her ; and she had to pay them off also. The real question is, whether a guardian or manager is not empowered to indemnify herself out of her husband's property for debts originally contracted by him, and for which she became personally liable? If she is, these purchasers who made inquiries at the time of the sale have acted in good faith, and the property of which they have been in possession since 1884 cannot be followed in their hands. As to the interpretation of the sale-deed, the intention with which it was executed is important. One of the purchasers has sworn that in selling she represented her husband's estate. The cases cited for Dhoble's sons do not apply.

JUDGMENT.

The judgment of the Court was delivered by

[634] FARRAN, J. [which on the above point was as follows] :—Kalidas and his brother also claim the plot which originally belonged to Ramji Dhoble, basing their title upon a conveyance by Dhoble's widow Chimnabai bearing date the 12th of December, 1884. Dhoble died in April or May, 1879, leaving his widow Chimnabai and two minor sons . . . . [His Lordship referred to the evidence as to the circumstances under which the conveyance was made, and continued :—]

The substantial questions raised are whether the sale by Chimnabai was binding upon the minor sons of Dhoble ; and whether the deed of sale, having regard to its peculiar terms, operated to convey the minors' interest in the land to Kalidas. The law as to the mother's right to sell the property of her minor sons is laid down in West and Buhler's Work on Hindu Law (3rd ed.), p. 611, in these terms :—"A widow managing for her infant son like any other manager when minors are interested as co-parceners can deal with the property only to meet existing necessities, but the other party is protected by good faith and reasonable inquiry." We have referred to the cases cited in the notes to that passage and to those referred to at p. 367 of the same work. They draw no distinction between the case of a mother acting for her minor sons and that of any other manager of a Hindu united family in which there are minor members. In each case the manager has power to alienate the family estate in cases of strict necessity. We refer especially to *C. Colum Comara* v. *R. Rangasawmy* (2) and *Dalpatsing* v. *Nanabhai* (3).

In the present instance the pressing necessity for the sale is, we think, sufficiently shown. Dhoble died in debt, and the action of his widow Chimnabai after his death demonstrates with considerable certainty that

(1) 13 W.R. 63. (2) 8 M. I. A. 319. (3) 2 B.H.C.R.A.C.J. 306 (309).

1894
JULY 6.

ORIGINAL CIVIL.

18 B. 631.

he left no available assets to satisfy his liabilities. He owed Rs. 725 to the firm of Puna Assu. Chimnabai paid off Rs. 375 of this in small sums, and made herself personally liable for the remaining Rs. 350. In May, 1879, a decree was passed against her in the Small Cause Court for Rs. 351-4-9 in respect of that liability. In February, 1881, that decree being then outstanding, she borrowed Rs. 300 on the [635] security of the plot in question, informing Kalidas that she had this outstanding decree to satisfy and debts incurred by her for the funeral expenses of her husband and other debts left by her husband. This latter statement must have been, on the whole, substantially true, for she was unable to pay off the decree from this loan. Subsequently, in 1884, she was arrested and put in jail for non-payment of it. She was only released on getting two of her friends to satisfy the decree-holder. In December, 1884, she received a further sum of Rs. 250 from Kalidas, and sold the land to him for this sum *plus* her former debt to him of Rs. 300. We think that we may fairly infer that the Rs. 250 were received by her to pay the friends who satisfied the firm of Puna Assu. The whole sum of Rs. 550 was, therefore, received by Chimnabai to satisfy family liabilities. We do not think that the necessity for the sale is lessened by the fact that Chimnabai had made herself personally liable for the family debt. The liability of the managing member of a family to be sued and put in jail, for a family-debt for which she has made herself personally responsible, satisfies, we think, the requirement of the Hindu law that there must be necessity for the alienation.

It was lastly contended that the terms of the deed of sale to Kalidas show that Chimnabai was selling the plot as her own, and that it does not operate to transfer the minors' interest in the land to Kalidas. The evidence of Kalidas, which we see no reason to distrust, shows that she intended to sell the land as that of her husband, and did not get her sons to join because they were too young: and the terms of the deed, when read as a whole, do not, we think, show any other intention on the part of Chimnabai. What the effect of such a conveyance is, appears to depend upon the intention of the parties to be gathered from the terms of the instrument and from the surrounding circumstances.

In *Watson* v. *Shamlal* (1), their Lordships of the Privy Council took both into consideration. Here the lady signs as widow of Dhoble intending to convey his interest in the land. That is clear having regard to the circumstances under which she executed. [636] We think it would be taking too technical a view of the instrument to hold that the whole interest of Dhoble did not pass by it, because he left minor sons, whose interest the deed does not, in terms, purport to convey.

The case of *Bahur Ali* v. *Sookeea Bibee* (2) was wholly different. That was the case of a sale by a Muhammadan lady, Shamla. The purchaser set up the case that she sold as owner of the land by reason of a *hibbah* executed to her by her husband in his lifetime. It was held that that case failing, the purchaser could not set up the contention that the sale was binding as a sale by her as guardian of her minor sons, inasmuch as she sold, and intended to sell, as sole proprietor and in her own right. In the matter of the purchase of Dhoble's share, we must confirm the decision of the Division Court.

Attorneys for the parties:—Messrs. *Chalk, Walker and Smetham*, and Messrs. *Thakurdas Dharamsi and Cama*.

(1) 14 I. A. 178.

(2) 13 W. R. 63.

18 B. 636.

1894
AUG. 9.

CROWN SIDE.

CROWN SIDE.

Before Mr. Justice Bayley (Acting Chief Justice) and Mr. Justice Starling (Acting).

18 B. 636.

ALTER CAUFMAN AND OTHERS, (*Appellants*) *v.* THE GOVERNMENT OF BOMBAY (*Respondent*). [9th August, 1894.]

Habeas corpus—Foreigners—Act III of 1864, *validity and application of—Powers of legislation of the Governor General in Council—Indian Councils Act (Stat. 24 and 25 Vict., c. 67), s. 22—Crim. Pro. Code (X of* 1882), *s.* 491*—Warrant to arrest and imprison—Form of warrant—Service of warrant—Procedure.*

On the 3rd July, 1894, certain foreigners resident in Bombay having been arrested by the police and sent to jail under warrants issued under ss. 3 and 4 of Act III of 1864, they applied to the High Court and obtained a rule *nisi* under s. 491 of the Criminal Procedure Code (X of 1882) and under Stat. 31, Car. II, c. 2 (Habeas Corpus Act), calling on the Superintendent of the Jail to show cause why they should not be set at liberty. In the affidavits filed in showing cause against the rule the only reason suggested for their arrest was that they were connected with loose women residing in a certain district of Bombay. It was contended for the prisoners that their arrest and imprisonment were illegal, (1) inasmuch as Act III of 1864 was *ultra vires* of the Indian Legislature; (2) that the Act being intended only to secure the "peace and security" of British India was in this case improperly applied.

[637] *Held* (1) that Act III of 1864 was not *ultra vires* of the Governor-General of India in Council;

(2) that it was rightly applied in the case of the foreigners in question, although their residing in Bombay may not have been likely to have affected or endangered the peace and security of British India.

Per STARLING, J.—Section 3 of Act III of 1864 gives the fullest power to the Government to order any foreigner to remove himself from British India. The Government is the sole judge of what is necessary for the peace and security of British India, and if it acted in accordance with the letter of the Act the Court could not inquire into the sufficiency of its reasons for so acting.

A separate warrant was issued in the case of each of the foreigners in question; and all were in the same form. The warrant directed the person whose name appeared in it forthwith to "remove himself from British India by sea," and it further contained the following words:—"All officers to whom this order may be communicated are required to see that it is duly obeyed, and in the event of its being infringed to apprehend and detain the said ( ) in safe custody in the jail of Bombay under s. 4 of the said Act, until he shall be lawfully discharged therefrom." Each warrant was signed by the Secretary to Government and was directed to the Commissioner of Police and to the Superintendent of the Jail.

Held that the warrants were not vaild warrants for the following reasons:—

(1) They were irregular in that they contained an order to the person named in them to do a certain thing with a further conditional order for his imprisonment in the event of his not doing it. There ought to have been a separate order to each prisoner to remove himself from British India, which order should have been duly served upon him. Then, in case of his refusal or neglect to comply with its terms, there ought to have been a further order by the Governor in Council authorizing his arrest and detention in jail.

(2) The persons named in them were not indicated with sufficient certainty and particularity. The warrants contained no description of the persons against whom they purported to be directed, and did not give their place of residence.

(3) By reason of the direction contained in them that the persons named in them were to remove themselves from British India by sea to the places mentioned in the warrant. The particular route to be specified under s. 3 of Act III of 1864 is intended to be a route in British India, and not a route beyond the high seas. The Government has no jurisdiction to direct a person's movements at sea beyond the limits of three miles from the shore.

1894
AUG. 9.

CROWN SIDE.

18 B. 636.

(4) (Per STARLING, J.)—The warrants were also defective inasmuch as they bore no seal.

[R., 11 Cr. L. J. 570=8 Ind. Cas. 137=23 P. R. 1910 Cr.=85 P. L. R. 1910.]

APPEAL from an order made by Farran, J.

The appellants and two others, who were foreigners residing in Bombay, were arrested by the police in Bombay on warrants issued under Act III of 1864, ss. 3 and 4, on the evening of the 3rd **[638]** July, 1894. On the following day an application was made on their behalf to Farran, J., who issued a rule *nisi*, under s. 491 of Act X of 1882, and under Stat. 31, Car. II., c. 2 (Habeas Corpus Act) calling on the Superintendent of the Jail to show cause why the prisoners should not be set at liberty. On the 9th July the rule came on for hearing, and after argument Farran, J., as to the five appellants discharged the rule (1). From this order of discharge the present appeal was filed.

From the affidavits it appeared that on the 11th June the Commissioner of Police handed over to an Inspector of Police seven warrants purporting to be issued by the Governor of Bombay in Council, under ss. 3 and 4 of Act III of 1864 and signed by one of the Secretaries to Government and dated the 8th June. Each of the warrants was made out in the name of one of the prisoners. The Inspector was directed to show to each of the said persons the warrant applicable to him, and to have the contents thereof read and explained to him.

The warrant made out in the name of the first appellant was as follows. The warrants for the other prisoners were exactly similar, except that two of them directed removal "by sea to Roumania" and one "to Austria" and one "by sea to Adrianople":—

"*Warrant.*

"In exercise of the power conferred by s. 3 of Act III of 1864, the Right Honourable the Governor of Bombay in Council is pleased hereby to direct that Alter Caufman *alias* Alter Goolyk do forthwith remove himself from British India by sea to Odessa.

"And all officers to whom this order may be communicated are requirde to see that it is duly obeyed, and, in the event of its being infringed, to apprehend and detain the said Alter Caufman *alias* Alter Goolyk in safe custody in the jail of Bombay under s. 4 of the said Act, until he shall be lawfully discharged therefrom.

"By order of His Excellency the
Right Hon'ble the Governor in Council,
"(Signed) W. LEE-WARNER.

"*Political Department,*
"*Bombay Castle, 8th June 1894.*"

[639] On the 17th June the Inspector of Police went to a house in Bombay which was used by the prisoners and others as a club, and there carried out (as he alleged) the above orders.

The following paragraphs of the affidavit of the Inspector of Police state the subsequent proceedings:—

"4. On two or three occasions after that I went to the same club and found the above-named persons there, and I warned them again that

(1) The case as to the remaining two prisoners was adjourned. They were subsequently discharged on the ground of informality in the warrant with regard to their names.

they must comply with the orders of Government to depart from British India. They then appeared to understand what the orders were, but said they had no money to enable them to buy their passage. They all speak a little English. Jay Hussel *alias* Edell Chusel speaks English fairly well.

"5. I reported to the Acting Commissioner of Police that they had failed to leave Bombay, although they had had an opportunity of doing so. I was then ordered by the Acting Commissioner of Police to arrest the above-named persons in pursuance of the said warrant. I accordingly attended with four European constables at the said club on the evening of the 3rd July, at eight o'clock in the evening, and showed the warrants again to and arrested the above-named seven persons. As it was late that evening I detained them in the police lock-up—three of them at Girgaon and four of them at Nesbit Lane, and the next day, in accordance with the terms of the said warrant, I made them over, with the several warrants applicable to them, to Mr. Alfred George Mackenzie, the Superintendent of Her Majesty's Common Jail, at the said jail.

"6. It is true that I declined to give copies of the warrants, and that I referred the parties, who asked me for copies, to the Acting Commissioner of Police.

"7. I have been in the E Division for two years. The above-named seven persons lived within that division. They are all known to me as *being connected with the loose women who live about the vicinity of Foras Road and Cursetji Sukhlaji Street.*"

The passage italicised in the seventh paragraph was the only indication in the affidavits of any cause for the arrests.

The matter came on before Farran, J., who after argument discharged the rule. From that order the present appeal was brought. It was heard on the 3rd August.

The preamble of Act III of 1864 and ss. 3 and 4 of that Act under which the arrests were made are as follows :—

"Whereas it is expedient to make provision to enable the Government to prevent the subjects of foreign states from residing or sojourning in British India, or from passing through or travelling therein, without the consent of the Government; it is enacted as follows :—

"3. The Governor General of India in Council may, by writing, order any foreigner to remove himself from British India or to remove himself therefrom by **[640]** a particular route to be specified in the order; and any Local Government may, by writing, make the like order with reference to any foreigner within the jurisdiction of such Government.

"4. If any foreigner ordered to remove himself from British India, or ordered to remove himself therefrom by a particular route, shall neglect or refuse so to do; or if any foreigner, having removed himself from British India in consequence of an order issued under any of the provisions of this Act, or having been removed from British India under any of the said provisions, shall wilfully return thereto without a license in writing granted by the Governor General of India in Council or by the Local Government under whose order he shall have removed himself or been removed, such foreigner may be apprehended and detained in safe custody until he shall be discharged therefrom by order of the Governor General of India in Council or of the Local Government within whose jurisdiction he shall be so apprehended or detained, upon such terms or conditions as the said Governor General of India in Council or Local Government shall deem sufficient for the peace and security of British India and of the allies of Her Majesty, and of the neighbouring princes and states."

1894
AUG. 9.

CROWN SIDE.

18 B. 636.

For the appellants it was contended that their arrest was illegal on the following grounds :—

1st. That Act III of 1864 was invalid, being *ultra vires* of the Indian Legislature.

2nd. That the Act was in this case improperly applied.

3rd. That the warrants were irregular.

Kirkpatrick, for the appellants.—This Court may consider the validity of an Act of the Indian Legislature—*Empress* v. *Burah*(1), and I contend that Act III of 1864 is invalid, being *ultra vires*, and that orders and arrests made under it are illegal. The Indian Legislature may not exceed its powers (see per Lord Selborne in the *Queen* v. *Burah* (2)). It is created by Statute and has no powers except those given to it by Statute. Those powers are prescribed by s. 22 (3) of the Indian Councils Act (Stat. [641] 24 and 25 Vict., c. 67). That section explicitly declares how far the Acts of the Indian Legislature shall operate. They may control or supersede Acts of the Local Legislatures, but the section gives the Indian Legislature no power to control or supersede an Act passed by the English Parliament, and it expressly forbids it to make any law "which shall repeal or in any way affect" (4) any provisions of Stat. 21 and 22 Vict., c. 106. Section 64 of this latter Statute (5) provides that "all Acts and provisions

---

(1) 3 C. 63. (2) 5 I. A. 178 (193) = 4 C. 172 (180).

(3) The following is the material portion of s. 22 of the Councils Act (Stat. 24 and 25 Vict., c. 67) :—

Section 22.—The Governor General in Council shall have power at meetings for the purpose of making laws and regulations as aforesaid, and subject to the provisions herein contained, to make laws and regulations for repealing, amending, or altering any laws or regulations whatever now in force or hereafter to be in force in the Indian territories now under the dominion of Her Majesty, and to make laws and regulations for all persons, whether British or native, foreigners or others, and for all Courts of justice whatever, and for all places and things whatever within the said territories, and for all servants of the Government of India within the dominions of princes and states in alliance with Her Majesty; and the laws and regulations so to be made by the Governor General in Council shall control and supersede any laws and regulations in any wise repugnant thereto which shall have been made prior thereto by the Governors of the Presidencies of Fort St. George and Bombay respectively in Council, or Lieutenant Governor in Council of any presidency or other territory for which a Council may be appointed, with power to make laws and regulations, under and by virtue of this Act. Provided always, that the said Governor General in Council shall not have the power of making any laws or regulations which shall repeal or in any way affect any of the provisions of this Act :

Or any of the provisions of the Acts of the 3 and 4 Will, IV, c. 85, and of 16 and 17 Vic., c. 95 and 17 and 18 Vic., c. 77, which after the passing of this Act shall remain in force.

Or any provisions of the Act 21 and 22 Vic., c. 106, entitled "An Act for the better Government of India," or of the Act of 22 and 23 Vic., c. 41, to amend the same :

* * * * * * * * *

or which may affect the authority of Parliament, or the constitution and rights of the East India Company, or any part of the unwritten laws or constitution of the United Kingdom of Great Britain and Ireland, whereon may depend in any degree the allegiance of any person to the Crown of the United Kingdom, or the sovereignty or dominion of the Crown over any part of the said territories.

(4) As to the meaning of these words, see *per* Sargent, J., in the *Queen* v. *Beay* (7 B. H. C. R. Cr. Ca. 27).

(5) Stat. 21 and 22 Vict., c. 106, is the Statute passed in 1858 by which the Government of India was transferred from the East India Company to Her Majesty, and is entitled "An Act for the better Government of India."

Section 64.—All Acts and provisions now in force under charter or otherwise concerning India shall, subject to the provisions of this Act, continue in force, and be construed as referring to the Secretary of State in Council in the place of the said Company and the Court of Directors, and Court of Proprietors thereof; &c., &c.

now in force under charter or otherwise concerning India shall . . continue in force." English law was then and is now in force in the Presidency towns (see 6 Beng. L. R. at pp. 438-9 and pp. 446-7 and **[642]** see 4 Bom. H. C. Rep. 31—39). Magna Charta, the Petition of Rights and the Habeas Corpus Act are essential parts of English law; (see per Norman, J., at p. 451 of 6 Beng. L.R.); therefore, these Statutes as part of that law were in force: they are, therefore, Acts expressly continued in force by that section. But Act III of 1864, which allows arbitrary imprisonment and refuses a trial in open Court and gives no opportunity for defence, supersedes and practically repeals these Acts. Therefore the Indian Legislature by Act III of 1864 assumes to itself without authority the power of superseding English Statutes and also infringes s. 64 of 21 and 22 Vic., c. 106, which it was expressly forbidden to do by s. 22 of the Councils Act. Act III of 1864 is, therefore, *ultra vires* and invalid.

It is also *ultra vires* and invalid under the last clause of s. 22 of the Councils Act as it affects "part of the unwritten law and constitution of the United Kingdom, whereon may depend in *any degree* the allegiance of *any person* to the Crown." It is true that Act III of 1864 only refers to foreigners. But under this provision an Act may be invalid although it relates to persons who owe no allegiance to the Crown. For the test is, does it affect (not allegiance but) the constitution. Does it affect *any part* of the constitution on which the allegiance of *any person* depends *in any degree*? It will hardly be denied that the allegiance of Englishmen depends largely on the careful observance of the right to personal freedom, except on conviction of an offence after fair and open trial. This is conclusively shown by Norman, J., in his judgment in *Ameer Khan's case* (1) at p. 451 of the report. That right is an essential part of the constitution. But the constitution does not limit that right only to British subjects, but extends it to all who live within its protection (see pp. 443-4 of the report). Act III of 1864 takes away that right altogether from foreigners. Therefore in its dealings with foreigners it affects a part of the constitution on which the allegiance of Englishmen in *some* degree at all events depends, and it is, therefore, under the Councils Act, invalid. Further it is clear that under the Councils Act the Indian Legislature's power to legislate for foreigners is precisely the same as its power to **[643]** legislate for British subjects. Therefore, in order to ascertain if an Act as to foreigners is valid, we have only to see if it could be validly enacted as to British subjects. The test of validity is the same, as the powers of legislation are precisely the same. Act III of 1864, if made applicable to Englishmen, would certainly violate a part of the law and constitution whereon their allegiance in some degree depends. See per Norman, J., in *Ameer Khan's case*, at p. 451 of the report (1). Therefore, it would be invalid and *ultra vires* as to them, and, if so, it must also for the same reason be invalid as to foreigners. It is to be remembered that there is no analogy between the position and proceedings of the English Parliament and those of the Indian Legislature. Parliament being *paramount* has the power to pass any measures it pleases. Being *representative* it may be presumed that its measures merely express the will of the community and, therefore, can hardly be such as to shake the allegiance of the community. But whatever their nature and effect may be, they are "law," being passed by a competent legislature and can be legally enforced

(1) 6 B.L.R. 392 (450, 451).

1894
AUG. 9.
CROWN SIDE.
18 B. 636.

The Indian Legislature on the other hand is a non-representative and Subordinate body exercising merely delegated and limited powers, and it is expressly forbidden to pass any measures which may have a tendency to affect allegiance. Such measures if passed by it are not "law" and any attempt to enforce them is illegal. The meaning and purpose of this limitation of the powers of a subordinate legislature are obvious.

Ameer Khan's case (1) will be relied on by the other side. It, however, was decided not with reference to the Councils Act, but with reference to Stat. 3 and 4 Will. IV., c. 85, and is no authority in the present case. But in any event I contend that it was wrongly decided, and ought not to be followed. The Judges did not decide that case on a construction of the Act then in force (Stat. 3 and 4, Will. IV, c 85, s. 45), but on political considerations. Norman, J., apparently found it impossible to hold that under the words of that Statute the Legislature had power to pass Act III of 1858, and he, therefore, held that it could do so on the ground of "emergency." He held that any Act which the Indian Legislature could pass in view of an emergency it could also **[644]** make permanent (see pp. 454-5 of the report). But that is clearly not the intention of the Councils Act, which by s. 23 gives a special power in cases of emergency to make laws which shall only remain in force for six months. If the doctrine laid down by Norman, J., were accepted, the limitations prescribed in s. 22 might be altogether disregarded and the Indian Legislature could permanently assume to itself supreme, uncontrolled and arbitrary power. No rights would be secure, for an emergency abrogates all law and all rights (see *Phillips* v. *Eyre* (2); *Empress* v. *Burah* (3). Considerations of emergency or expediency or necessity ought not to influence Judges in construing the law—*The King* v. *Wilkes* (4); *Queen* v. *Dudley* (5). An emergency which makes it necessary for Government to overstep the law does not justify the Courts in misconstruing the law, but calls for an Act of indemnity—*Phillips* v. *Eyre* (2).

Phear, J., held (p. 476 of the report) that Act III of 1858 constituted the Governor-General in Council a Court with full discretion to adjudicate and with power to imprison during pleasure. The effect of that decision is that the Indian Legislature might give itself judicial power and assume the power of interpreting and administering its own laws without control, and might thus constitute itself a Court in which there should be no trial granted, and no defence permitted,—in fact, turn itself into a new Star Chamber. I submit that is an unconstitutional doctrine. The Indian Legislature may not disregard what in England is deemed essential, *viz.*, the separation of the legislative from the judicial functions. There is no authority for such a doctrine and no such power is given by the Councils Act.

Markby, J., in his judgment apparently argued thus (p. 482 of the report) :—"The Legislature is only forbidden to pass laws affecting that part of the constitution on which allegiance depends. But the subject's duty of allegiance does not in any way depend on the conduct of the sovereign towards him. He is bound to continue loyal, although all his rights and liberties are taken away. Therefore, Act III of 1858 did not affect allegiance, and, therefore, the Indian Legislature had power to pass it." The **[645]** conclusion is no doubt correct if the premises are

(1) 6 B.L.R. 392 (451). (2) L.R. 6 Q.B. 16, (17). (3) 3 C. 63, (101).
(4) 19 How. State Trials, 1112. (5) 14 Q.B.D. 273.

granted. If this Court accepts them as a true statement of English constitutional law, further argument on this point is useless. These doctrines have seldom, if ever, been heard in an English Court of Law since the Revolution.

I submit, therefore, that, having regard to the principles on which *Ameer Khan's case* was decided, it ought not to be followed.

Next I contend that, even if Act III of 1864 is valid, it has been misapplied. The whole Act was clearly intended to be applied to insure "peace and security," and it is not suggested that the arrest of the appellants is for this purpose. It is now apparently applied to protect and improve the morals of the community. That is quite outside the object of the Act. Sections 3 and 4 cannot be read and construed independently and without regard to the rest of the Act. They are part of an Act the object of which is manifest. A Statute passed for one purpose ought not to be used for another—Maxwell on Statutes (2nd Ed.), 146, 320, &c.; *Shidlingapa* v. *Karisbasapa* (1); Stephen's Blackstone, Vol. I, pp. 72-76 (5th Ed.). The Court will bring up the prisoners on *habeas corpus* or under s. 491 of the Criminal Procedure Code to inquire into the reasons of their imprisonment—Broom's Constitutional Law, pp. 110, 112, 209-10; *In re Omirtolall* (2); *In the matter of Khattija Bibi* (3).

The warrants are bad in form. They contain both the orders of removal and the authority to arrest. The orders of removal should have been given in writing and should have been served separately. They exceed the powers given by the Act. The description of parties contained in them is not definite. The warrants to arrest should have been separate from the orders.

Lang (Advocate General), for the Crown:—Magna Charta and the Petition of Rights do not protect from imprisonment *according to law*. Act III of 1864 is law in British India, and, therefore, the imprisonment of the appellants under it is no infringement of the former Acts. The Indian Legislature has full power to make laws for India, and foreigners are bound to obey these laws. **[646]** The limitation on the Legislature not to pass laws affecting allegiance, cannot apply to laws affecting foreigners, as they owe no allegiance except so far as they are bound to observe the laws they find in force. The orders and warrants in this case were sufficient in form and did not exceed the power given by Act III of 1864 or infringe its provisions.

Kirkpatrick in reply:—The argument for the Crown is that Act III of 1864 is "the law of the land," and, therefore, Magna Charta, &c., is not infringed. That, however, merely begs the question, which is whether Act III of 1864 *is* the law of the land. That is the very point at issue, and my contention is that Act III of 1864 is not law, as it was *ultra vires* of the Indian Legislature. The Advocate General then argues that the validity of an Act affecting foreigners cannot depend on considerations relating to the allegiance of British subjects. But it is quite clear that under the Councils Act it does: 1st, because under the Councils Act any Act which touches a constitutional right on which the allegiance of *any person* (not necessarily the person against whom the particular Act is directed) depends is invalid, inasmuch as it affects the constitution; and secondly because the power to legislate for foreigners is the same as the power to legislate for Englishmen, and, therefore, any test which shows that a similar Act

---

(1) 11 B. 599 (601). (2) 1 C. 78. (3) 5 B.L.R. 557.

1894
AUG. 9.

CROWN SIDE.

18 B. 636.

would be invalid if enacted as to Englishmen is sufficient to show the invalidity of an Act affecting foreigners. The Acts belong to one and the same class, and must stand or fall together.

Cur. adv. vult.

JUDGMENT.

August 9th. BAYLEY, J.—This is an appeal against so much of an order made by Mr. Justice Farran on the 9th July, 1894, as discharged a rule *nisi* dated the 4th July, 1894, which called upon Mr. A. G. Mackenzie, the Superintendent of the Common Jail, Bombay, to show cause why Alter Chaufman and four other foreigners, alleged to be illegally or improperly detained by such Superintendent in the said Jail, should not be delivered; and by which rule *nisi* it had been ordered that the said Superintendent should bring up to the High Court the bodies of the said five persons there to be dealt with according to law.

[647] In the memorandum of appeal filed on behalf of the said five persons it was alleged (1) that the learned Judge was in error in holding that the passing of the Foreigners Act, III of 1864, was within the powers conferred upon the Governor General in Council; (2) that he erred in refusing to inquire whether the presence of the appellants did, in fact, endanger the peace and security of British India; (3) that he erred in refusing to inquire whether the power given by Act III of 1864 was properly exercised in the appellant's case; (4) that he erred in refusing to make an order liberating the appellants from custody; (5) that he was wrong in refusing to admit the appellants to bail and in referring them to the Magistrate; (6) that the order shoud be set aside with costs, and an order made for the appellants' release.

The appeal was argued before us on the 3rd instant by Mr. Kirkpatrick on behalf of the five appellant foreigners, and by the Advocate-General, who, instructed by the Acting Government Solicitor, appeared on behalf of the Government of Bombay.

The learned Advocate-General, when the Court inquired whether the appellants were out on bail, informed us that four of the appellants had on the 2nd instant left by sea for Europe and that the appellant named Solomon Moses *alias* Waxfigoor was the only one of the five appellants now in Bombay, where he was detained under the warrant against him in Her Majesty's Common Jail.

The warrants under which the appellants were arrested were precisely similar in form, except as to the names of the persons and as to the direction by which route each was to remove himself by sea.

As part of the argument on behalf of the appellants turned upon the alleged insufficiency of the warrants, it will be convenient to give here the one under which Solomon Moses *alias* Waxfigoor was arrested and is now detained in jail:—

"*Warrant.*

"In exercise of the power conferred by s. 3 of Act III of 1864 the Right Honourable the Governor of Bombay in Council is pleased hereby to direct that Solomon Moses *alias* Waxfigoor do forthwith remove himself from British India by sea to Roumania.

[648] "And all officers to whom this order may be communicated are required to see that it is duly obeyed, and, in the event of its being

infringed, to apprehend and detain the said Solomon Moses *alias* Waxfigoor in safe custody in the jail of Bombay under s. 4 of the said Act, until he shall be lawfully discharged therefrom.

" By order of His Excellency the Right Honourable the Governor in Council,
" (Signed) W. LEE-WARNER,
Secretary to Government.

" *Political Department*,
" *Bombay Castle*, *8th June*, 1894.

" To
" The Commissioner of Police, Bombay.
" The Superintendent, Her Majesty's Common Jail, Bombay."

It was contended on behalf of the appellants—

(i) That Act III of 1864, being " An Act to give the Government certain powers with respect to foreigners," was *ultra vires* of the Government of India to enact.

(ii) That that Act had been improperly applied.

(iii) That in any event the appellants, who had been arrested under that Act, were entitled to a writ of *habeas corpus*, or to an order under s. 491 of the Criminal Procedure Code (Act X of 1882), the warrants, it was alleged, being absolutely insufficient.

First, as to the argument addressed to us, that Act III of 1864 was *ulira vires* of the Government of India, and that it infringed the rights conferred by Magna Charta, the Petition of Rights, and the *Habeas Corpus* Statutes.

The right of arbitrary arrest and detention in prison without assigning any cause therefor, which Act III of 1864 confers upon the Governor General of India in Council and the Local Governments—however contrary such right may be to the ordinary notions of Englishmen—was not conferred upon these authorities for the first time by that Act, and it may be useful to refer briefly to the powers which by legislative enactment were granted during the present century to those who were responsible for the government and the peace and security of British India and of those dwelling in it.

In the last year of the tenure of the office of Governor of Bombay by Mountstuart Elphinstone, that distinguished statesman **[649]** passed a Code of Regulations, one of which was Reg. XXV of 1827, which is still in force throughout the Presidency of Bombay and is entitled 'a Regulation for the confinement of State-prisoners and for the attachment of the lands of Chieftains and others for reasons of State.' It appears to have been based mainly upon a previous Regulation of the Bengal Government, Reg. III of 1818 of the Bengal Code.

After reciting that 'Reasons of State embracing the due maintenance of the alliances formed by the British Government with Foreign Powers, the preservation of tranquillity in the territories of Native Princes entitled to its protection, and the security of the British dominions from foreign hostility and from internal commotion, occasionally render it necessary to place under personal restraint individuals against whom there may not be sufficient ground to institute any legal judicial proceedings, or when such proceedings may not be adapted to the nature of the case, or may for other reasons be unadvisable or improper, and that it is fit that in every case of

1894
AUG. 9.
—
CROWN SIDE.
—
18 B. 636.

the nature therein referred to the measures adopted should emanate immediately from the Governor in Council . . . . the following rules have therefore been enacted' it proceeded to enact first that 'when any of the considerations stated in the preamble of this Regulation may seem to the Governor in Council to require that an individual should be placed under restraint without any immediate view to ulterior proceedings of a judicial nature it shall be lawful for the Governor in Council, provided always that with reference to the individual, the measure shall not be in breach of British law, to cause such individual to be apprehended in such manner as the Governor in Council may deem fit, and when apprehended, to be delivered over to any officer in whose custody it may be deemed expedient that he shall be placed with a warrant of commitment to such officer's address.' The second clause states 'the warrant of commitment shall be in the form specified in Appendix (A), and shall be sufficient authority for the detention of any State-prisoner in any fortress, jail, or other place within the zillas subordinate to Bombay.

So much of the first clause as provided that, with reference to the individual, the apprehension and confinement therein referred [650] to shall not be in breach of British law, was repealed by Act III of 1858 of the Governor General in Council, except so far as the said provision applied to European British subjects.

By Act XXXIV of 1850, 'An Act for the better custody of State-prisoners,' after reciting that doubts had been entertained whether State-prisoners confined under Reg. III of 1818 of the Bengal Code could be lawfully detained in any fortress, jail or other place within the limits of jurisdiction of any of the Supreme Courts of Judicature established by Royal Charter, and it was expedient that such doubts should be removed, and the powers of the said Regulation extended to all the territories under the Government of the East India Company, enacted that the warrant of commitment under Reg. III of 1818 of the Bengal Code might be directed to the Sheriff of the jail of any of the Supreme Courts established by Royal Charter in the said territories, and that such warrant should be sufficient authority for the detention of such State-prisoner in the fortress, jail or other place mentioned in the warrant, and by s. 3 it was enacted that any State-prisoner thus confined under any such warrant within the jurisdiction of any of the said Supreme Courts, under the warrant of the Governor General in Council, should be deemed to have been lawfully committed thereunto.

By Act III of 1858, 'An Act to amend the law relating to the arrest and detention of State-prisoners,' it was enacted by s. 2 that the provisions of Reg. III of 1818 of the Bengal Code, Reg. II of 1819 of the Madras Code, and Reg. XXV of 1827 of the Bombay Code as altered by s. 1 of that Act relating to the arrest and confinement of persons as State-prisoners should be in force within the local limits of the jurisdiction of the Supreme Courts at Calcutta, Madras and Bombay respectively, and by s. 3 all powers for the better custody of State-prisoners which by Act XXXIV of 1850 were vested in the Governor General in Council were stated to be possessed and might be exercised by the Governor in Council of Fort St. George and the Governor in Council of Bombay respectively for the better custody of State-prisoners arrested within their respective Presidencies.

[651] I will next consider Act III of 1864, under the authority of which the warrants now under consideration were issued. It is entitled

"An Act to give the Government certain powers with respect to foreigners." It contains 25 sections, but it appeared to be admitted before us that only the first four sections are in force in the Bombay Presidency, the Governor General in Council not having as yet exercised the powers conferred upon him by s. 5, of extending that section and the subsequent sections to this Presidency.

The Act recites that 'it is expedient to make provision to enable the Government to prevent the subjects of foreign States from residing or sojourning in British India, or from passing through or travelling therein without the consent of the Government,' and enacts, by s. 3, that 'The Governor General of India in Council, may, by writing, order any foreigner to remove himself from British India, or to remove himself therefrom by a particular route to be specified in the order; and any Local Government may, by writing, make the like order with reference to any foreigner within the jurisdiction of such Government. And by s. 4 it is enacted that 'If any foreigner ordered to remove himself from British India, or ordered to remove himself therefrom by a particular route, shall neglect or refuse to do so, ... such foreigner may be apprehended and detained in safe custody until he shall be discharged therefrom by order of the Governor General of India in Council, or of the Local Government within whose jurisdiction he shall be so apprehended or detained, upon such terms and conditions as the Governor General of India in Council or Local Government shall deem sufficient for the peace and security of British India, and of the allies of Her Majesty, and of the neighbouring Princes and States.'

Now the points argued before us on behalf of the appellants, *viz.*, that the Government of India had no power to pass Act III of 1864, and that such Act was in violation of Magna Charta, the Bill of Rights and the Habeas Corpus Acts, are the same as were urged on behalf of one Ameer Khan, a European British subject, (who had been arrested and imprisoned under Reg. III of 1818 of the Bengal Code), when he applied in the **[652]** High Court of Calcutta for a writ of *habeas corpus* in 1870, and when it was contended that the two Acts I have cited, *viz.*, Act XXXIV of 1850 and Act III of 1858, (the former of which Acts re-enacted the substance of Reg. III of 1818), were beyond the powers conferred on the Indian Legislature by the Statute 3 and 4 Will. IV, c. 85, s. 43. Mr. Justice Norman after a very lengthened argument by Mr. Anstey for Ameer Khan and by the Advocate General for the Crown refused the application for a *habeas corpus*, and on appeal Mr. Justice Phear and Mr. Justice Markby held that he had rightly done so, and decided that as it appeared that the prisoner was in custody under a warrant in the form prescribed by Reg. III of 1818, the detention was legal, that the detention to be legal need only be covered by an actually existing warrant of the Governor General in Council in the form prescribed, without regard to the lawfulness of the arrest; that by the combined operation of Reg. III of 1818, Act XXXIV of 1850, and Act III of 1858 the detention was legal, and that those Acts were not contrary to the powers conferred on the Indian Legislature by 3 and 4 Will. IV, c. 85, s. 43—*In the matter of Ameer Khan* (1).

Mr. Kirkpatrick strenuously contended that Act III of 1864 violated the concluding paragraph of s. 22 of "the Indian Councils Act, 1861" (24 and 25 Vict., c. 67) which enacts that the Governor General in Council

(1) 6 B.L.R. 392 (459).

1894
AUG. 9.

CROWN SIDE.

18 B. 636.

shall not have the power of making any laws or regulations 'which may affect any part of the unwritten laws or constitution of the United Kingdom of Great Britain and Ireland whereon may depend in any degree the allegiance of any person to the Crown of the United Kingdom, or the Sovereignty or Dominion of the Crown over any part of the said territories.' That paragraph is word for word the same as the concluding paragraph of s. 43 of 3 and 4 Will. IV, c. 85. which empowered the Governor General in Council to legislate for India except as to the matters therein mentioned, and such words in 3 and 4 Will. IV, c. 85, s. 43, were much relied on by the counsel for Ameer Khan on the question as to *ultra vires* then before the High Court at Calcutta. The conclusion arrived at by **[653]** the learned Judges in *Ameer Khan's case*, that Act XXXIV of 1850 and Act III of 1858 were not contrary to the powers conferred on the Indian Legislature by 3 and 4 Will, IV, c. 85, s. 43, seems to me a perfectly sound one, and can well be used in support of the contention of the Advocate-General in the present case, that Act III of 1864 is not in violation or excess of the powers conferred on the Indian Legislature by the Statute 24 and 25, Vict., c. 67, s. 22. I may remark that by s. 22 authority is given to 'make laws and regulations for all persons whether British or Native, foreigners and others,' words which are identical with those in s. 43 of 3 and 4 Will. IV, c. 85.

The concluding paragraph of s. 22 of 24 and 25 Vict., c. 67, has, so far as I can see, no application to foreigners like the appellants, who came to Bombay for the purposes of their business, and who owe, save temporarily, no allegiance to the Crown of the United Kingdom. The only duty they owe to the Crown whilst they remain in British India is to obey the laws in force in this country.

The right, the greatly cherished right, which Englishmen possess in their native country, of residing and travelling where they please, was not considered by the Imperial Parliament to be compatible with the political and prudential measures necessary for the safety of the Paramount Power which the British Government exercises in India. This is apparent from the provisions of the 3 and 4 Will. IV, c. 85, for whilst by s. 81 of that Act authority was given for His Majesty's subjects to reside in certain specified parts of India without licence, s. 82 enacted that it shall not be lawful for any subject of His Majesty, except the servants of the Company and others then lawfully authorized to reside in the said territories, to enter the same by land or to proceed to or reside in any place or places in such parts of the said territories as were not therein before mentioned without licence from the Board of Commissioners, the Court of Directors, the Governor General in Council, or a Governor or Governor in Council of any of the Presidencies for that purpose first obtained; and s. 84 contained this important enactment—'That the Governor General in Council shall be and he is hereby required **[654]** as soon as conveniently may be, to make laws or regulations providing for the prevention or punishment of the illicit entrance into or residence in the said territories of persons not authorized to enter or reside therein.' The provisos in s. 81 and s. 82 were repealed by the Statute Law Revision Act, 1874, (37 and 38 Vict., c. 35), whilst s. 84 appears to be still in force.

By s. 51 of 3 and 4 Will. IV, c. 85, a section which appears to be still in force, it was enacted that that Act was not to affect the right of Parliament to legislate for India, and that a full and constantly existing right and power was intended to be reserved for Parliament to repeal and

1894
AUG. 9.
CROWN SIDE.
18 B. 636.

alter at any time any law or regulation made by the Governor General in Council; and the better to enable Parliament to exercise at all times such right and power, all laws and regulations made by the Governor General in Council shall be transmitted to England and laid before both Houses of Parliament; and by "The Indian Councils Act, 1861," s. 21, it was enacted that whenever any law or regulation made by the Council of the Governor General at a meeting for the purpose of making laws and regulations has been assented to by the Governor General he shall transmit an authentic copy thereof to the Secretary of State for India, and it shall be lawful for Her Majesty to signify through the Secretary of State for India in Council her disallowance of such law, and such disallowance shall make void and annul such law from the day on which the Governor General shall make known by proclamation or by signification to his council that he had received the notification of such disallowance by Her Majesty.

No instance was cited to us in which an Act of the Legislative Council of the Governor General has been disallowed, or repealed by higher authority as being *ultra vires*. The point was taken in a case which came before the Privy Council in 1878 on appeal from a judgment of the High Court at Calcutta—*The Queen* v. *Burah* (1), where it had been contended that Act XXII of 1869 of the Indian Legislature, which excluded the jurisdiction of the High Court within certain specified districts, was not within the legislative power of the Governor General in Council. **[655]** The Judicial Committee of the Privy Council, reversing the judgment of the majority of the Judges of the Full Bench, held that the Act was in its general scope within the legislative power of the Governor General in Council, and in the judgment of their Lordships, delivered by Lord Selbourne, it is said (p. 193) "Their Lordships are of opinion that the doctrine of the majority of the Court is erroneous, and that it rests upon a mistaken view of the powers of the Indian Legislature, and indeed of the nature and principles of legislation. The Indian Legislature has powers expressly limited by the Act of the Imperial Parliament which created it, and it can, of course, do nothing beyond the limits which circumscribe these powers. But when acting within those limits, it is not in any sense an agent or delegate of the Imperial Parliament, but has and was intended to have plenary powers of legislation, as large and of the same nature as those of Parliament itself."

In *Abdulla* v. *Mohan Gir* (2), which was decided by a Full Bench of five Judges of the High Court at Allahabad in 1889, where one question was whether the Governor General in Council had power to pass the Jhansi and Morar Act (No. XVII of 1886) by virtue of the provisions of which civil and criminal jurisdiction was given to the High Court over the town and fort of Jhansi, or whether the Act was in excess of the powers conferred on the Indian Legislature by s. 22 of the Indian Councils Act, 1861, the Court held that the Act was not *ultra vires* of the Governor General in Council; and also held that it must be presumed that the laws and regulations of the Governor General in Council are known to Parliament.

Seeing, therefore, that the Indian Legislature both before and after the passing of the Indian Councils Act, 1861, had express authority from the Imperial Legislature to make laws and regulations for foreigners, and in passing Act III of 1864 violated no express condition or restriction by which that power was limited (see per Lord Selborne in 5 Ind. App. 194).

(1) 5 I.A. 178.

(2) 11 A. 490.

1894
AUG. 9.

CROWN SIDE.

18 B. 636.

I am of opinion that Act III of 1864 was not *ultra vires* of the Governor General of India in Council.

[656] I will next consider whether that Act has been improperly applied with regard to the five appellants.

It was contended that the order to remove themselves from British India was illegal, as it was based upon a cause of alleged immorality and was not necessary for the peace and security of British India. This argument appears to have been founded upon the language of the concluding paragraph of s. 4 of Act III of 1864, which enacts that "such foreigner may be apprehended and detained in safe custody until he shall be discharged therefrom by order . . . of the Local Government within whose jurisdiction he shall be so apprehended or detained upon such terms and conditions as the . . . . Local Government shall deem sufficient for the peace and security of British India, and of the allies of Her Majesty, and of the neighbouring Princes and States."

Such words cannot, in my opinion, be imported into or be taken to control the absolute and unqualified power given by s. 3, which authorizes the Governor General of India in Council or any Local Government, without assigning any cause, by writing, to order any foreigner to remove himself from British India, or to remove himself therefrom by a particular route to be specified in the order. The Government of Bombay, so far as concerns the appellants, who were admittedly foreigners within the meaning of the Act, were constituted the sole Judge as to whether or not the power of expulsion given by s. 3 should be enforced or not, and having come to a decision on the point, issued orders that the appellants should remove themselves from British India, as they were justified in doing. It is to be remarked that in s. 17 of the Act, which relates to the removal of foreigners apprehended for travelling without or contrary to the conditions of a licence and thereby violating s. 14, there is no reference to the peace and security of British India, whilst there is such reference in ss. 18 and 19 in regard to persons apprehended and detained for violating the provisions of those two last mentioned sections. Such sections, as already pointed out, are not in force in the Bombay Presidency. The words relied on in the concluding paragraph of s. 4 appear to be used as a direction or guide to the Government ordering the removal, and it is left to such Government [657] to impose any terms or condition, or not to impose any, as in its judgment it thinks best.

To adopt the construction contended for on behalf of the appellants would tend to limit the powers conferred by the Act with respect to foreigners—powers no doubt summary and arbitrary, but which the Indian Legislature has granted in what appears to me to be reasonably clear language. The object of the Act must be looked to, which in the recital is stated to be to make provisions to enable the Government to prevent the subjects of Foreign States from residing or sojourning in British India, or from passing through or travelling therein without the consent of the Government.

In a case decided by the Judicial Committee of the Privy Council in 1886 on appeal from the Supreme Court of Natal—*Salmon* v. *Duncombe* (1), their Lordships held that where the main object and intention of a Statute are clear, it must not be reduced to a nullity by the draftsman's unskilfulness or ignorance of law, except in the case of necessity or the absolute intractability of the language used. There the clearly expressed intention

(1) 11 Ap. Cas. 627.

of the Natal Ordinance No. 1 of 1856 was to give to any subject of the Queen resident in Natal the power of disposing by will, according to English law, of property, both real and personal, which otherwise would devolve according to Natal law. Section 1 was operative for that purpose, except that it concluded with the provision "as if such subject resided in England," the effect of which was to leave both the *lex situs* and the *lex domicilii* in operation, thus reducing the section to a nullity. It was held that these words ought not to be construed so as to destroy all that had gone before, and, therefore, should be treated as immaterial. The Act, thererefore, appears to me to be applicable to the five appellants, although their residence in Bombay may not have been likely to have affected or endangered the peace and security of British India.

Lastly, were the appellants entitled to writs of *habeas corpus*, or to orders under s. 491 of the Criminal Procedure Code of 1882?

It was contended on their behalf that no orders to remove themselves from British India were served upon them, and that **[658]** the orders were too large, as they professed to operate beyond three miles from the shores of British India.

We have sent for and been furnished with the original warrant under which Solomon Moses, the only one of the five appellants now in India, was arrested on the 3rd July last, and under which he has been detained in jail ever since. It is a printed document, with blanks left to be filled up, and is headed "Warrant" in capital letters and in large type, and it says that the Governor of Bombay in Council is hereby pleased to direct that Solomon Moses *alias* Waxfigoor do forthwith remove himsalf from British India by sea to Roumania, and that all officers to whom the order may be communicated are required to see that it is duly obeyed, and, in the event of its being infringed, to apprehend and detain the said Solomon Moses *alias* Waxfigoor in safe custody in the jail of Bombay under s. 4 of the said Act (Act III of 1864) until he shall be lawfully discharged therefrom.

This document appears to me to be wholly irregular, comprising, as it purports to do, two distinct orders—one to remove himself from Bombay, the other to arrest him in case it is not duly obeyed. I think there ought to have been a separate order to remove himself from British India which should have been duly served upon him. Then, in case of his refusal or neglect to comply with its terms, there ought to have been a further order by the Governor in Council authorizing his arrest and detention in jail.

Mr. Inspector Butterfield in paragraphs 5 and 6 of his affidavit says that he reported to the Acting Commissioner of Police that the five appellants had failed to leave Bombay, although they had had an opportunity of doing so, and that he was then ordered by the Acting Commissioner of Police to arrest them in pursurance of the said warrant, and that he accordingly did so on the evening of the 3rd July, and showed the warrant again to them, and that he declined to give copies of the warrants and referred the parties, who asked him for copies, to the Acting Commissioner of Police.

The procedure followed by Courts of Justice in the somewhat analogus case of an injunction ordering a person to do or to abstain from doing a particular act ought, in my opinion, to have been followed, and on failure to comply with the order the matter should have been brought to the notice of the Governor in **[659]** Council, who would then have had before him materials to justify him in odering the person to be

1894
AUG. 9.
CROWN SIDE.
18 B. 636.

arrested. Instead of which the arrest and detention of the appellants were left to the discretion of 'all officers, to whom this order may be communicated,' a delegation of authority which, in my opinion, the Governor in Council had no power to make.

There is high judicial authority that such a conditional order for imprisonment is illegal. In *The Queen* v. *Joma bin Balu* (1) decided in 1867 by Couch, C. J., Newton and Gibbs, JJ., an order of a Magistrate under s. 2 of Act XIII of 1859, "that the prisoner should work for a certain period and in case he failed to do so should suffer imprisonment for one month," was annulled as to the latter part, as the Magistrate had no power to make that order until the failure had occurred and has been proved to his satisfaction. The present case is a stronger one than that one, as here it is left to the officers, to whom the orders may be communicated, to see that they are duly obeyed, and it is left to their discretion whether or not the persons are to be apprehended and detained. The same course, *viz.*, the annulling of the objectionable part of the document, cannot be adopted here as was done by Couch, C. J., and his colleagues in *Queen* v. *Joma bin Balu* ; as, if the order for the arrest and detention of the appellants is struck out, or treated as surplusage, the document ceases to be a warrant altogether, and nothing remains but an order to remove themselves from British India.

There is another ground which, though not taken in the argument before us, is, in my opinion, equally fatal to the validity of these five warrants, *viz.*, that the persons named in them are not described with sufficient certainty and particularity. There is also high judicial authority in support of this objection. In two of the warrants the names only of each of the two persons, Osias Melitroff and Miskel Leaff, are mentioned ; in the five other warrants the names are given with one or more *aliases* ; but there is no place of residence of the individuals mentioned such as is required by the Form 2 in Schedule V of the Criminal Procedure Code, 1882, which is the form of a warrant of arrest issued under s. 75 of that Code.

[660] A similar point was decided by Sir C. Sargent in 1872 in the case of one James Hastings who had been brought up under a writ of *habeas corpus* granted by Westropp, C.J. The warrant had been issued under s. 76 of the Code of Criminal Procedure (Act XXV of 1861). Sir C. Sargent held that the prisoner was not in custody under a valid and legal warrant. After dealing with the first objection, which was that the instrument was without a seal, and stating that upon that ground alone he should have had great difficulty in saying that the warrant was a valid one, he proceeded thus:—

"There is, however, another objection put forward to its validity to which I attach even greater force. The warrant authorizes the committal of James Hastings without giving any description whatever as to what James Hastings is indicated thereby." Then, after stating the form of warrant given in the Appendix to the Code, he said : "Under a warrant in this form, if it were held to be a legal and valid warrant, the Commissioner of Police would be justified in arresting any one of that name. In *Hood's case* (2) the Christian name only of the person arrested was omitted, but a full description was given of him. The warrant there was 'to take the body of—Hood, of the hamlet of Bemerton, in the Parish of Fugglestone, St. Peter, in the same county, by whatsoever name he may be called or

(1) 4 B.H.C.R.Cr.Ca. 37.

(2) *Rex* v. Hood. 1 Moody's Cr. Cases, 128,

known, the son of Samuel Hood, to answer,' &c.; and in that case the Judges were unanimously of opinion that the warrant was bad. That case was decided comparatively recently by Lord Tenterden and all the other Judges with the exception of three, and the Judges who sat were unanimously of opinion that the warrant was bad because it omitted the Christian name. It was said it should have assigned some reason for the omission and have given some distinguishing particular of George Hood. I think I am bound to follow the principle involved in that ruling, which is that a warrant should contain a distinct and unequivocal intimation to the person that he is the individual meant to be apprehended and must surrender to the officers; and this, too the more especially as the form of warrant provided by the Code requires that his residence should be inserted The issuing of general warrants is, it is well known, illegal, and this **[661]** though not, properly speaking, a general warrant, which means a warrant to apprehend all persons committing a particular offence or class of offences, is, however, of such a general nature as to justify the police in arresting any person of the name of James Hastings, whoever he may be or wherever he may be found, the number of persons liable to be arrested under it, being limited only by the limit to the number of persons bearing that name. The warrant in this case is, in my opinion, far more general than was the warrant in *Hood's case*, and I am, therefore, of opinion that it is bad"—*In re James Hastings* (1).

No doubt the names of the five appellants seem to an Englishman somewhat strange; but I apprehend that the same principle must be applied as if the warrants were for the arrest of persons bearing ordinary names, such for instance as John Smith or any other common name.

The warrants in question appear to me to be also objectionable for another reason, *viz.*, they all require the appellants to remove themselves from British India by sea by particular routes. Solomon Moses, the man now in the Bombay Jail, is to remove himself by sea to Roumania, three of the others are to remove themselves by sea to Odessa, one is to remove himself to Austria, another is to remove himself by sea to Roumania, and one is to remove himself by sea to Adrianople, an order which as Adrianople is an inland town, more than fifty miles from the nearest sea, the Black Sea, is as incapable of being strictly complied with as if the order had been that he was to remove himself by sea to Bucharest, Vienna or Moscow. The objection to this part of each order, in my opinion, is that the particular route to be specified in the order referred to in s. 3 of Act III of 1864 is intended to be a route in British India and not a route beyond the high seas.

The Indian Legislature must be taken to have known the extent of its legislative powers. It could confer no power on the Local Government which would be *ultra vires* of its own legislative powers; and the authority given by s. 3 of Act III of 1864 must be taken to be an authority it could grant, *viz.*, a legal authority. When the foreigner, whose expulsion is **[662]** considered expedient, resides at Lahore, Allahabad or any other inland town, the Local Government can specify, and may have very good reasons for indicating, in the order the particular route by which the individual is to remove himself, but once beyond the three-mile limit I am not aware that the Local Government has any power over him.

In the case of the wilful destruction by fire of the "Aurora" in June, 1870, at a distance of about fifty miles outside the Harbour of

(1) 9 B H. C. R. 154.

1894
AUG. 9.

CROWN SIDE.

18 B. 636.

Bombay and on the high seas, it was held by a Full Court, on points reserved for its opinion, that the substantive law applicable to a British-born subject tried in the High Court at Bombay for destroying a British ship, at a distance of more than three miles from the shores of British India was the English law and not the Penal Code, and the question whether the Indian Legislature had power to legislate with reference to offences committed on the high seas was much considered.

In the course of the judgment of the three Judges who heard the case, delivered by Westropp, C.J., it is stated "according to writers on international law the territorial right extends to at least three geographical miles, a sea-league from the coast, that having been supposed to be the range of a cannon shot." This distance of three miles was the limit lately laid down by the Privy Council in *Rolet* v. *The Queen* (1) for the operation of the revenue laws of Sierra Leone. Sir Robert Phillimore in his commentaries (Vol. I, plac. 197,) says: "But the rule of law may now be considered as fairly established, namely, that this absolute property and jurisdiction does not extend, unless by the specific provisions of a treaty, or an unquestioned usage, beyond a marine league (being three miles) or the distance of a cannon shot from the shore at low tide." And in a later passage in the judgment Sir Michael Westropp after referring to the Statutes I have already quoted (3 and 4 Will. IV, c. 85, ss. 43, and 24 and 25 Vict., c. 67, s. 22) says that other Statutes which he mentions furnish a very strong reason for supposing that the previous general power of legislation conferred by the same Statutes is limited to the territories of British India—*Reg.* v. *Elmstone Whitwell and others* (2).

[663] In *Reg.* v. *Kastya Rama and others* (3) it was held by Kemball and West, JJ., that an offence committed on the high seas, but within three miles from the coast of British India, as being committed within the territorial limits of British India, was punishable under the provisions of the Indian Penal Code, and there was an intimation of opinion on the part of three learned Judges that the Governor General of India in Council had no power to legislate for offences committed on the high seas outside the territorial limits of British India, though he had power to legislate in respect of offences committed on the high seas within three miles of its coasts.

I may here mention that in the case of *Low* v. *Routledge* (4) Lord Justice Turner after stating that every alien coming into a British colony becomes temporarily a subject of the Crown, bound by, subject to, and entitled to the benefit of the laws which affect all British subjects, said; "As to his rights within the colony he may well be bound by its laws, but as to his rights beyond the colony he cannot be affected by those laws, for the laws of a colony cannot extend beyond its territorial limits"

The directions in the orders (assuming, but not admitting, that the early portion of the warrants in question can be regarded as orders,) that the persons named in them are to remove themselves from British India by sea to the different towns and countries specified, are, in my opinion, *ultra vires* and illegal. Whether, however, such objectionable words can be considered as surplusage and be disregarded altogether, or whether they do not vitiate the warrants, I think it unnecessary to express an opinion, as on the other points I have mentioned I consider that the warrants are clearly invalid and have no legal effect.

---

(1) L. R. 1 Pr. C. Ca. 198.
(2) 7 B.H.C.R. Cr. Cas. 89 (104, 108).
(3) 8 B. H. C. R. Cr. Cas. 63.
(4) 1 Ch. App. 47.

For the reasons I have stated, I think that the warrants under which the five appellants were arrested were not valid warrants, and that the appeal must be allowed; that the order made on the 9th July, 1894, so far as it relates to the five appellants, must be reversed, and that Solomon Moses *alias* Waxfigoor, who is the only one of the appellants that is now detained in jail, must be discharged.

STARLING, J.—In this case certain foreigners were, ostensibly [664] under the power conferred by Act III of 1864, ordered by the Governor in Council to remove themselves from British India. It being alleged that they had not obeyed that order they were arrested under a warrant signed by Mr. Lee-Warner, Secretary to Government, and sent to jail until discharged therefrom in due course of law. On this, the foreigners applied to Mr. Justice Farran to issue a writ of *habeas corpus* or an order under s. 491 of Criminal Procedure Code to release them from imprisonment on the ground that their arrest and detention was illegal. A rule *nisi* was granted which after argument was discharged, and against this discharge the present appeal, has been brought.

The case was argued before us on the 3rd instant when we took time to consider our judgment, for the questions argued are important ones, because while it is necessary on the one hand that Government should not be hampered in the exercise of summary powers entrusted to it by the Legislature, it is also, incumbent on the other, on this Court to see that the liberty of the subject is not restrained, except in due course of law.

The first point argued by Mr. Kirkpatrick was that the Act itself, under which these proceedings have been taken, was *ultra vires* of the Legislative Council of India, and nearly the whole of the time occupied in argument was spent on this point. I, however, agree with the reasons given by the Judges in the High Court in Calcutta in the case of *Ameer Khan* (1) for holding that the series of similar, but more stringent, enactments against British subjects, and not against foreigners, therein discussed were *intra vires* of the Legislative Council, and am of opinion, for similar reasons that Act III of 1864 is a valid Act and one which the Legislative Council had power to pass. To carry Mr. Kirkpatrick's argument to its logical conclusion it would be necessary to hold that any curtailing of the liberty of the subject was *pro tanto* a repeal of the unwritten laws or constitution and thereby caused a diminution of the allegiance due by the subject to the Crown. A great deal was said by him about Magna Charta and other provisions of a like nature, but when these are looked into it will be seen that they do not guarantee an absolute amount of liberty to each man, but only provide [665] that no man shall be deprived of his liberty except in accordance with law. No man was to be imprisoned by a warrant under the king's sign manual, or under the signature of a Secretary of State, unless that warrant was authorized by law. If Parliament authorizes a Secretary of State under certain circumstances to issue a warrant, in a certain form, for the detention of one of Her Majesty's subjects for an unlimited time, imprisonment under that warrant is imprisonment in due course of law, and none of the bulwarks of the personal liberty of the subject are attacked, nor is any cause given for saying that the duty of allegiance due by any subject is thereby in any way diminished.

It was then argued that the powers given by this Act can only be exercised when " the peace and security of British India," &c., require

(1) 6 B. L. R. 392 (459).

1894
AUG. 9.
CROWN SIDE.
18 B. 636.

such exercise. Now the phrase referred to only appears in the 4th section in connection with the eventual discharge of the foreigner from imprisonment. The preamble, however, shows that the intention of the Legislature was to enable Government to prevent foreigners residing, sojourning or travelling in British India without their consent; and s. 3 gives the fullest power to the Government to order any foreigner to remove himself from this country without reference to the probable or possible results of such foreigners residing, sojourning or travelling therein. Consequently on the authority of *Salmon* v. *Duncombe* (1), I must refuse to read the words referred to from the fourth section into the third; but even if those words were so read in, it seems to me that the Government would still be the sole judges of what was necessary for the peace and security of British India, and that, if they acted in accordance with the letter of the Act, this Court could not inquire into the sufficiency or otherwise of their reasons for so acting.

The next point to be considered is whether the Government have acted in accordance with the provisions of this Act. Section 3 provides that any Local Government with respect to foreigners residing within its jurisdiction "may, by writing, order any foreigner to remove himself from British India, or to remove himself therefrom by any particular route to be specified in the order." Now such order must, of course, be communicated **[666]** to the foreigner, but the section does not say in what way. A verbal order given to a tradesman is given by the customer speaking to him across the counter; a written order would be handed or sent to him, so that instead of having only words, the remembrance of which existed only in his memory, he would have in his possession the same words, in black and white, to which he could refer if necessary. It seems to me that the essence of an order in or by writing is that the person to whom it is given may have it by him, and be able to refer to it if necessary, so that I do not consider that the mere showing, reading and explaining a written order to a foreigner, and then taking it way, is a compliance with the terms of this section. That the order ought to be in the possession of the person ordered, I think is further shown by the fact that the order may contain directions as to the route by which he is to remove himself from British India, and if the foreigner be up-country and it be desirable that he should not pass through certain places while leaving the country, that route might be a complicated one, and the details ought to be in his possession in writing, for if he deviates therefrom, he may be arrested. The Advocate-General suggested that, if the order was left with the foreigner, he might destroy it, and so there would be no record of it, but that is merely a matter of detail which could be provided for by having a duplicate of the order, also signed by the Secretary to Government, which could be kept on record while the other was given to the foreigner.

As the orders, by writing, were not given to the appellants, but, as appears from the affidavits, only shown, read, and translated to them, I do not think the terms of the 3rd section have been complied with, and consequently that they were not bound to leave British India.

Further, looking at the form of the document by which the order is said to have been given, it appears to be a warrant, it is so headed, and nothing else. It is not an order to the foreigner, but an authority to arrest him, addressed to a third person, with what is called the order as a

(1) 11 App. Ca. 627.

recital at the beginning, and I do not think that any Court should hold that a document in this form is a compliance with s. 3 of the Act.

[667] There is also a defect in the terms of the orders. The Government may order a foreigner to remove himself from this country by a particular route; therefore it was lawful to order these persons to leave "by sea"; but the Act does not give power to direct where the foreigner is to go when he has left British India. I should be inclined under some circumstances to treat the words following "by sea" as surplusage, but it seems to me that the addition of the ultimate destination might work harshly and be the means of doing injustice. For instance, a foreigner is ordered to go by sea to Trieste. Instead of taking a ticket by the Austrian Lloyd's line he takes one by the P. & O. for Ceylon. He would be quite justified in doing this, because all the Act provides is that he is to remove himself from British India by a particular route, *i.e*, by sea, which he would do by going to Ceylon, but a police officer *might* say he had not complied with the order, and arrest him, which, in my opinion, he would not be justified in doing.

Then the document, which is headed "warrant," contains first an order to a person to do a thing, and then an order that, if he does not do it, he is to be arrested. This form of order has constantly been condemned by the Courts. See *Reg.* v. *Jooma* (1); 6 Mad. H. C. Rep., App. 24, and two criminal rulings of this High Court—*In re Babaji*, on the 26th April, 1888, and *Empress* v. *Sakharam* on the 3rd May, 1888.

The mischief of the form used is that on the face of it the determination as to whether the person to whom the order is addressed has obeyed it or not, is left to the officer in charge of the warrant; whereas it is the authority which issues the order which ought to determine that point. The mere fact that, after the order is given to a foreigner, he does not remove himself from British India, is not necessarily disobedience. After receiving the order he might slip down and break his leg; he might have a wife so ill that he could not possibly leave her without danger to her life, not having means to provide attendance for her in his absence; he might be absolutely without the means of removing himself. In such cases the mere non-removal of himself could not be said to be a neglect or refusal to remove **[668]** himself, and the determination as to whether a particular act or omission amounted to a neglect or refusal ought to rest with no authority other than the one which gave the order.

After the order is communicated to the person who is to obey it, the authority issuing it should determine whether he has disobeyed it or not, and if he has disobeyed it, a warrant should be issued for his apprehension and imprisonment. Such a warrant ought to recite that, under the provisions of s. 3 of this Act, A. B. had been ordered by the Governor in Council to remove himself from British India (by sea), that the said A. B. had neglected (or refused as the case may be) to do so, and then go on to order him to be apprehended and conveyed to such and such a jail and there to be kept in custody until discharged therefrom in due course of law. If the warrant in the present case had been in that form, all that would have been required on the return to the rule herein would have been for Mr. Mackenzie to have stated, on affidavit, that he held the prisoner under that warrant, and as it would then have appeared from the warrant itself that it was issued by a competent authority in the exercise of powers

(1) 4 B.H.C.R. Cr. Ca. 37.

1894
AUG. 9.

CROWN SIDE.

18 B. 636.

granted by the Legislature, the Court would have refused to have made any further inquiries.

By reason of the order appearing at the top of the warrant, it may possibly be inferred that the person named therein has been ordered to leave, but it does not definitely appear on the face of the warrant, because there is nothing to show that it has been communicated to him that he *has been* ordered; and then it does not appear that he has disobeyed the order, in my opinion a very much more important omission, and one which invalidates the warrant entirely, because unless that has happened there is no power to imprison.

The warrant is also defective in another way. It bears no seal, an addition which is essential to a warrant under ordinary circumstances. Regulation XXV of 1827 gives a form of warrant which is to be sufficient under that Act, and in the form no mention is made of a seal; consequently a warrant under that Act might be valid without one. The present Act provides no form of warrant; consequently, in my opinion, the ordinary form of warrant must be adopted. By common law a warrant without a **[669]** seal is invalid, and the Criminal Procedure Code has adpoted the provisions of the common law and directs that a warrant should be both signed and sealed. In the absence of statutory provision, the absence of a seal will render a warrant void, which will appear from the case of *In re Phipps* (1).

Sargent, J., in the case of *In re Hastings* (2) expresses an opinion that a warrant under the Criminal Procedure Code is invalid without a seal, and I should have great difficulty in coming to the conclusion that there is any reason why a seal should not be necessary for the validity of a warrant authorizing the imprisonment of a foreigner under Act III of 1864.

The last defect in the order and warrant which I will point out is that there is no description or designation of the person to whom it is directed or against whom it is to be executed. The name of the foreigner who is still in jail is Solomon Moses. Now Moses is not an uncommon surname in this city, and I should think that there were probably more than one inhabitant having the name of Solomon Moses. A warrant should not merely bear the full name of the person to be arrested, but also his description, *i e.*, the place where he resides, if not also his occupation, so that there may be no doubt as to the identity of the person in custody with the person named in the warrant. See the judgment of Sargent, J., in *Hastings case* (2). The order, too, should contain a like description, in order that the person to whom it is given may know that he, and no one else, is the person to whom it is addressed.

I am of opinion, therefore, that all the warrants in this case are bad in law, and that Solomon Moses, the only appellant now in custody, is not in custody in due course of law. Consequently the order made by Farran, J., discharging the rule obtained on the 5th July must be reversed, and the rule must be made absolute, and Solomon Moses discharged from custody.

Appeal allowed.

Attorneys for the appellants: Messrs. *Turner and Hemming.*

Attorney for the Crown: Mr. *E. F. Nicholson*, Acting Government Solicitor.

---

(1) 11 W.R. Eng. 730.

(2) 9 B.H.C.R. 154.

18 B. 670.

1893
FEB. 1.

CRIMINAL REVISION.

18 B. 670.

[670] CRIMINAL REVISION.

Before Mr. Justice Telang and Mr. Justice Fulton.

IN RE ANTAJI KESHAV TAMBE.* [1st February, 1893.]

Forest Act (*VII of* 1878). *ss.* 75,76—*Ratnagiri District*—Khot—Khoti khasgi *land*—*Trees*—*Right to cut trees*—*Dunlop's proclamation*—*Right of Government to rescind proclamation*—*Crown grant, construction of.*

In 1824 by a proclamation known as Mr. Dunlop's proclamation it was declared that the owners of land in the Ratnagiri District, on which teak and other forest trees were growing or should thereafter be grown, should be the owners of these trees and might dispose of them at their pleasure without any claim on the part of Government. In 1851, however, this proclamation was rescinded by a subsequent proclamation which declared that the "Government resumed, in regard to forest, all the seigniorial rights which it possessed previously to 1823."

The accused was *khot* of the village of Asgoli in the Ratnagiri District. He was charged under s. 75, cl. (*c*) of the Indian Forest Act (VII of 1878) with the offence of cutting down two teak trees without obtaining the permission of Government as required by the rules framed by Government under the Forest Act. He contended that he was absolute owner of the trees under Dunlop's proclamation. He was convicted, and applied to the High Court under its revisional jurisdiction.

Held, that the conviction must be reversed. The land on which the trees in question were growing was the *khoti khasgi* land of the accused, and he was, therefore, entitled to the benefit of Dunlop's proclamation, by virtue of which the trees thereon became his property.

Held, also, that Dunlop's proclamation could not be withdrawn by Government in so far as it related to trees planted after that date.

Collector of Ratnagiri v. *Vyankatrav N. Surve* (1), followed.

Per FULTON, J.—*Khasgi* land of which the *khot* was actually in possession was clearly within Dunlop's proclamation and it granted the right to teak and other trees in *khasgi* lands held by *watandar khots* * * * It is clear, too, that the right to trees having once been conceded could not be withdrawn by the proclamation of 1851, and it seems also manifest that the contention is untenable that the benefit of the first proclamation did not extend to the case of trees planted after its cancellation in 1851. Even though the *khot* may not be the proprietor of the soil in *khoti khasgi* lands, he is certainly the holder of an interest in it, and that interest having in 1823 been increased by the concession of all trees which he might grow threafter could not subsequently be reduced by the withdrawal of the right to such trees.

[F., Rat. Unr. Cr. Cas. 828; R, 23 B. 518; 25 B. 714 (750) = 3 Bom. L.R. 603 (620).]

THIS was an application under s. 435 of the Code of Criminal Procedure (X of 1882).

The accused was the *khot* of the village of Asgoli in the Ratnagiri District. He was charged with having committed an [671] offence under ss. 75 and 76 of the Indian Forest Act (VII of 1878) by cutting down two teak trees, growing on his *khoti khasgi* land, without obtaining the permission of Government, as required by the rules(2) framed by Government under the Forest Act (VII of 1878).

---

* Criminal Revision No. 301 of 1892.

(1) 8 B.H.C.R.A.C.J. 1.

(2) Rule II made under s. 75, cl. (*c*) of the Forest Act provides as follows:—

"No person who holds land on which trees are growing, *which are the property of Government*, shall cut, lop or in any way injure any such tree, and knowingly and wilfully permit any other person to cut, lop, or in any way injure the same without having first obtained the permission of the Collector, or in the case of teak, blackwood, or sandalwood trees, of the Conservator of Forests."

1893
FEB. 1.
CRIMINAL REVISION.
18 B. 670.

The accused pleaded not guilty. He contended (*inter alia*) that under Mr. Dunlop's proclamation dated 1st March, 1824, he was the absolute owner of the teak trees growing on his *khoti khasgi* land, and had a right to deal with them as he pleased, and that Government had no claim to such trees.

Mr. Dunlop's proclamation was to the following effect:—

"Whereas the Government has observed that the former Government used to take the teak, blackwood, and other good timber grown on the lands situate in the aforesaid zilla belonging to any person whatever, the people did not take the trouble of raising (such timber trees); and (whereas the Government) thinks that it would be to the advantage of all if from this day forth teak, blackwood and any other kind of good timber (trees) were raised in the country, it is proclaimed to all the people that the Government has no intention (eye) towards the trees that may be growing on the lands of any person whatever situate beyond the frontiers (limits) of the jungles preserved by the Government . . . . that those who may own and may grow hereafter (such trees) may (*i.e.*, have the liberty to deal with them in any manner they like; and that no obstruction whatever will be made by the Government (to their so doing)."

"*Dated* 1*st March*, 1824."

This proclamation was rescinded by a subsequent proclamation in 1851.

The subsequent proclamation ran thus:—

"*Proclamation regarding Teak and Sissu in the Collectorate of Ratnagiri.*

"1. Be it known that in 1823 (*sic.*) Mr. Dunlop, when Collector of the Southern Konkan, put forth a proclamation wherein he conditionally made over, on behalf of Government, the royalty rights heretofore exercised in regard to teak and sissu trees growing in certain places.

"2. The object of the said proclamation, as stated in the first paragraph thereof, was the extension of the growth of useful timber.

[672] "3. As, however, from past experience it is clear that the continuance of the permission to cut teak and sissu trees on such terms throughout the Collectorate will speedily lead to the complete annihilation of such useful timber.

"4. The Right Honourable the Governor in Council is pleased to declare that the proclamation of 1823 is rescinded, and that the Government resumes, in regard to forest, all the seigniorial rights which it possessed previous to 1823.

"5. At the same time, as it is understood that a few persons, taking advantage of the liberal offer made by Government in 1823, did attend to the teak and sissu timber growing in their own grounds (jagih), Government is prepared to grant full benefit, present and prospective, to such persons, provided they establish to the satisfaction of the Collector and Conservator of Forests, within six months from 1st June next, that the wood in their lands had been attended to and nurtured since 1823, such benefit to be contingent on their continuing their care to the trees now in course of growth.

"6. The forest preserves in the taluka of Suvarndurg and in the subha of Malvan to remain, as at present, exclusively Government

preserves, subject to such future orders as Government may see fit to issue in regard to them."

1893
FEB. 1.
CRIMINAL REVISION.
18 B. 670.

The accused was convicted under s. 76 of the Indian Forest Act (VII of 1878) by the Second Class Magistrate of Guhagar and sentenced to pay a fine of Rs. 3, or in default to suffer four days' simple imprisonment.

This conviction and sentence were upheld, on appeal, by the District Magistrate of Ratnagiri.

Thereupon the accused applied to the High Court under its revisional jurisdiction.

Ganesh K. Deshmukh, for the accused.

Rao Saheb *Vasudeo J. Kirtikar*, Government Pleader, for the Crown.

JUDGMENT.

TELANG, J.—In this case the accused was charged with having committed an offence under s. 75 (*c*) of the Indian Forest Act by cutting down some trees in what is admitted to be his *khoti khasgi* land in contravention of the rules made by Government under the Indian Forest Act. The section of the Act as well as the rules referred to, relate, in terms, to trees belonging to Government; and in order to convict the accused the Court must be satisfied that the trees cut down by the accused were the property of Government.

It was argued in the first instance by the learned Government Pleader, as we understood him, that if he could **[673]** show that there was some reasonable ground for the claim made on behalf of Government to the trees in question, that would be sufficient justification for the Government "notification" whereby the trees have been declared to be the property of Government, and that the Magistrate would be justified and even bound to accept such notification as proof of the declared ownership in such a case as the present. We must express our entire dissent from this view. The offence is only committed, as we have seen, under the express terms of the Act and rules, when the trees cut are the property of Government. And, therefore, in this case as in any other, where the same issue arises, the Court before convicting is bound to satisfy itself of Government proprietary right in the usual modes and by means of the usual materials recognized in Courts of Justice. The declared opinion of the Executive Government merely as such can have no more weight with the Court than that of the humblest of Her Majesty's subjects.

On the other side it was similarly argued, that if the accused could show that he had reasonable grounds to believe that he might cut the trees in question, he ought not to be convicted of a criminal offence. The answer to that argument is clear. The law which the Courts have to apply in this case says nothing about belief or reasonable grounds for belief. The act of cutting the trees is itself an offence, whatever the belief of the man who cuts, if the trees are proved to be, in truth, the property of Government.

The question, therefore, which must be determined in this case is whether the trees cut down by the accused were or were not the property of Government. No special evidence has been given in the case bearing on this point, and both sides have rested their respective contentions on the general rules applicable to trees growing on land of the kind to which the land of the accused belongs. The learned Government Pleader has broadly argued that in no case has a *khot* any right to the soil, or to the trees growing upon it, unless he affirmatively proves such a

1893
FEB. 1.
CRIMINAL REVISION.
18 B. 670.

right. He relies on the decision at I. L. R., 4 Bom. 264 ; P. J., 1875, p. 325 (*Nagardas* v. *The Conservator of Forests*) ; I. L. R. 12 Bom. 534 (*Collector of Ratnagiri* v. *Antaji Lakshman*). We are very far from being certain that the authorities referred **[674]** to really lay down such a sweeping proposition, without reference to the *onus* of proof in each particular case. And in the present case, as will be seen further on, we could not decide against the accused on the strength of any such wide presumption. Nor can we hold that s. 37 of the Bombay Land Revenue Code of 1879 helps the Government ; because on the other side it would be necessary to have regard to the presumption of full ownership arising from actual possession and enjoyment, which in this particular case appears to have extended over a considerable period. We think that we cannot, in this case, give effect to either of these arguments in favour of Government in this case ; because we are of opinion that the land here being admittedly the *khoti khasgi* land of the accused, must be deemed to be entitled to the benefit of Dunlop's proclamation by vritue of which the trees then growing and thereafter to be planted on the land become the landholder's property free from any right on the part of Government. Such appears to have been the view of the Court in the case of *The Collector of Ratnagiri* v. *Vyankatrav N. Surve* (1), and, in the absence of any specific evidence in the present case, we think that view must be followed, notwithstanding the observations referred to by the District Magistrate limiting the effect of that decision which are contained in Sir M. R. Westropp's judgment. We cannot agree with the District Magistrate in his view that Dunlop's proclamation could be withdrawn by Government in so far as it related to trees planted after its date. The contrary was expressly decided in *Surve's case*, and in that decision we concur, having regard to the express terms of Dunlop's proclamation. That being the conclusion at which we have arrived, it is unnecessary to consider the points raised in reference to Bombay Act I of 1865 and Bombay Act V of 1879. It is not contended that either of those Acts deprived landholders of any rights already conceded to them. Whether those Acts or either of them would have helped the accused in this case, but for the view which we take of the effect of Dunlop's proclamation, we need not in this case determine. On the whole, therefore, we must reverse the conviction had in this case, and order the fine to be refunded.

[675] FULTON, J.—The first question which we have to consider is whether the teak trees in dispute were the property of the defendant by virtue of Mr. Dunlop's proclamation. It is not disputed that the land on which they grew was held by the defendant as *khoti khasgi*, but it is contended that such land did not come within the terms of the concession. The proclamation as translated on p. 535 of I. L. R., 12 Bom., was as follows :—

" Whereas the Government has observed that as the former Government used to take the teak, blackwood and other good timber grown on the lands situate in the aforesaid zilla belonging to any person whatever, the people did not take the trouble of raising (such timber trees); and (whereas the Government) thinks that it would be to the advantage of all if from this day forth teak, blackwood, and any other kind of good timber trees were raised in the country, it is proclaimed to all the people that the Government has no intention (eye) towards the trees that may be

(1) 8 B.H.C.R.A.C.J. 1.

growing on the lands of any person whatever situate beyond the frontiers of the jungles preserved by the Government . . . that those who may own and may grow hereafter (such trees) may (*i.e.*, have the liberty to) deal with them in any manner they like; and that no obstruction whatever will be made by the Government (to their so doing)."

The Government Pleader argued that this proclamation did not apply where the *khot* was not proprietor of the soil, and referred us to the remark of Melwill, J., in the judgment in *The Collector of Ratnagiri* v. *Raghunathrav* (1), in which the *khot* claimed the trees on land held by him either as *khot* or as tenant under the *khoti* co-parceners. "It has been decided in regular appeal No. 15 of 1869 (and in this decision we concur) that a *khot* has no right to cut timber either as *khot* or by virtue of Mr. Dunlop's proclamation, unless he can prove the grant of a proprietary title in the land of the village." But as pointed out in *The Collector of Ratnagiri* v. *Antaji Lakshman* (2), "it may be a question whether this did not carry the ruling beyond what was the intention of the Court, as Westropp, C. J., distinctly refrained in his judgment from expressing any opinion upon the general rights of *khots*, and what is even more important, referred without disapproval to his decision in the *Collector of Ratnagiri* v. *Vyankatrav Narayan Surve* (3)." Turning to this last decision we find that Westropp, C. J., held that the proclamation did apply to timber grown on *khoti khasgi* or *khoti nisbat* **[676]** lands. He remarked (p. 4): "It also appears that the land on which the timber was cut was either '*khasgi*' or '*khoti nisbat*' land in the possession of the plaintiff or his sub-tenants, and of such land at all events he would be the proprietor, and not a mere farmer of the revenue, if that be the true position of the *khot* in respect of ordinary *khoti* lands."

The learned Government Pleader, while not disputing that the land on which the timber, in the present case, stood, was *khoti khasgi* land both at the time of the proclamation in 1823, and up to the present date, maintained that the defendant was not the proprietor of the soil, and referred us to the decision of the Privy Council in *Nagardas* v. *The Conservator of Forests* (4), as showing that he was, therefore, not entitled under Mr. Dunlop's proclamation to the teak trees growing on it. It seems to me, however, unnecessary to determine whether or not the *khot* is the owner of the soil of *khoti khasgi* of which he is in possession. I think that the decisions in regular appeal 15 of 1869 and in *The Collector of Ratnagiri* v. *Antaji Lakshman* (2) must not be carried beyond what was actually determined, and, as suggested by Sargent, C. J., in the last-named case, that it is doubtful whether judgments deciding that a *khot* is not entitled to the timber in the forest and uncultivated lands can be applied to the *khoti khasgi* lands which were in the actual occupation of the *khots* at the time of Mr. Dunlop's proclamation and from which they could not be ousted by Government so long as they paid the assessment due on their *khoti*.

The correct mode of construction of grants by the Crown or Government is stated by Westropp, C. J., at the top of p. 331 of the Printed Judgments for 1875 as follows:—"In respect to Crown grants 'upon a question of the meaning of words the same rules of commonsense and justice must apply, whether the subject-matter of construction be a grant

(1) P. J. (1875), p. 324.
(2) 12 B. 534 (549).
(3) 8 B.H.C.R.A.C.J. 1.
(4) 4 B. 264.

1893
FEB. 1
CRIMINAL REVISION.
18 B. 670.

from the Crown or from a subject,' and that 'it is always a question of intention, to be collected from the language used with reference to the surrounding circumstances.' If those guides to a satisfactory construction fail, but not otherwise, the ancient rule is that 'if the king's grant can endure to two intents it shall be taken to [677] the intent that makes most for the king's benefit." Applyng this test we have to decide, not whether *khots* can be said to be the owners of the soil of their *khasgi lands*, but whether the language of Mr. Dunlop's proclamation, when read by the light of surrounding circumstances, is such as to make it clear that he intended it to apply to *khoti khasgi* lands.

The circumstances under which the proclamation was issued are explained in Mr. Dunlop's letter to Government, No. 5 of the 18th October, 1823 (paras. 21 to 28), and of Government's reply thereto, No. 1630 of the 1st November, 1823, to which by the courtesy of the Chief Secretary we have been enabled to refer. Mr. Dunlop's recommendation, which was sanctioned by Government, was stated in the last sentence of his letter as follows:—

"I, therefore, think that the established forests should be retained by Government, and with the hope of encouraging the growth of teak that a proclamation should be issued surrendering all the claims asserted by the former Governments to teak or other valuable woods, and declaring that wherever these may be found beyond the limits of the three forests of Band and Tordil and Vinhiri in the Surambay (Suvarnadurg?) Taluka and of Mhan near Malvan, they shall henceforth be the full and exclusive property of the persons on whose grounds they may grow, who shall be free to or dispose of such trees in any way they choose."

Whether the proclamation issued in pursuance of the recommendation above expressed, gave *khots* a right to the valuable timber in forests and jungle lands in *khoti* villages, may well be doubted Mr. Dunlop's report of the 31st December, 1822, referred to in Mr. Candy's compilation on Khoti tenure, shows that he spoke of watandar *khots* (*vide* para. 10) as "purely farmers" (of the revenue), and it may, therefore, be improbable that in his proclamation about trees he would, in referring to *khots*, have intended to include in the category of lands "belonging to" them the uncultivated and jungle lands of the village. Accordingly in appeal No. 15 of 1869 (P. J., 1875, p. 325) the High Court held that the proclamation did not confer on the *khot* the right to trees growing in a *khoti* village in respect of which he was unable to prove a proprietorship in the soil, and the decision was confirmed by the Privy Council on appeal (I. L. R., 4 Bom., 264). Similarly in *The Collector of Ratnagiri* v. *Antaji Lakshman* (1) it was [678] held that, in the absence of a *sanad* expressly granting the right to cut timber and the proprietorship in the soil of the village, a *khot* had no right to cut timber on the uncultivated and forest land, inasmuch as in uncultivated land he had no right of proprietorship which could fall within the contemplation of Dunlop's proclamation. But it seems to me that in regard to *khasgi* land, of which the *khot* was actually in possession, it is impossible to say that it was not within the contemplation of the proclamation. The correspondence preceding the issue of this document shows that it was intended to be of wide application, and it is difficult to imagine to what class of lands it was intended to apply, if it did not include those of which the *khot* was entitled to the permanent occupation so long

(1) 12 B. 531 (549).

as he paid the assessment due on the village. It may be said that it would apply to the holdings of *dharekaris*; but it is not easy to suppose that Mr. Dunlop intended to make the concession to these men and not to other classes of permanent occupants, for in paragraph 52 of his report of 15th August, 1824, he speaks of the lands "belonging to the *khots*," and in this expression he must certainly have intended to include *khoti khasgi* lands. The passage which is quoted at the top of p. 14 of Mr. Candy's compilation is as follows:—"In the register of *pañanis* or surveys that have at different times been made of the districts under the Collectorate, the fields belonging to *khasgi* or *dharekari* rayats are entered in their own names, whereas those belonging to the *khots* and cultivated by *ardhelis* are entered in the names of the *khots*." This extract supports the view that when in his proclamation he referred to lands "belonging to any person" he intended to include those occupied by *khots* as their *khasgi*, and that he had not in his mind the idea of excluding from its scope all lands excepting those in respect of which valid *sanads* could be produced, granting to the holders the proprietary right in the soil.

Under these circumstances, while aware that it is difficult to reconcile this judgment with that reported in *The Collector of Ratnagiri* v. *Raghunath* (1) I think that we ought to follow the decision in *The Collector of Ratnagiri* v. *Vyankatrav N. Surve* (2) in holding that Mr. Dunlop's proclamation did grant the right **[679]** to teak and other forest trees in the *khasgi* lands held by watandar *khots*. It is true that it was the intention of that decision not to prejudice the right of Government, in any similar case that might subsequently arise, to give evidence upon the points on which light had not been shed; but I do not find that in the present case our attention has been called to any facts requiring us to differ from the conclusion arrived at. It is clear, too, that the right to trees having once been conceded could not be withdrawn by the proclamation of 1851, and it seems also manifest that the contention is untenable that the benefit of the first proclamation did not extend to the case of trees planted after its cancellation in 1851. Even though the *khot* may not be the proprietor of the soil in *khoti khasgi* lands, he is certainly the holder of an interest in it, and that interest having in 1823 been increased by the concession of all trees which he might grow thereafter could not subsequently be reduced by the withdrawal of the right to such trees.

Such being my opinion on the first question raised, it is unnecessary to consider whether the second contention on behalf of the defendant, *viz.*, that the right to trees had been conferred on him when the survey settlement was introduced, is maintainable. For the foregoing reasons, I concur in setting aside the conviction and directing that the fine, if paid, be refunded.

Conviction quashed.

(1) P. J. (1875), p. 324.

(2) 8 B.H.C.R.A.C.J. 1.

1893
SEP. 26.

APPELLATE CIVIL.

18 B. 679.

18 B. 679.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice and Mr. Justice Bayley.

RACHAWA AND OTHERS (*Original Defendants*), *Appellants v.* SHIVAYOGAPA (*Original Plaintiff*), *Respondent.** [26th September, 1893.]

Maintenance, mother's right to—Right to possession in virtue of claim to maintenance—Mortgagee's right to possession subject to mother's claim to maintenance—Practice—Procedure—Point of law raised for first time in second appeal.

After the death of S., who had mortgaged certain land belonging to him, his widow (defendant No 2) mortgaged it again in consideration of the existing mortgage-debt and a further advance. The mortgage was afterwards assigned to the plaintiff, who sued the widow (defendant No. 2) and the mother (defendant No. 1) of S. for possession. The mother (defendant No. 1) contended that any right the widow (defendant **[680]** No. 2) had to mortgage the property was subject to her (the first defendant's) right to maintenance out of it, and, as her maintenance, she claimed to remain in possession. The lower Court held that the property should not be given to the plaintiff until a proper arrangement had been made by him for the maintenance of defendant No. 1, but stated that it imposed that condition on the supposition that there was no other family property out of which she could be maintained.

Held, that the decree was wrong in making the right of the first defendant to remain in possession dependent on there being no other property. Further, that as the mortgagees lent their money with full knowledge of the first defendant's possession in virtue of her claim to maintenance, the first defendant ought not to be compelled to accept from the plaintiff maintenance in some other form.

In a suit by a mortgagee for possession of mortgaged land, the mother of the deceased owner claimed to remain in possession of it in virtue of her right to maintenance. At the hearing of the second appeal a claim was made, on her behalf, not merely to maintenance, but to a share in the property as mother of the last owner. The point had not been taken in the lower Courts, nor was it one of the grounds of appeal.

Held, that it could not be taken for the first time in second appeal. It set up a new right differing in kind from that asserted throughout the trial, and not differing merely in degree, as was the case in *Nagesh* v. *Gururao* (1).

[R., 1 N.L.R. 1 (2).**]**

SECOND APPEAL from the decree of C. G. W. Macpherson, District Judge of Belgaum.

Suit by the assignee of a mortgage for possession of the mortgaged land, and for mesne profits.

The land in question had been mortgaged for Rs. 150 by Solbaya to one Balapa Bhandari. Solbaya afterwards died, leaving his mother (defendant No. 1) and his wife (defendant No. 2) him surviving. After his death his wife (defendant No. 2), in consideration of the mortgage-debt then due (Rs. 150) and of a further advance of Rs. 30, mortgaged the same land to Balapa Bhandari and one Shidapa. They transferred their interest to the plaintiff, who now sued.

The first defendant claimed a right to hold possession of the land for her maintenance unaffected by the second mortgage; she was willing to pay off the first mortgage made by her son.

The second defendant did not defend the suit.

The Subordinate Judge passed a decree for the plaintiff.

---

* Second Appeal No. 319 of 1892.

(1) 17 B. 303.

In appeal, the District Judge was of opinion that the second defendant's right to mortgage the land was subject to the first [681] defendant's right to maintenance, and that in making the second mortgage the second defendant was acting in fraud of the first defendant's right and that the mortgagees had notice of the fraud. He held that the plaintiff was entitled to possession of the land subject to the first defendant's right to maintenance, and he made the following order :—

"I reverse the decree of the lower Court and award plaintiff possession on an arrangement being made to the satisfaction of the Subordinate Judge in regard to the maintenance of defendant No. 1. This of course presupposes that there is not other property from which defendant No. 1 can be maintained. This point should be ascertained by the lower Court in execution proceedings, when also the mesne profits due to the plaintiff after making allowance for defendant No. 1's maintenance should be ascertained. What is a suitable maintenance for defendant No. 1 should be ascertained at the same time."

Defendants preferred a second appeal.

Vasudeo G. Bhandarkar, for the appellants (defendants) :—(States that he is authorized to appear on behalf of both the defendants, but would press the appeal on behalf of defendant No. 1 only.) The first defendant is not only entitled to maintenance, but also has a right to retain possession of the property from which the maintenance is paid. The Judge was wrong in directing that an arrangement should be made in regard to her maintenance. Even if there is some other property, she cannot be compelled to give up the property from which she has been drawing maintenance. The right of a widow to retain property assigned for her maintenance is not dependent upon the existence or otherwise of any other property—*Lakshman* v. *Sarasvatibai* (1) ; *Imam* v. *Balamma*(2) ; *Vrandavandas* v. *Yemunabai* (3).

The maintenance of the defendants should be charged upon the property in dispute. Both the widows were in possession of the property and both of them paid interest to the mortgagee. The mortgagee had notice of our possession and right of maintenance. A Hindu widow cannot be made liable for mesne profits of the property from which she derives her maintenance. The Judge was wrong in making the order for mesne profits. Defendant No. 1 is the mother of the husband of defendant No. 2 [682] and as mother she is entitled to a share in the property—*Lakshman Ramchandra* v. *Satyabhamabai* (4) ; *Damodardas* v. *Uttamram* (5).

[SARGENT, C. J.—That point was not taken in either of the lower Courts.]

But being a point of law, it can be taken for the first time in second appeal—*Nagesh* v. *Gururao* (6).

Balkrishna N. Bhajekar, for the respondent (plaintiff).—The claim of defendant No. 1 to a share should not be allowed. The point is now taken for the first time in second appeal. It is not taken in the memorandum of appeal, but is urged for the first time at the hearing. A mother is entitled to a share only when the sons effect a partition. But here there could be no partition, because there was an only son, and, therefore, there being no partition the appellant has no right to a share. Even if she had been entitled to a share, still as on her son's death the whole property

(1) 12 B.H.C.R. 69. (2) 12 M. 334. (3) 12 B.H.C.R. 229.
(4) 2 B. 494 (522). (5) 17 B. 271. (6) 17 B. 303.

1893
SEP. 26.
APPELLATE CIVIL.
18 B. 679.

devolved on defendant No. 2 as son's widow and heir, defendant No. 1 has lost her right.

The mortgage by defendant No. 2 was made from necessity,—that is, for maintenance and for payment of her husband's debt, and it was for this reason that the mortgage was held binding on both the defendants. Further, defendant No. 1 acquiesced in the mortgage made by defendant No. 2.

Bhandarkar in reply.

JUDGMENT.

SARGENT, C. J.—The first defendant by her written statement claimed to hold the land unaffected by the mortgage created by the second defendant; and the District Judge has held that the right of the second defendant to dispose of the land was limited by the right of the first defendant to maintenance, and it was not suggested that the mortgagees, through whom plaintiff claims, were not aware of the first defendant being in possession in respect of the maintenance.

It has, however, been argued before us, for the appellants, that the right of the first defendant as the mother of Solbaya, the [683] husband of the second defendant, was not merely to maintenance but to a half share in all the property. In the Courts below this point does not appear to have been taken, the right of the first defendant in both Courts being treated as one of maintenance only; nor is it one of the grounds of appeal to this Court. We do not think, therefore, that we ought to allow it to be taken now for the first time on second appeal. It sets up a new right in favour of the first defendant differing in kind from that asserted throughout the trial, and not merely in degree, as was the case in *Nagesh* v. *Gururao* (1).

The only question, therefore, for this Court's consideration is, whether the decree of the Court below can be objected to, assuming the right of the first defendant to the land to rest exclusively upon her right to maintenance. The decree provides for possession not being given to the plaintiff until a proper arrangement to the satisfaction of the Subordinate Judge has been made by plaintiff for her maintenance; but that condition is imposed on the assumption that there is no other family property out of which she can be maintained. Whether, if there was such property available for the purpose, the first defendant ought to be removed, it is not necessary to decide; there is no suggestion that there is any other, still less that the second defendant is ready to appropriate it to the first defendant for her maintenance, and the decree is therefore, in our opinion, wrong in making the first defendant's right to remain in possession dependent on there not being other property. Again, as the mortgagees lent their money with full knowledge of the first defendant's possession in virtue of her claim to maintenance, the first defendant ought not to be compelled to accept from the plaintiff maintenance in some other form in lieu of the land.

We must, therefore, pass the same decree as was passed by the Madras Court in *Imam* v. *Balamma* (2), dismissing the suit with the first defendant's costs throughout to be paid by the plaintiff.

Decree reversed and suit dismissed.

---

(1) 17 B. 303.

(2) 12 M. 334.

18 B. 684.

1893
OCT. 10.

APPELLATE CIVIL.

18 B. 684.

[684] APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Bayley.

PADMANABH BOMBSHENVI (*Original Plaintiff*), *Appellant v.* KHEMU KOMAR NAIK AND OTHERS (*Original Defendants*), *Respondents.**

[10th October, 1893.]

Mortgage—Suit on registered mortgage—Execution—Sale—Proceeds of sale how applied—Priority—Unregistered mortgage—Money decree—Priority of holder of unregistered mortgage to holder of money decree—Incumbrances—Transfer of Property Act (IV of 1882), s. 97.

The plaintiff Padmanabh held a mortgage of certain land belonging to the first defendant. The mortgage was not registered. The second defendant, Marpal, was a mortgagee of the same land under a mortgage which was subsequent in date but was duly registered. Marpal obtained a decree upon this latter mortgage and applied in execution for sale of the land. The plaintiff intervened, but his claim was rejected on the ground that Marpal's mortgage was registered and had priority to his mortgage, which was not registered. The land was sold by auction to Ramchandra (defendant No. 4) and the proceeds of the sale were partly applied in satisfaction of Marpal's claim, and a further sum of Rs. 164 was paid to one Santapa (defendant No. 3), who had obtained a money decree against the mortgagor (defendant No. 1). A balance of Rs. 103-8-11 was paid into Court and subsequently returned to defendant No. 1 (the mortgagor). The plaintiff Padmanabh now sued for payment of his mortgage-debt out of the proceeds of sale or from the defendants. The lower Court held that defendant No. 3 (Santapa) could not be called upon to refund the money which had been paid to him out of the proceeds, and that the plaintiff had a cause of action only against the mortgagor (defendant No. 1) not merely for the balance of Rs. 103-8-11, but for the whole of his claim. On appeal to the High Court,

Held, that the claim of the plaintiff in virtue of his mortgage although unregistered was prior to that of the third defendant (Santapa) under his money decree. The plaintiff's earlier mortgage was postponed to that of Marpal because it was not registered, but the plaintiff had the right of a second mortgagee over the balance in virtue of his mortgage. The proceeds of the sale after satisfying the first incumbrancer (Marpal) became payable first to the other incumbrancers, if any, and then to the mortgagor (defendant No. 1). The judgment-creditor (defendant No. 3) could only take any balance that remained subject to the equitable right of the plaintiff.

[R., 33 C. 92 (103)=9 C.W.N. 989; 4 A.L.J. 492=27 A.W.N. 201.]

SECOND APPEAL from the decision of A. H. Unwin, District Judge of Kanara.

On 28th October, 1886, defendant No. 1 mortgaged certain land (No. 166) without possession to the plaintiff. The deed was [685] not registered, and it fixed no time for repayment of the mortgage-debt.

Subsequently defendant No. 1 mortgaged the same land together with other land for Rs. 200 without possession to defendant No. 2. This mortgage-deed was registered.

On this latter mortgage defendant No. 2 filed a suit (No. 6 of 1890) against his mortgagor (defendant No. 1) and obtained a decree for the sale of the mortgaged property. When he applied *in execution* for the sale of the land, the plaintiff intervened and set up his prior mortgage lien upon part of the lands comprised in the mortgage and decree of defendant No. 2. His claim was rejected on 13th September, 1890, on the ground that the mortgage of defendant No. 2 being registered was prior to his which was unregistered.

---

* Second Appeal No. 402 of 1892.

1893
OCT. 10.
APPELLATE CIVIL.
18 B. 684.

In execution accordingly of the above decree two lots of land were sold, *viz.*, No. 111, which was only included in the second mortgage, and No. 116, which was included both in the first and second, and which had, therefore, been mortgaged both to the plaintiff and the defendant No. 2. At the Court sale, defendant No. 4 purchased the former for Rs. 125 and the latter for Rs. 415. Out of the total proceeds of sale, Rs. 272 6 4 were paid to defendant No. 2 in satisfaction of his decree and Rs. 164-0-9 were paid to defendant No. 3 in satisfaction of a money decree which he had obtained against defendant No. 1, and the balance of Rs. 103-8-11 remained as a deposit in Court.

In 1890 the plaintiff filed this suit to recover Rs. 90 as principal and Rs. 57 as interest, in all Rs. 147, contending that his mortgage being earliest in date, his right was superior, and he had, therefore, a right to the land as well as to the proceeds of the sale. He, therefore, prayed that his claim might be satisfied (1) from the proceeds of the sale lying in deposit in Court, (2) from the defendants who might be liable to pay, or (3) by sale of the mortgaged land. Defendant No. 4 relied on his purchase at the auction held in execution of the decree passed in the duly registered mortgage of defendant No. 2 and denied his liability to the plaintiff.

[686] Defendant No. 3 put in a similar defence, and further contended that the plaintiff's debt, if any, was a charge upon the land and not on the proceeds of the sale, and that he (defendant No. 3) was unnecessarily made a party to the suit.

Defendants Nos. 1 and 2 did not appear.

The Subordinate Judge found that the plaintiff's mortgage was proved, that the plaintiff was entitled to recover the money due to him from defendants Nos. 1 and 3, and that though the plaintiff's personal remedy against defendant No. 1 was time-barred, the suit having been filed after the expiration of three years from the date of the deed, still defendant No. 1 was liable to the plaintiff's claim to the extent of Rs. 103-8-11, he having after the institution of the suit taken out of Court that sum which had been deposited there after the sale. He, therefore, made the following order:—

"I order that out of the sum claimed by plaintiff he should, in the first instance, recover Rs. 103-8-11, with costs in proportion, from defendant No. 1. In the event of this being found impossible, he should recover the said amount and costs, or so much thereof as might remain unpaid from defendant No. 3. The plaintiff to recover the rest of the amount claimed from defendant No. 3 alone with costs in proportion. Defendant No. 3 to bear his own costs, and costs of defendants Nos. 2 and 4 to be paid by plaintiff."

On appeal by the plaintiff the District Judge amended the decree and directed the plaintiff to recover the amount claimed and his costs from the property of defendant No. 1 alone, and to bear the costs of the other defendants. His reasons were as follows:—

"Although plaintiff intervened under s. 278 of the Civil Procedure Code (XIV of 1882) pending the attachment which followed the registered mortgagee defendant No. 2's decree, it appears that he intervened unsuccessfully, and that defendant No. 3's suit (No. 192 of 1890.) against defendant No. 1 on a money bond and decree thereon meantime anticipated plaintiff's suit. And the Court having, after satisfaction of the registered mortgagee's decree for Rs. 272 odd, out of the sale proceeds already paid away to defendant No. 3 Rs. 164-0-9 out of the balance Rs. 267 odd, cannot

possibly be justified in cancelling or altering this order by calling upon the payee to refund any portion of this Rs. 164 under any circumstances. Plainly, it is the mortgagor defendant No. 1 alone against whom plaintiff had a cause of action and against whom a decree can be passed here, not merely for the Rs. 103-8-11 **[687]** which was returned to him as the surplus of the sale proceeds, but also for the whole of plaintiff's claim ; the Subordinate Judge being wrong also in supposing that plaintiff's personal remedy against his mortgagor is barred by limitation. His suit is to 'enforce payment of money charged (under Ex. 21) upon immoveable property'—Art. 132, Sch. II of Act XV of 1877—and he had, therefore, twelve years within which to sue from the date of the bond, 28th October, 1886 ; *vide* the Full Bench ruling in *Lallubhai* v. *Naran*, I.L.R., 6 Bom. 719."

Plaintiff preferred a second appeal.

Narayan Ganesh Chandavarkar, fo rthe appellant (plaintiff) :—Defendant No. 3 was merely the holder of a money decree against defendant No, 1, while the plaintiff holds a mortgage right over the mortgaged property. Defendant No. 3 cannot, therefore, have a preferential right over the plaintiff under ss. 272 and 295 of the Civil Procedure Code (XIV of 1882,). Compare also s. 97 of the Transfer of Property Act (IV of 1882)—*Raja Kishendatt* v. *Raja Mumtaz Ali Khan* (1).

Shamrao Vitthal, for respondent No. 3 (defendant No. 3).

Wasudeo Gopal Bhandarkar, for respondent No. 4 (defendant No. 4) the auction-purchaser :—The first Court dismissed the suit as against us. We were not joined as a party to the appeal in the lower Court, and yet we have been joined as a respondent in second appeal. So the appeal as against us must be dismissed with costs.

JUDGMENT.

SARGENT, C. J.—The District Judge has misconceived the respective rights of the plaintiff and the judgment-creditor, defendant No. 3, in the surplus proceeds of the sale effected in execution of the mortgage-decree obtained by defendant No. 2. Although plaintiff's earlier mortgage was postponed to that of defendant No. 2, by reason of its non-registration, the plaintiff still had the same rights over the balance as if he had been the second mortgagee in point of date. In *Raja Kishendait Ram* v. *Raja Mumtaz Ali Khan* (1) the Privy Council say : "The effect of a sale under a power of sale is to destroy the equity of redemption in the land, and to constitute the mortgagee exercising the power a trustee of the surplus proceeds, after satisfying his own charge, first for the subsequent incumbrancers and ultimately for the mortgagor." The same must be the result **[688]** when the Court sells to satisfiy the first mortgage. The proceeds which are paid into Court after satisfying the first incumbrance become payable first to the other incumbrancers (if any) and then to the mortgagor, and so it is virtually provided by s. 97 of the Transfer of Property Act (IV of 1882), which directs that "the residue is to be paid to the person proving himself to be interested in the property sold." Such being the right of the plaintiff over the balance in virtue of his mortgage, the attaching creditor could only take the balance subject to that equitable right.

We must, therefore, reverse the decree of the Court below and send back the case for a fresh decision having regard to the above remarks. In

(1) 6 I. A. 145 (160).

1893
OCT. 10.
APPEL-
LATE
CIVIL.
18 B. 684.

dealing with the case it will be necessary to bear in mind that the balance, Rs. 267-9-8, was the result of the sale of two properties Nos. 111 and 166, in the latter of which alone the plaintiff was interested. Costs to abide the result as regards appellant and defendant No. 3. But the appeal must be dismissed as against defendant No. 4 with costs.

Decree reversed and case sent back.

18 B. 688.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Starling.

ABAJI GANGADHAR (*Original Plaintiff*), *Appellant v.* MUKTA KOM RAGHU AND ANOTHER (*Original Defendants*), *Respondents.**

[11th October, 1893.]

Gift—Necessity of possession—Attestation of deed, effect of.

In 1873, Ramji, a Hindu, executed a deed of gift of his immoveable property to his daughter Mukta (defendant No. 1). The deed was attested by the plaintiff. In 1878, Ramji mortgaged to the plaintiff some of the land comprised in the deed of gift. Ramji died in that year, and in 1882 his grandson conveyed the equity of redemption to the plaintiff, who was already in possession of the mortgaged land as mortgagee. In the year 1888 the plaintiff being dispossessed by Mukta (defendant No. 1) and the second defendant, to whom she had sold the land, he brought the present suit to recover possession. The defendants relied upon the gift.

Held, that the plaintiff was entitled to possession. At the time of the mortgage to him in 1878 Ramji had not completed his gift to Mukta by giving possession. He was, therefore, in a position to give the plaintiff a good title. It had not been shown that Mukta had ever been treated as the owner of the equity of redemption.

[689] *Held*, also, that the circumstances that the plaintiff attested the deed of gift in 1873 could not affect his title, as the gift had not been completed by delivery of possession.

[R., 21 P.L.R. 1901.]

SECOND APPEAL from this decision of T. Hart-Davies, Acting District Judge of Ahmednagar.

In 1873, by a registered deed of that date Ramji Jaitha made a gift of his immoveable property, including the land in dispute in this suit, to his daughter Mukta (defendant No. 1). The deed was attested by the plaintiff and by one of the donor's sons. Ramji, however, remained in possession, and in 1878 he mortgaged to the plaintiff a part of the lands comprised in the deed of gift and put the plaintiff in possession as mortgagee. Ramji died in the same year. In 1882, Ramji's grandson, Vithal, conveyed the equity of redemption to the plaintiff. In 1888, Mukta and the second defendant, to whom she had sold the land in question, forcibly dispossessed the plaintiff, and he then brought this suit to recover the land. The defendants relied upon the gift to Mukta by her father Ramji.

The Subordinate Judge dismissed the suit, holding that the gift to Mukta was valid and had been acted upon by delivery to her of possession of other lands.

* Second Appeal No. 399 of 1892.

1893
OCT. 11.

APPELLATE CIVIL.

18 B. 688.

On appeal by the plaintiff, the Judge confirmed the decree. Plaintiff preferred a second appeal.

Mahadeo Chimnaji Apte for the appellant (plaintiff):—The lands in dispute were Ramji's ancestral property. He could not, therefore, make a gift of them to the prejudice of his heirs, namely, Govinda and his son Vithu. Further, the gift was not completed by delivery of possession to the donee. Ramji continued in possession after the gift, and mortgaged the property with possession to the plaintiff. On both these grounds, the gift to Mukta was invalid, and that being so she could not convey a valid title to the second defendant. The plaintiff is entitled to recover possession—*Vasudev Bhat* v. *Narayan Daji* (1).

There was no appearance for the respondents (defendants).

JUDGMENT.

SARGENT, C. J.—Both the Courts below have omitted to consider an important fact in the case, that is, that Ramji had not [690] given possession to his daughter Mukta under the deed, and the gift had, therefore, not been completed when he executed the mortgage in 1878 to the plaintiff—*Vasudev Bhat* v. *Narayan Daji Damle* (1)—and he could, therefore, confer a good title on the plaintiff. Nor is there any evidence to show that she was ever treated as the owner of the equity of redemption by Ramji or Vithu so as even to effect the latter's title. The circumstance that plaintiff attested the deed of gift in 1873 could not affect this title, as the gift was never completed by possession. Under these circumstances Mukta could confer no title on defendant No. 2; and as he only purchased in 1882 he could not have acquired title by adverse possession before the present suit was brought.

We must, therefore, reverse the decree of the Court below and order that possession of the land in question be given to the plaintiff. Plaintiff to have his costs in both the Courts below.

Decree reversed.

---

18 B. 690.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Bayley.

KEDARI AND OTHERS (*Original Defendants*) *v.* GAJAI KOM NARAYANRAO AND ANOTHER (*Original Plaintiffs*), *Respondents.** [17th October, 1893.]

Landlord and tenant—Mirasi *tenure*—Mirasi *tenure declared in a decree*—*Civil Procedure Code* (*XIV of* 1882), *s.* 258—*Subsequent payment of rent by defendants not a payment under decree but under the tenure, and so need not be certified under s.* 258 *of the Civil Procedure Code.*

The plaintiff sued the defendants to recover possession of certain land. The defendants pleaded they were *mirasi* tenants and entitled to possession as long as they paid the rent. The suit was compromised, and by a consent decree it was declared that the defendants held by *mirasi* tenure and they were directed to pay rent "as before," or in default the plaintiff should take possession. The plaintiff afterwards applied in execution for possession, alleging that the rent had not been paid. The defendants pleaded that it had been paid, and the

---

* Second Appeal, No. 335 of 1893.

(1) 7 B. 131.

1893
OCT. 17.

APPELLATE CIVIL.

18 B. 690.

plaintiff rejoined that, even if it had been paid, the Court could not recognize the payment, as it had not been certified under s. 258 of the Civil Procedure Code.

Held, that, under the circumstances, the rent when paid was to be deemed as paid under the *mirasi* tenure and not under the decree, and, therefore, s. 258 of the Civil Procedure Code (XIV of 1882) did not apply, and payment need not be certified.

[691] THIS was a second appeal from the decision of Rao Bahadur R. D. Paranjpe, First Class Subordinate Judge of Satara with appellate powers.

The plaintiff brought a possessory suit, No. 646 of 1884, against the defendants in the Court of the Subordinate Judge of Peth (now Islampur) to recover possession of certain land. The defendants set up a *mirasi* title to it. The suit was compromised, and there was a consent decree, which declared their *mirasi* tenure, directed them to pay rent as before, and ordered that as long as they did so they should not be dispossessed. The following is the material part of it:—

"The land in dispute belongs to the plaintiffs by (right of) ownership, and they admit that it has been in *miras* with the defendants from Narayanrao. Only (while) in the *miraspatra* there is a stipulation for payment of Rs. 11-4-0 every year, the plaintiffs received every year from the defendants Rs. 3-12-0 in addition Accordingly, the defendants should hereafter pay to the plaintiffs, as before, every year Rs. 15 as (if it were) an instalment of Government assessment. And so long as the defendants (continue to) pay the amount as aforesaid, their *miras* right shall remain intact, and they will not be liable to be dispossessed of the land by the plaintiffs. If the defendants fail to pay by the 31st of July of any year the said amount of Rs. 15, which is payable every year, the land in dispute shall be taken out of the possession of the defendants. The defendants shall then have no *miras* right remaining on the land."

One the 21st March, 1892, the plaintiffs applied for execution of the decree, and prayed for possession of the land, alleging that the assessment of 1890-91 had not been paid by the defendants.

The defendants pleaded that it had been paid, and contended that they could not, therefore, be dispossessed.

The plaintiffs denied the alleged payments, and argued that (even if it had been) the Court could not recognize any payment which was not certified to the Court under s. 258 of the Civil Procedure Code (Act XIV of 1882).

The Subordinate Judge allowed evidence of the alleged payment to be given. On the evidence, he found the payments proved and rejected the plaintiffs' application.

On appeal by the plaintiffs, the First Class Subordinate Judge reversed the order, holding that the Subordinate Judge was not right in admitting evidence of a payment which he could not [692] recognize under s. 258, which section applied to all sums of money payable under a decree. He, therefore, made an order directing execution to proceed by giving the lands in plaintiffs' possession.

The defendants preferred a second appeal.

Macpherson (with *Vasudeo R. Joglekar*) for the appellants (defendants) :— Section 258 of the Civil Procedure Code has no application to a case like the present. It was not necessary to certify these payments. The rent is payable, and has been paid, not under the decree, but under the original *mirasi* tenure. The decree merely confirmed the tenure and

gave certain directions with regard to the payment. We have paid all the instalments as they fell due.

We further contend that the clause in the decree with respect to the recovery of possession is penal, and should be relieved against—*Vaguran* v. *Rangayyangar* (1).

Mahadeo C. Apte, for the respondents (plaintiffs) :—When litigant parties come to an understanding, and a decree is passed on the terms of that undrestanding, anything directed by the decree that is done subsequently to the decree must be considered as done under it. We, therefore, submit that any payments made were made under the decree and not under the old *mirasi* tenure, and ought to have been certified to the Court in accordance with s. 258. Not having been so certified, they cannot be recognized. When a forfeiture clause comes into operation under a decree, it cannot be avoided, because there has been no change of the relationship of the parties under the decree.

JUDGMENT.

SARGENT, C. J.—The original suit in which the decree was made was a possessory suit brought by the inamdar against the defendants, who set up a right to hold the lands under a *mirasi* tenure. The decree declares that such was the nature of the tenure and directs that the rent "should be paid as before." We think that under these circumstances the rent when paid is to be deemed as paid under the *mirasi* tenure and not under the decree, and, therefore, that s. 258, Civil Procedure Code, does not apply.

[693] The decree must, therefore, be reversed and the case sent back for decision on the merits; and we may observe that the defendant will not be precluded by ss. 56 and 64 of the Dekkhan Agriculturists' Relief Act from proving the payment of the instalment in question by any one of the ordinary legal modes of proof.

Decree reversed.

---

18 B. 693.

APPELLATE CIVIL.

Before Mr. Justice Candy and Mr. Justice Fulton.

KAZI SUJAUDIN (*Original Defendant*), *Appellant v.* MADHAVDAS (*Original Plaintiff*), *Respondent.**

[17th October, 1893.]

Right of suit—Cause of action—Religious processions—Public road—Suit to enforce a right to conduct a religious procession along a public road—Obstruction to a public road—Public nuisance—Special damage—Injunction.

A civil action will not lie to enforce a right to conduct a religious procession along a public road without an allegation of some personal loss or damage to the plaintiff.

Satku v. *Ibrahim* (2) followed.

[Appl., 34 B. 571 (573) = 12 Bom. L. R. 586 = 7 Ind. Cas. 663 ; **R.**, 32 M. 478 = 1 Ind. Cas. 716 = 19 M. L. J. 617 (626) ; 11 Bom. L. R. 372 (375) = 2 Ind. Cas. 494.]

---

* Second Appeal, No. 422 of 1893.

(1) 15 M. 125.

(2) 2 B. 457.

1893
OCT. 17.

APPELLATE CIVIL.

18 B. 693.

SECOND appeal from the decision of Khan Bahadur N. N. Nanavati, First Class Subordinate Judge with appellate powers at Dhulia, in Cross Appeals Nos. 187 and 191 of 1892.

The plaintiff sued (1) for a declaration of his right to conduct the car and *palki* of the deity Shri Datatrya Maharaj in procession, accompanied by bodies of worshippers reciting prayers to the sound of music (such as *tal, zanj, mirdang and vina*) along the public thoroughfares of Raver, and (2) for a perpetual injunction restraining the Mahomedans of the locality from obstructing the passage of the procession and the performance of the ceremony called *Gopal Kala* at Nagziri, with music playing.

The defendants were made defendants under s. 30 of the Civil Procedure Code (XIV of 1882) as representing the Mahomedan community.

The Subordinate Judge of Yeola granted the declaration sought, subject, however, to the right of the Mahomedans not to be disturbed **[694]** while assembled and engaged in public worship during hours in which they usually assemble for public worship, and of which they have informed the authorities in due time.

On appeal, the First Class Subordinate Judge, A. P., confirmed the decree of the Court of first instance, and further ordered that the defendants should inform the authorities responsible for the preservation of the public peace of the hours fixed for public prayer, and that the plaintiff and his processionists should stop all music within 75 feet on either side of a mosque during hours in which the Mahomedans were engaged therein in public worship.

From this decree the defendants appealed to the High Court.

Manekshah Jehangirshah, for appellants:—This case falls under the general rule that no action can be maintained by one person against another for obstruction to a highway, unless special damage is proved: The plaint in this case does not allege special loss or damage to the plaintiff. Nor has he given any proof of special damage sustained by him. This suit cannot, therefore, lie—*Satku* v. *Ibrahim*(1); *Siddeswara* v. *Krishna* (2).

P. M. Mehta (with Messrs. *Dixit* and *Hiralal*) for respondent:—The suit was instituted on the allegation that plaintiff had been obstructed by the defendants. This obstruction constitutes special damage. The suit will, therefore, lie. Refers to Second Appeal No. 527 of 1891. The point now taken on second appeal was not raised in either of the Courts below. It should not, therefore, be allowed.

JUDGMENT.

FULTON, J.—The only question argued in this appeal was, whether without alleging any personal loss or damage the plaintiff could maintain this action. The question has been very fully considered in the learned judgment of Sir M. R. Westropp in *Satku* v. *Ibrahim*(1) which does not seem to have been brought to the notice of the Courts below. That decision shows clearly that although "there cannot be any doubt that Her Majesty's subjects, as well in India as in England, have the right to pass and re-pass along a public highway," a civil action to enforce a right to **[695]** conduct a religious procession along a particular road cannot ordinarily be maintained. Whether, if an order had been passed under s. 44 of Bombay Act IV of 1890, an action could be instituted under cl. 2, it is unnecessary to determine, as no such order has been made.

(1) 2 B. 457.

(2) 14 M. 177.

1893
OCT. 17.
APPELLATE CIVIL.
18 B. 693.

The decisions of the Madras High Court in *Sundram* v. *The Queen*—*Ponnusami* v. *The Queen* (1) and *Muthialu Chetti* v. *Bapun Saib* (2) are appropriate for the purpose of showing the legal rights of the plaintiff, but do not support the proposition that in case of obstruction his proper remedy is by civil suit. The former of these was the judgment in a criminal case, and the latter in a suit for which the cause of action was not any alleged obstruction to the road, but the procurement of an improper order from a Magistrate. It was admitted that in Second Appeal No. 527 of 1891, in which the point now under consideration might have been raised, it was not taken by the respondents, who were defendants and made no objection to the decree of the Courts below. Consequently that case cannot be relied on as a precedent. The present case seems governed by *Satku* v. *Ibrahim* (3). We trust that the parties to this suit will come to some reasonable compromise, and would suggest that they should either accept the First Class Subordinate Judge's opinion, or, if they cannot do so, refer their dispute to the arbitration of the Collector and agree to abide by his award. A prolongation of this quarrel may compel the interference of the Magistrates and lead to much trouble, which can be avoided by the exercise of forbearance on both sides. We reverse the decree and reject the claim. The parties to pay their own costs throughout.

Decree reversed.

---

18 B. 696.

[696] APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice.

KASHINATH BALLAL AND OTHERS (*Original Plaintiffs*), *Appellants* *v.* GANPATRAO AMRITESHVAR JOSHI (*Original Defendant*), *Respondent.** [10th November, 1879.]

Stamp—Valuation—Court Fees Act (VII of 1870), *s.* 7, *cls.* 1—9—*Foreclosure suit—Suit by the mortgagee against the heir of the mortgagor for recovery of the mortgage-debt by sale of mortgaged and other property—Valuation for the purpose of Court fees.*

A suit instituted by the mortgagee against the heir of the original mortgagor, to have the mortgage-debt paid by sale not exclusively of the mortgaged property, but also of all the other property in the hands of such heir liable for the debts of the original mortgagor, is virtually a suit for money, and should be valued, not at the principal debt, but the entire amount including interest.

[R., 7 Bom. L. R. 194 (195).]

THIS was a reference by the Taxing Officer under s. 5 of the Court Fees Act (VII of 1870).

The plaintiffs sued in the Court of the First Class Subordinate Judge of Nasik to recover the sum of Rs. 8,236-14-0 (being Rs. 7,000 principal and Rs. 1,236-14-0 interest) due upon a mortgage-bond executed by the deceased defendant Ganpatrao in favour of the deceased father of the plaintiffs, and prayed that the amount might be realized by the sale of the mortgaged property and of the other property of defendant.

---

* First Appeal, No. 23 of 1879.

(1) 6 M. 203. (2) 2 M. 140. (3) 2 B. 457.

1879
NOV. 10.

APPELLATE CIVIL.

18 B. 696.

The First Class Subordinate Judge decreed the claim with costs, and ordered that the plaintiffs should recover the amount awarded by the sale of the mortgaged property.

From this decision the plaintiffs appealed to the High Court, contending that they were entitled to recover the amount decreed from the whole or any portion of defendant's property.

The appeal was presented with a Court fee of Rs. 355, valuing the claim at Rs. 7,000, as an appeal in a foreclosure suit, under s. 7, sub-s. 9 of the Court Fees Act (VII of 1870), the principal amount of the mortgage being Rs. 7,000. The Shirastedar being of opinion that the memorandum of appeal was chargeable with a Court fee of Rs. 405 as an appeal in a suit for money **[697]** under s. 7, sub-s. 1 of the Court Fees Act, required the appellants' pleader to pay the deficient Court fee.

The appellants' pleader (*Pandurang Balibhadra*) objected to the valuation by the Shirastedar, and contended as follows :—

"No doubt, the plaintiffs do not, in this suit, ask that the defendant's right in the property should be foreclosed in the technical sense of that term, but they ask to have this right extinguished by the sale of the property for the satisfaction of their debt. In effect, the suit is of the same nature as a foreclosure suit. There is no reason why such a suit should be valued differently from a foreclosure suit, or why, as contended by the Shirastedar, the plaintiffs should be asked to pay stamps on the amount of the principal and of interest. In determining the amount of the stamp duty under the Stamp Act, the amount of principal only is taken into consideration, and in the same way the amount of Court fees chargeable in suits coming within the words of s. 7, cl. 9, is calculated on the amount of the principal only. The same principle ought to apply to suits by a mortgagee when he asks the payment of his debt by the sale of the property instead of the property itself. Such a construction would be reasonable, looking to the practice of mortgagees in the Mofussil, who seldom bring what would strictly be a foreclosure suit."

In support of his contention the pleader cited the case of *Ganpat Pandurang* v. *Adarji Dadabhai* (1) and the English cases quoted therein with approval at p. 320 of the Report.

The question was referred to the Taxing Officer for decision.

The Taxing Officer referred the point to the Chief Justice under s. 5 of the Court Fees Act (VII of 1870). His reference was as follows :—

"The only question for determination is, whether the suit can be regarded as a foreclosure suit or not for the purposes of the Court Fees Act. If it can, the appellant is right in his contention that the valuation taken in respect to principal only is sufficient. The section of the Court Fees Act which applies to the **[698]** case is s. 7, cl. 9, and if the suit comes under cl. 9, the principal debt, *viz.*, Rs. 7,000, is to be taken as the basis of valuation. The suit was to realize Rs. 8,236-14-0 by sale of certain mortgaged property, and though the result of a decree ordering such a sale may be of the same effect as a foreclosure decree, still it is not, strictly speaking, the same. I think to arrive at the intention of the Legislature, the whole of cl. 9, which deals with mortgage suits, must be taken and read together. In the third clause of it, express provision is made as regards a conditional sale, in which case valuation is

(1) 3 B. 312.

allowed on the same favourable terms as in cases of redemption and foreclosure. The present is not a case of conditional sale, and I think the common maxim of '*expressio unius*' must be taken to apply. As the law makes express provision as to redemption, foreclosure, and conditional sale suits, it must be presumed to have intentionally excluded other cases of sale; and although I am not prepared to hold a very positive opinion, still, I think, the Shirastedar is right, and that the appeal should be valued, not at Rs. 7,000, but at Rs. 8,236-14-0. I do not think the appellants' argument on the analogy of the Stamp Act a sound one. That Act is quite distinct from the Court Fees Act, and under the Court Fees Act, when a suit is brought upon a simple money bond for principal and interest, the plaint is always valued at the total amount of principal *plus* interest."

Pandurang Balibadra, for the appellants.

JUDGMENT.

SARGENT, C. J.—As this suit is instituted against the heir of the original mortgagor, not exclusively for the purpose of having the mortgage-debt realized by sale of the mortgaged property, but also out of all other property, presumably meaning any other property in the hands of such heir which would be liable for the debts of the original mortgagor, it is virtually a suit for money brought against the representative of the original debtor. I am, therefore, of opinion that the appeal should be valued, not at the principal debt, but the entire amount including the interest.

Order accordingly.

1879 NOV. 10. — APPELLATE CIVIL. — 18 B 696.

---

18 B. 699.

[699] APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Bayley.

TANUDIN AND OTHERS (*Original Plaintiffs*), *Appellants v.* PANDU AND OTHERS (*Original Defendants*), *Respondents.**

[13th November, 1893.]

Civil Procedure Code (Act XIV of 1882), *s.* 30—*Burial ground—Land belonging in common to all the Mahomedan inhabitants of a village—Encroachment by some of the Mahomedans—Right of suit of some members of a community.*

Where certain Mahomedans of a village brought a suit against other Mahomedans of the same village for the removal of a wall built by the defendants upon land which was found to belong in common to all the Mahomedan inhabitants of the village for the purpose of a burial ground, the Judge, in appeal, dismissed the suit on the grounds that all the Mahomedans were not joined as parties to the suit and that the plaintiffs had not obtained the permission of the first Court to file the suit under s. 30 of the Civil Procedure Code (Act XIV of 1882). On second appeal,

Held, reversing the decree, that s. 30 of the Civil Procedure Code was not applicable to the suit, which must be regarded as one in which the plaintiffs claimed to restrain the defendants from violating the common interest they all had in the land.

Held, further, that the defendants having erected the wall in dispute so as to exclude the plaintiffs from a part of the common land, there was a violation of the plaintiffs' right, and that, therefore, the plaintiffs were entitled to bring the suit for the removal of the wall.

[R., 18 P.R. 1908=78 P.L.R. 1908=52 P.W.R. 1908; 91 P.R. 1901=113 P.L.R. 1901; 105 P.R. 1901.]

---

* Second Appeal, No. 241 of 1892.

1893
NOV. 13.

APPELLATE CIVIL.

18 B. 699.

SECOND appeal from the decision of Rao Bahadur Kashinath Balkrishna Marathe, First Class Subordinate Judge of Ratnagiri with appellate powers.

This action was instituted by Tanudin valad Abdul Rajam and thirty-two others against defendants Pandu valad Shekh Yakub and twenty-six others to remove a new compound wall erected by the defendants, alleging that the land in dispute, which was to the east and west of a certain masjid, was the joint burial ground of the parties to the suit, all of whom were Mahomedans and resided in the same village; that the defendants by erecting the wall in dispute included this land in the land appertaining to their masjid, and that the plaintiffs had been thus dispossessed. They, therefore, prayed for the removal of the wall and that the land might be kept in the joint *vahivat* (management or user) of the parties.

[700] Defendants Nos. 2 to 5, 6, 8, 9, 15, 18, 20, 23 and 25 set up their exclusive ownership of the lands, and contended that the plaintiffs had no right to them.

The heirs of defendant No. 16 answered that the suit was barred by ss. 13 and 43 of the Civil Procedure Code (XIV of 1882) and also by the Statute of Limitations.

The other defendants were absent.

The Subordinate Judge (Rao Saheb N. G. Phatak) found that the lands in dispute were in the joint possession of the parties, that they had a joint right to them, and that the suit was neither time-barred nor barred by ss. 13 and 43 of the Civil Procedure Code. He, therefore, allowed the claim.

On appeal by the defendants the Judge reversed the decree on the following grounds:—

"*Issue 1.*—The land in dispute as a burial ground appears to be the joint property of all Mahomedans of the village. The plaintiff-respondents' pleader is not prepared to say that all Mahomedans have been joined as parties to the suit. The lower Court's permission to file the suit according to s. 30 of the Civil Procedure Code (XIV of 1882) does not appear to have been asked or granted, and the suit is, therefore, informal.

"*Issue 2.*—Assuming that all persons interested in the subject matter of the suit are parties to the suit, according to the plaintiffs' admission the property in dispute is joint property. If it is joint property, each one of the owners is entitled to make such use of it as will suit his convenience and taste. The defendants as joint owners were entitled to raise the wall sought to be removed until and unless the plaintiffs should manifest an intention to divide the land and stop the defendants from raising a wall by a temporary injunction. The time for an injunction is gone, because the wall is complete. The plaintiffs must now sue for partition of their interest and get the land divided. The present suit for retaining the property joint and for restraining the defendants from exercising an act of admitted ownership cannot lie."

The plaintiffs preferred a second appeal.

[701] *Ganesh K. Deshmukh* for the appellants (plaintiffs):—Section 30 of the Civil Procedure Code (Act XIV of 1882) is not applicable; and even supposing that it is applicable, the suit ought not to have been dismissed summarily. It ought to have been remanded, because s. 30 of the Civil Procedure Code was not relied on by the defence, nor was the point taken in the first Court.

Section 30 is not applicable, because the Court has not found that there are other necessary parties. We say that all the persons who were necessary parties have been joined in the suit. Our contention was that the lands in dispute were the joint property of the parties, and that contention has not been traversed. The defendants do not say that there are other persons interested in the lands. Their contention is that they are the exclusive owners. Under these circumstances, s. 30 of the Code can have no application—*Hira Lal* v. *Bhairon* (1). When property is joint, one member cannot act in such a manner as would exclude access of the other members to it. The defendants built a wall in the midst of the land, and have appropriated to their use a portion of the common ground.

Manekshah J. Taleyarkhan, for the respondents (defendants) :—The frame of the suit is wrong. The suit as it is brought seems to be one with respect to a common family property. But the Courts below have found that the property is the joint property of the whole Mahomedan community of the village. Therefore, the Judge was right in dismissing the suit under s. 30 of the Civil Procedure Code.

JUDGMENT.

SARGENT, C. J.—The Courts below have found that the property belongs in common to all the Mahomedans of the village for the purpose of a burial ground. Section 30 of the Civil Procedure Code has, therefore, no application to the present suit, which, according to that finding, must be regarded as one in which the plaintiffs claim to restrain the defendants from violating the common interest they all have in the land—*Hira Lal* v. *Bhairon* (1).

[702] The suit, therefore, being maintainable, the only question which arises is, whether the wall in question which the defendants have erected so as to exclude the plaintiffs from a part of the common land, is a violation of the plaintiffs' rights. As to this there can be no doubt, on the finding, that as the land is held in common by all, the defendants' conduct amounts to such a violation.

We must, therefore, reverse the decree of the Court below and restore that of the Subordinate Judge. The appellants to have their costs here and in the lower appeal Court.

Decree reversed.

---

18 B. 702.

ORIGINAL CIVIL.

Before Mr. Justice Candy.

CALLIANJI HARJIVAN (*Plaintiff*) *v.* NARSI TRICUM (*Defendant*).*
[19th July, 1894.]

Specific performance—Injunction—Negative agreement—Discretion of Court—Agreement not to work for a rival tradesman—Specific Relief Act (I of 1877), ss. 22, 56 and 57.

The plaintiff was a milliner carrying on business in Bombay and the defendant was in his employment up to the year 1890. In that year he left the plaintiff's service, and the plaintiff alleged that at the time he left it he was indebted to the

* Suit No. 537 of 1893.

(1) 5 A. 602.

1894
JULY 19.

ORIGINAL CIVIL.

18 B. 702.

plaintiff for moneys not accounted for and also in respect of loans made to him. The plaintiff instituted criminal proceedings in the Police Court against the defendant for criminal breach of trust, and procured a warrant for his arrest. The defendant surrendered, and at the time of the agreement hereafter mentioned the proceedings in this matter were going on. The defendant was out on bail, and was then in the service of a rival milliner named Bhimji Jivan. On the 1st February, 1893, an agreement in writing was made between the plaintiff and the defendant, whereby the defendant agreed as follows:—(1) to pay the plaintiff Rs. 1,950 in full settlement of the plaintiff's claim; (2) to enter plaintiff's service as cutter and to serve him for ten years from the date of agreement; (3) to serve plaintiff honestly. (4) In case plaintiff was obliged to dismiss him for some "fault," then until the expiration of the said period of ten years the defendant should not carry on the business of a cutter or tailor, either directly or indirectly, on his own account or as partner or servant of another, and in case he should do so, the plaintiff should be at liberty to stop him.

On the 15th February, 1893, the charge of criminal breach of trust against the defendant was dismissed, the plaintiff offering no evidence in support of it. The plaintiff subsequently called upon the defendant to enter his employment in accordance with the agreement, but the defendant refused, and remained in the service of Bhimji [703] Jivan. The plaintiff, therefore, filed this suit praying for an injunction restraining the defendant from carrying on business as a cutter or tailor for ten years from the date of the agreement.

Held, dismissing the suit, that the parties were not really on equal terms, and that in the exercise of the discretion permitted to the Court by s. 22 of the Specific Relief Act (I of 1877) the injunction should be refused.

[R., 23 B. 103 (116); 5 Bom. L. R. 878 (881).]

SUIT for an injunction.

The plaintiff carried on business in Bombay as a milliner under the name of Callian Moti & Co. The defendant had been formerly a cutter in the plaintiff's service, but left the plaintiff's employment in 1890. The plaint stated that the defendant was then largely indebted to the plaintiff in respect of moneys not accounted for, and also in respect of loans made by the plaintiff to him.

The plaint further stated that after the defendant had left the plaintiff's employment the plaintiff instituted criminal proceedings against him in the Police Court on a charge of criminal breach of trust, and that in February, 1893, the defendant, who had in the meantime entered the service of one Bhimji Jivan, a milliner in Bombay, came to the plaintiff and requested him to come to a settlement in regard to the claims made against him and also begged that the plaintiff would take him again into his employment. The plaintiff ultimately agreed to this, and an agreement dated 1st February, 1893, was made between them, which was reduced to writing. It contained the following terms:—

(1) The defendant was to pay the plaintiff Rs. 1,950 within eight days in full settlement of all the claims which the plaintiff had against him.

(2) The defendant was to enter into the plaintiff's service as a cutter and tailor and to serve as such for ten years from the date of the agreement, receiving Rs. 37 per month as remuneration.

(3) The defendant was to serve the plaintiff honestly and to be obedient to the plaintiff's order.

(4) Except for some "fault" of the defendant the plaintiff was not to dismiss him within the said period of ten years, and if [704] "by reason of a fault or ungratefulness" the plaintiff should be obliged to dismiss the defendant, "then until the aforesaid fixed period shall expire the defendant is not to do or carry on in Bombay the work or business of a cutter or a tailor, or the sewing business, either directly or indirectly, either on his own account or as a partner or servant of somebody else, and in

case he shall carry on the same, then the party of the second part (*i. e.* the plaintiff) shall be at liberty to stop him."

(5) The defendant bound himself to get a similar agreement executed by his brother Hari Tricum, and the plaintiff was to make a similar agreement and to pay him Rs. 31 per mensem.

On the 15th February, 1893, the charge of criminal breach of trust, which, as stated above, had been brought by the plaintiff against the defendant, was dismissed by the Magistrate, the plaintiff offering no evidence in support of it.

The plaint further stated that after the execution of the above agreement the plaintiff at the defendant's request consented to the latter remaining for a limited time in the service of Bhimji Jivan for the convenience of all parties, but that subsequently the plaintiff had called upon the defendant to enter into his employment in accordance with the said agreement, but the defendant refused to do so, and remained in the service of the said Bhimji Jivan.

The said Bhimji Jivan was a rival in the business of the plaintiff.

The last paragraph of the plaint was as follows:—

"9. The plaintiff says that the said agreement comprises a negative agreement by the defendant not to work as a cutter or tailor on his own account, or to serve any other milliner in either of those capacities, and the plaintiff brings this suit for an injunction ordering the defendant to perform the said negative agreement, the plaintiff having in no respect failed to perform the said agreement on his part."

The plaintiff prayed that the defendant should be restrained by injunction from carrying on business as a cutter or tailor on his own account, or as a servant or partner of any person other than the plaintiff, for a period of ten years from the date of the above agreement.

[705] In his written statement the defendant (*inter alia*) stated that he had been obliged to leave the plaintiff's service in consequence of the false prosecution which the plaintiff instituted against him in order to bring pressure upon him and thus prevent his entering into the service of a rival establishment, and that the plaintiff having issued a warrant against him compelled him by undue influence to enter into the above agreement. He pleaded that the agreement was, therefore, not binding upon him, and that the plaintiff was not entitled to the injunction prayed for.

At the hearing the following issues were raised:—

(1) Whether the agreement was to any and what extent void?

(2) Whether the plaintiff was entitled to the injunction prayed for?

Inverarity and *Raikes*, for the plaintiff:—They cited s. 57 of the Specific Relief Act (I of 1877); *The Brahmaputra Tea Co.* v. *Scarth* (1).

The defendant appeared in person.

JUDGMENT.

CANDY, J.—Plaintiff is a milliner in Bombay carrying on business under the name and firm of Callian Moti & Co.

Defendant was formerly in the plaintiff's service, but left that service in 1890, being at that time indebted to the plaintiff. About the time that defendant left plaintiff's service, plaintiff instituted proceedings against

(1) 11 C. 545 (550).

1894
JULY 19.

ORIGINAL CIVIL.

18 B. 702.

him in the Police Court, Bombay; and a warrant was issued for his arrest. Defendant surrendered, and in January, 1893, the proceedings of a criminal case were actually going on between the parties in the Police Court. Defendant was on bail, and was at that time in the service of a rival milliner, Bhimji Jivan, having in November, 1892, taken a contract as cutter in that shop.

Negotiations were then entered into between the plaintiff and defendant. The proceedings in the Police Court were to be dropped, and on 1st February, 1893, an agreement was signed by both plaintiff and defendant, of which the following is a translation :—

[706] (This writing) is made this 1st day of February in the year 1893 between me Darji (*i.e.*, tailor) Narsi Tricum of the one part and Darji (*i.e.*, tailor) Callian Harjivan, trading under the name of Callian Moti, of the other part. The particulars thereof are as follows :—

1. The party of the first part and his father and brother (making in all) three persons have passed in writing under their (own) signatures a "mortgage" deed for Rs. 2,500 and interest in favour of the above-mentioned party of the second part. In respect of the same, and in respect of all other dealings, "Fargati" (*a*) has been made for Rs. 1,950, in letters one thousand nine hundred and fifty. On the said rupees being paid within eight days from this day, the said party of the second part is truly to make and deliver at the cost (and) in favour of the party of the first part a reconveyance in respect of the said mortgaged property.

2. The said party of the first part has agreed to work as a "cutter" and a tailor at (the shop of) the party of the second part. The particulars of the conditions in respect thereof (are as follows) :—

3. The said party of the first part is to serve as a "cutter" and tailor for ten years from this day's date at (the shop of) the party of the second part. And his pay at the rate of Rs. 37, in letters thirty-seven, per each month is truly to be received and paid as the same shall accrue due.

4. The said party of the first part is to serve the party of the second part with honesty and is not to be partial (*i.e.*, wanting in the discharge of his duties) in any way whatever. And he is not to disregard all (any of) his legitimate work and orders. Also he is always truly to behave himself in obedience to his orders and directions.

5. Within the aforesaid fixed period I, the party of the first part, am never to leave the service of the party of the second part; and without my fault the party of the second part is not to dispense with my services (within that period). And if the party of the second part be obliged to dispense with the services of the above-mentioned party of the first part by reason of a fault or ungratefulness on his part, then until the aforesaid fixed period shall expire the party of the first part is not to do or carry on in Bombay the work (or) business of a "cutter," or a tailor or the sewing business, either directly or indirectly, either on his own account or as a partner or a servant of somebody else. And in case he should carry on (the same), then the party of the second part (shall) be at liberty to stop him from doing so.

6. The party of the first part binds himself to get a writing containing conditions similar to these made (executed) also by Hari Tricum, the brother of the above-mentioned party of the first part. And the party of

---

(*a*) "Fargati" literally means release, but here it is used probably to mean a settlement.

the second part also binds himself to give a similar instrument in writing and to fix the pay at Rs. 31, in letters thirty-one, per month.

In witness hereof, both the parties have executed this writing of their free will and pleasure. The same is agreed to and approved of by them and the respective heirs (and) representatives of each (of them).

DARJI NARSI TRICUM (his signature, his own hand-writing).

CALLIAN MOTI.

[707] Defendant has continued to remain in Bhimji Jivan's service; and, on plaintiff calling on him to carry out the contract and join his (plaintiff's) service, has refused to do so. Hence the plaintiff has brought this suit praying that defendant be restrained by injunction from carrying on business as cutter or tailor on his own account, or as servant or partner of any person other than the plaintiff, for a period of ten years from 1st February, 1893.

Defendant by his written statement pleaded that his indebtedness to the plaintiff was sufficiently secured by the mortgage referred to in the agreement, and that the plaintiff, taking advantage of the fact of having procured a warrant against him, compelled him by undue influence to enter into the agreement of 1st February, 1893, and, therefore, the agreement is void and not binding on him.

At the hearing of the suit defendant appeared in person and stated that he was unwilling to enter plaintiff's service. The Court raised the following issues:—

1. Whether the agreement is to any, and what extent, void?
2. Whether plaintiff is entitled to the injunction prayed for?

Defendant put himself into the witness-box, and admitted that he knew, before he signed the agreement, that the police case against him was to be dismissed. He said: "No one told me that unless I signed A (the agreement), the police case would not be withdrawn. Plaintiff once got a warrant out against me. I am afraid to go into his service again, lest he should again take out a warrant against me." He further admitted that plaintiff had asked him to leave Bhimji Jivan and join his shop according to the agreement, but he had declined, and that Mr. Bhaishankar had told him that in any case the criminal case was withdrawn. Mr. Bhaishankar (plaintiff's solicitor) also deposed that the withdrawal of the proceedings in the Police Court was no part of the consideration of the agreement A. "The abandonment of those proceedings had been determined independently of the agreement, and I told this to defendant before he signed the agreement."

During the course of the argument at the bar it was admitted that the allegation in the 6th paragraph of the plaint, that on the [708] date of the agreement the charge against defendant was dismissed by the Magistrate, was incorrect; and that, as a fact, the proceedings in the Police Court were not closed till 15th February, 1893, when the complaint was dismissed, as complainant did not call his witnesses. It was stated that the object of this delay was in order that Bhimji Jivan should not at that time get an inkling of the agreement between plaintiff and his employee (defendant).

On the above facts I have to decide whether plaintiff is entitled to the injunction prayed for.

In the 9th paragraph of the plaint the claim for the injunction is based on the negative covenant in the agreement by the defendant not to

1894
JULY 19.
ORIGINAL CIVIL.
18 B. 702.

work as a cutter or tailor on his own account, or to serve any other milliner in either of those capacities. But in the argument it was conceded by the learned counsel for the plaintiff that he could not directly rely on the latter portion of the fifth paragraph of the agreement, for the plaintiff had not dismissed the defendant, and, therefore, the state of things contemplated by the parties in that paragraph had not arisen; but he relied on the negative covenant in the fifth paragraph as indirectly showing the intention of the parties, and on illus. (*d*) of s. 57, Specific Relief Act (I of 1877). He also referred to the remaks of a Division Bench of the Calcutta High Court in the *Brahmaputra Tea Co., Limited* v. *Scarth* (1) as showing that the present agreement would not be void under s. 27 of the Contract Act.

I think that this last contention is sound. Whether, in the event of the plaintiff dismissing defendant after taking him into his employ, any question would arise as to the applicability of s. 27 of the Contract Act (IX of 1872) is another question. At present all that we are concerned with is the covenant on the part of the defendant that he would serve plaintiff *exclusively* for the period of ten years from 1st February, 1893. That is a lawful agreement. Specific Relief Act (I of 1877), s. 57, Illus.(*d*), shows that if B contracts with A2 that he will serve him faithfully for twelve months as a clerk, A is entitled to an injunction restraining B from serving a rival house as **[709]** clerk. So here defendant contracted with plaintiff to serve him as cutter for ten years from 1st February, 1893 : why should plaintiff not obtain an injunction restraining defendant from serving a rival milliner as cutter during that period?

It may be doubted whether in England the plaintiff would succeed. Thus to take the case of *Whitwood Chemical Co.* v. *Hardman* (2), defendant covenanted to be the plaintiff's manager for a term of years, and during that period to give the whole of his time to the plaintiff's business. Yet he was endeavouring to set up within the district a rival company to work the very same patent the plaintiffs were making, and was devoting part of his time to the business of that rival company. The Court of appeal held that plaintiff's remedy was not by injunction. Lindley, L J., admitted that every agreement to do a particular thing in one sense involves a negative. He said (pp. 426—427) :—

"It involves the negative of doing that which is inconsistent with the thing you are to do.....but it does not at all follow that because a person has agreed to do a particular thing, he is, therefore, to be restrained from doing everything else which is inconsistent with it. The Court has never gone that length, and I do not suppose that it ever will. We are dealing here with a contract of a particular class. It is a contract involving the performance of personal service, and, as a rule, the Court does not decree specific performance of such contracts. That is a general rule. There has been engrafted upon that rule an exception, which is explained more or less definitely in *Lumley* v. *Wagner* (3),—that is to say, where a person has engaged not to serve any other master.....the Court can lay hold of that and restrain him from so doing.....and the principle does not depend upon whether you have an actual negative clause, if you can say that the parties were contracting in the sense that one should not do this or the other—some specific thing on which you can put your finger.

"But there is this to be considered. What are we to say in this particular case? What injunction can be granted in this **[710]** particular

(1) 11 C. 545 (550). (2) L.R. (1891), 2 Ch. 416. (3) 1 DeG. M. and G. 604.

case which will not be, in substance and effect, a decree for specific performance of this agreement? It appears to me the difficulty of the plaintiffs is this, that they cannot suggest anything which, when examined, does not amount to this, that the man must either be idle, or specifically perform the agreement into which he has entered. Now there, it appears to me, the case goes beyond *Lumley* v. *Wagner*.....The principle is that the Court does not decree specific performance of contracts for personal service, and the question is, whether there is anything in this case which takes it out of that principle."

The Lord Justice held that plaintiffs failed to show that there was some recognised exception in the particular case, and after expressing agreement with Jessel, M.R., about there being no very definite line, and with Fry, L.J., that cases of this kind are not to be extended, he proceeded (p. 428):—

"I confess I look upon *Lumley* v. *Wagner* rather as an anomaly to be followed in cases like it, but an anomaly which it would be very dangerous to extend. I make that observation for this reason that I think the Court, looking at the matter broadly, will generally do much more harm by attempting to decree specific performance in cases of personal service than by leaving them alone; and whether it is attempted to enforce these contracts directly by a decree for specific performance, or indirectly by an injunction, appears to me to be immaterial. It is on the ground that mischief will be done to one at all events of the parties that the Court declines in cases of this kind to grant an injunction, and leaves the aggrieved party to such remedy as he may have apart from the extraordinary remedy of an injunction."

Now in the present case before me the object of the agreement was to detach the defendant from the rival shop of Bhimji Jivan and to engage his services for the plaintiff's shop for ten years. Plaintiff asks for an injunction which will amount to this, either defendant must be idle for the remaining period of ten years, or else he must specifically perform his agreement to serve the plaintiff at a fixed salary till 1st February, 1903. I [711] think I have said enough to show that, according to the principle guiding the Courts in England, plaintiff would not be entitled to the extraordinary remedy of an injunction.

But in India we must follow the words of the Statute. No doubt under s. 56, cl. (*f*), of the Specific Relief Act an injunction cannot be granted to prevent the breach of a contract the performance of which would not be specifically enforced; and under s. 21 (*b*) and (*g*) a contract of personal service cannot be specifically enforced, nor can a contract the performance of which involves the performance of a continuous duty, extending over a longer period than three years from its date. But s. 57 specifically provides for this difficulty. It runs:—"Notwithstanding s. 56, cl. (*f*), where a contract comprises an affirmative agreement to do a certain act, coupled with a negative agreement, express or implied, not to do a certain act, the circumstance that the Court is unable to compel specific performance of the affirmative agreement shall not preclude it from granting an injunction to perform the negative agreement; provided that the applicant has not failed to perform the contract so far as it is binding on him." Here the plaintiff can say, "I was quite willing to receive the Rs. 1,950, and to reconvey to defendant the mortgaged property. I have always been willing to receive defendant into my service and give him the salary agreed upon. The circumstance that the Court is unable to

1894
JULY 19.
ORIGINAL CIVIL.
18 B. 702.

directly compel specific performance of the affirmative agreement by defendant that he shall serve me as cutter for ten years from 1st February, 1893, does not preclude it from indirectly compelling specific performance of that agreement by granting an injunction to defendant to perform the implied negative agreement that he will not during that period serve any body else as cutter."

The contention seems sound. I agree with Handley, J., (*Madras Railway Company* v. *Rust* (1)) that to hold the contrary would make s. 57 of the Act a nullity. The Court, therefore, is not on account of the above considerations precluded from granting the injunction prayed for. But the question still remains whether the Court is bound to grant the injunction.

[712] Now *Doherty* v. *Allman*(2) was the case of a lessee for a long term of years who had covenanted to maintain certain store-houses. It became necessary to repair them, and he thought it would be beneficial to convert them into dwelling-houses, which would much increase their value, and was proceeding to do so, when the lessor filed a bill to restrain him alleging waste. The Vice-Chancellor of Ireland granted the perpetual injunction. This was reversed on appeal, and the House of Lords sustained the decision of reversal. Lord Cairns, after assuming in the lesssor's favour that the covenant ought to be read literally as a covenant to maintain the stores as stores, proceeded to show the distinction between the case in which there is a negative covenant and the Court has no discretion to exercise, and the case in which there is only an affirmative covenant of such a character that a Court of Equity, although it could not enforce affirmatively the performance of the covenant, may in special cases interpose to prevent that being done which would be a departure from, and violation of, the covenant. But he showed that in that case there come in considerations which do not occur in the case of a negative covenant, and there are different matters which the Court of Equity will, under these circumstances, take into its view. "It will consider, for example, whether the injury which it is asked to restrain, is an injury which if done cannot be remedied. It will consider whether, if done, it can or cannot be sufficiently atoned for by the payment of a sum of money in damages. It will ask also this question,—Suppose the act to be done, would the right to damages for it to be decided exhaustively, once and for all, by one action, or would there necessarily be a repetition of actions for the purpose of recovering damages from time to time? Those are matters which a Court of Equity would well look to, and on the other hand a Court of Equity would look to this: If we interfere and say, in aid of this affirmative covenant, that something shall not be done which would be a departure from it, no doubt we shall succour and help the plaintiff who comes for our assistance. But shall we do that? Will the effect of our doing that be to cause possible damage to the defendant very much greater than any possible advantage we can give to the plaintiff? **[713]** Now in a case of that kind, where there is an amount of discretion which the Court must exercise, those are all considerations which the Court will carefully entertain before it decides how it will exercise its discretion" (p. 720—1).

Of course the circumstances of the above case are not on all fours with the circumstances of the present case, but the principles laid down

(1) 14 M. 18.

(2) 3 Ap. Ca. 709.

show how very careful the Court should be in the special case of an injunction to prevent the violation of an affirmative contract by restraining the breach of an implied negative covenant. This was brought out by Sir W. Page-Wood, V. C., in *Peto* v. *Brighton and Uckfield, &c., Railway Company*(1). He said (p. 486): "If there was a distinct negative contract in this agreement.....the Court might fasten upon that, and separating that from the rest of the agreement, might enforce specific performance of that contract; but when a plaintiff comes into this Court upon an agreement, which does not contain any such direct negative clause, and where you must infer the negative from the necessity of the case, the instances in which the Court has found it possible to act are very few and special." As was said by Wilson, J., in *The Shamnugger Jute Factory Company* v. *Ram Narain* (2) "the granting of injunctions is now regulated by ss. 54 and 55 of the Specific Relief Act (I of 1877). But those sections have never been understood as inroducing new principles of law into India, but rather as an attempt to express in general terms the rules acted upon by Courts of Equity in England, and long since introduced in this country, not because they were English law, but because they were in accordance with equity and good conscience. It is necessary, therefore, to enquire on what principle the Courts have acted in England and in India.....The principle is well settled that in granting or withholding an injunction. the Courts exercise a judicial discretion, and weigh the amount of substantial mischief done or threatened to the plaintiff and compare it with that which the injunction, if granted, would inflict upon the defendant. The doctrine is very clearly explained in *Doherty* v. *Allman* (3)."

[714] As I have already shown, s. 57 of the Specific Relief Act (I of 1877) does in some respects apparently depart from principles which guide Courts of Equity in England. But the general principle remains that in granting an injunction the Court must exercise its discretion. Section 22 of the Specific Relief Act provides that "the jurisdiction to decree specific performance is discretionary, and the Court is not bound to grant such relief merely because it is lawful to do so; but the discretion of the Court is not arbitrary, but sound and reasonable, guided by judicial principles and capable of correction by a Court of appeal." The same holds good for injunctions (s. 52); and this is particularly so in the special case where specific performance is indirectly sought by the enforcement of an implied negative covenant. Even in *Lumley* v. *Wagner* (4), where there was held to be a direct negative covenant, the plaintiff was only held to be entitled to the benefit of the principle of law, because looking at the merits and the circumstances of the case he was in the right.

Now what are the circumstances here? These have to be considered independently of the legal considerations. In *Nusserwanji Merwanji Panday* v. *Gordon*(5), Sargent, J., doubted much whether the merits of the case would not preclude the interference of the Court on behalf of the plaintiffs. "This contract" (he said) "is certainly not one which, to use the language of Lord Cairns in *Eley* v. *Positive Government Security Life Assurance Company*(6), ought to receive any special favour from the Court." In the present case the contract was an arrangement made to deprive Bhimji Jivan of defendant's services and transfer them to plaintiff

(1) 1 H. and M 468. (2) 14 C. 189, (199, 200). (3) 3 Ap. Ca. 709.
(4) 1 DeG M. and G. 633. (5) 6 B. 266 (284). (6) 1 Exch. Div. 20.

1894
JULY 19.
ORIGINAL CIVIL.
18 B. 702.

for ten years at a salary of Rs. 37 a month, no provision being made for any increase of salary during all those years. It was a dodge of Callian Moti to injure a rival milliner, and to keep that rival in the dark as long as possible. The proceedings in the Police Court were not formally withdrawn when the complainant had fully determined to withdraw them. I doubt, to use the language of Lord Eldon in *Smith* v. *Fromont*(1), whether I would not be degrading the dignity of this Court by interfering in the way that plaintiff asks, and [715] by compelling defendant to leave Bhimji Jivan and sit idle or else work in plaintiff's shop. I see no reason why the plaintiff should not have had resort to the ordinary remedy of damages. The assessment thereof would not be impossible. Defendant had previously served in plaintiff's shop. Plaintiff can calculate the difference in his profits owing to defendant's absence, and there would be no difficulty with regard to the damages for future years up to 1903 (see judgment of Kay, L. J., in *Ryan* v. *Mutual Tontine Westminster Chambers Association* (2).

Again, I take it that though s. 57 includes the words "notwithstanding s. 56, cl. (*f*), (that is "an injunction cannot be granted to prevent the breach of a contract the performance of which would not be specifically enforced") still the disrection of the Court, which must always be exercised before granting an injunction (s. 52), must be the discretion set forth in s. 22, which recites cases in which the Court may properly exercise a discretion not to decree specific performance. It is true that s. 56, cl. (*f*), speaks of contracts the performance of which *would not* be specifically enforced, but s. 57 says that "the circumstance that the Court is *unable* to compel specific performance of the affirmative agreement, &c." This apparently relates to s. 21, which treats of contracts which "*cannot* be specifically enforced." Section 57 can hardly mean that though the Court would not in the proper exercise of its discretion (as explained in s. 22) decree specific performance of a contract, though it would be lawful to do so (as explained in s. 21), yet when indirectly decreeing specific performance by granting an injunction under s. 57, and exercising its discretion as provided by s. 52, the Court must not be guided by the rules laid down in s. 22 as to the exercise of its discretion.

Now the very first case given in s. 22 as one in which the Court may properly exercise a discretion not to decree specific performance is "where the circumstances under which the contract is made are such as to give the plaintiff an [716] unfair advantage over the defendant, though there may be no fraud or misrepresentation on the plaintiff's part." Here no doubt defendant was informed, before he signed the agreement, that the proceedings in the Police Court were to be withdrawn. But as a fact they were not withdrawn till at least fifteen days afterwards. The parties were not really on equal terms. Defendant was heavily in debt to the plaintiff and he was also on bail under a serious criminal charge. He was told that it had been determined to withdraw the criminal charge (which as a fact was kept pending for fifteen days), and that this would be no part of the consideration of the proposed agreement, which was that if he within eight days paid Rs. 1,950 for his mortgage-debt of Rs. 2,500, the mortgaged property would be reconveyed to him, and he on his part was to covenant to serve plaintiff as a cutter for ten years on a fixed salary

(1) 2 Swan. 332.

(2) L. R. (1893) 1 Ch. 116.

1894
JULY 19.
ORIGINAL CIVIL.
18 B. 702.

of Rs. 37 a month. It is not asserted that defendant was provided with funds, or that there was any likelihood of his producing Rs. 1,950 within eight days. It is admitted that defendant has not paid the money, and plaintiff is thus relegated to his original remedy under the mortgage bond. Plaintiff is thus not damnified. It is not a case in which the Court, while refusing to take any action, is unable to leave the parties in their original position. I should be doing more mischief by forcing defendant to remain idle till 1st February, 1903, or to join plaintiff's shop, than by leaving the parties alone.

For these reasons, I hold that the contract is not void; and though the Court is not precluded from granting the injunction prayed for, still in the exercise of a sound discretion I should refuse to grant it; and I accordingly do so refuse, and dismiss the suit with costs.

Attorneys for the plaintiff:—Messrs. *Bhaishankar and Kanga.*

Attorney for the defendant:—Mr. *Balkrishna V. N. Kirtikar.*

---

18 B. 717.

[717] ORIGINAL CIVIL.

Before Mr. Justice Starling.

ROULET (*Plaintiff*) *v.* FETTERLE. (*Defendant*)* [21st July, 1894.]

Civil Procedure Code (XIV of 1882), s. 491—Claim made by defendant for compensation for arrest—Claim for compensation made by defendant in a summary suit when defendant has not got leave to appear and defend—Cross claim when allowed—Set-off - Practice—Procedure—Summary suit—Civil Procedure Code (XIV of 1882), ss. 532, 533.

In a summary suit, if a defendant has been arrested before judgment and claim compensation for such arrest under s. 491, he is entitled on that ground to apply for leave to defend the suit, and, if a *prima facie* case is made out, leave to defend should be given.

Under the Civil Procedure Code (XIV of 1882) a cross claim made by a defendant against a plaintiff cannot, in ordinary cases, be set up as a defence, except when it arises out of the very transaction sued upon and is in the nature of a set-off, but the special cross claim provided for by s. 491 of the Code, *viz.*, a claim for compensation for arrest on insufficient grounds, may under that section be taken into account in any suit, and the amount awarded as compensation be awarded in the decree and thus *pro tanto* be a defence to the plaintiff's claim in the suit.

SUMMARY suit under chap. XXXIX of the Civil Procedure Code (Act XIV of 1882).

The plaintiff sued the defendant to recover Rs. 5,874-5 6 due upon a promissory note passed by him on the 2nd October, 1893. The plaint was filed on the 30th May, 1894, and on the same day the plaintiff applied for arrest before judgment against the defendant. The application was granted, and the defendant was arrested on the 31st May, 1894. He remained in jail for ten days, and on the 11th June he showed cause against the arrest, and was set at liberty.

On the 13th June the summons in this suit was served upon the defendant requiring him to obtain leave to appear and defend within ten days from the summons. On the 23rd instant he applied in chambers for

---

* Suit No. 253 of 1894.

1894
JULY 21.

ORIGINAL CIVIL.

18 B. 717.

leave to appear and defend, but it was refused. His counsel then applied that the defendant might be allowed in the suit to claim compensation for his arrest under s. 491 of the Civil Procedure Code (XIV of 1882). The Judge ordered that this application should be made at the hearing.

[718] The suit came on for hearing on 25th June.

Inverarity, for the defendant, applied under s. 491 of the Civil Procedure Code (XIV of 1882) that the Court should award against plaintiff in its decree the sum of Rs. 1,000 as compensation to the defendant for his arrest before the decree on insufficient grounds.

Scott, for plaintiff, objected:—The defendant has no right to appear. This is a summary suit and defendant has got no leave to defend: see ss. 532 and 533 of the Civil Procedure Code (XIV of 1882). Section 491 does not imply that in such a case he may appear without leave. A defendant cannot appear unless he has leave to appear and defend. He cited the Annual Practice, 1890-91, p. 298; *Sheppards & Co.* v. *Wilkinson* (1); *Zœdone Co.* v. *Barret* (2); *Newman* v. *Lever* (3); *Jackson* v. *Murphy* (4); *Mersey Steamship Co.* v. *Shuttleworth & Co.* (5); *Bacon* v. *Turner* (6).

Inverarity, for the defendant:—Section 491 of the Code gives the defendant the right to apply for compensation "in any suit;" and s. 532 only prohibits the defendant from appearing for the purpose of defending the suit: see also s. 533. The application here is not an independent cross claim, but is an application for compensation for something done in the suit: so the English cases are no guide. The Code permits this application.

Scott, for the plaintiff, *contra*.

JUDGMENT.

21*st July*, 1894. STARLING, J.—This is a summary suit brought upon two promissory notes signed by, and one bill of exchange accepted by, the defendant. When the plaint was presented, an application was made for the arrest of defendant before judgment, on the ground that he was disposing of his property with intent to defeat and delay the execution of any decree which might be passed against him, which was granted, and the defendant was arrested and remained in jail for some days.

On the 21st June last, Mr. Inverarity, for the defendant, applied for leave to defend the suit on various grounds. Some of the [719] grounds of defence set up appeared, on inspection of the documents, not to be sustained by the documents themselves. Another ground was that the defendant wished to make a claim under s. 491 of the Civil Procedure Code (XIV of 1882) for compensation for arrest before judgment on insufficient grounds, which in my then opinion was not a defence within the meaning of chap. 39 of the Code, and the remaining ground was that the defendant at the time of suit brought was not a resident in Bombay. I thought there was a bare possibility of his showing that, but so slight that I did not consider the defence was a *bona fide* one, as he apparently had no substantial defence to the claim for the payment of the bills; consequently, I only gave him leave to defend on payment of Rs. 3,000 into Court.

The payment was not made, and on the 25th June the case came on for hearing as a summary suit. On that occasion Mr. Inverarity, for the

(1) 6 Times Law Rep. 13.
(2) 26 Solicitor's Jour. 657.
(3) 4 Times Law Rep. 91.
(4) 4 Times Law Rep. 92.
(5) 11 Q. B. D. 531.
(6) 3 Ch. D. 275.

1894
JULY 21.
ORIGINAL CIVIL.
18 B. 717.

defendant, applied to be heard to advance his claim under s. 491. I heard his argument and reserved my decision, but allowed the plaintiff in the meantime to prove his case, and passed judgment for him for the amount claimed, but directed that the decree should not be drawn up until further orders.

After reading the English cases referred to on that occasion I came to the conclusion that I ought to have some materials before me from which I could judge whether there was any *prima facie* case made for compensation under s. 491, and not merely decide the point whether a defendant in a summary suit who was not allowed to appear and defend was competent to make such an application. Accordingly the whole matter was so argued on the 20th July, when I reserved my judgment.

In England, cross claims advanced in summary suits on negotiable instruments and in cases of specially endorsed writs, in which a plaintiff can sign judgment as a matter of course, are treated as a defence to the action; but then it must be remembered that, under the English practice, cross demands are allowed to be set up as a defence to any suit. In this country the case is different. The Civil Procedure Code (XIV of 1882) does not provide in general terms for a cross demand being set up by a **[720]** defendant as a defence to a suit filed against him, and the only case in which a cross demand can be so relied upon by a defendant is where it arises out of the very transaction sued upon, and is in the nature of a set-off. See *Kishorchand* v. *Madhowji* (1).

In ordinary cases, therefore, cross demands would not be a defence to a summary suit; but s. 491 provides that the special cross demand set up in this case may be taken into account in any suit, and any amount awarded as compensation be provided for in the decree, and thus *pro tanto* be a defence to the plaintiff's claim in the suit. Consequently I think I was not right in refusing the claim of defendant to defend this summary suit on the ground of his having this cross demand to urge, but I ought to have proceeded on the 21st June, as I have eventually done, and heard the application for leave to defend on that ground on its merits.

Has, then, the defendant shown that there is a *prima facie* case against the plaintiff of an application for an arrest "on insufficient grounds"? This wording of s. 491 is not, to my mind, satisfactory. How can I say that the plaintiff has applied on "insufficient grounds" when a Judge of this Court on hearing the plaintiff has been satisfied that the grounds he alleged were sufficient, and has issued a warrant of arrest? The fact that the defendant was subsequently released from custody does not affect the question. What I have to look to is, whether the plaintiff, or rather his agent, had a knowledge of facts sufficient to justify him in applying to a Judge for the arrest of the defendant before judgment? I think, therefore, I must interpret the words "on insufficient grounds" as being equivalent to "without reasonable and probable cause." Has the defendant, then, made out a *prima facie* case that the plaintiff had no reasonable and probable cause for the defendant's arrest? [His Lordship then referred to the evidence at length and continued :—]

Taking all these facts into consideration, I find it difficult to come to the conclusion that there is a *prima facie* case of want of reasonable and probable cause.

---

(1) 4 B. 407.

1894
JULY 21.

ORIGINAL CIVIL.

18 B. 717.

[721] Under these circumstances I must refuse the defendant leave to appear and urge this claim; but in so doing I do not deprive him of all opportunity of obtaining redress for the wrongs which he alleges he has suffered, for he is still at liberty, if so advised, to file a suit against the plaintiff for abuse of the process of the Court.

Attorneys for plaintiffs:—Messrs. *Roughton and Byrne.*
Attorneys for defendants:—Messrs. *Framji and Moos.*

---

18 B. 721.

APPELLATE CIVIL.

Before Mr. Justice Candy and Mr. Justice Fulton.

SHRI DHUNDIRAJ GANESH DEV AND OTHERS (*Original Plaintiffs*), *Appellants v.* GANESH (*Original Defendant*), *Respondent.**

[13th November, 1893.]

Compromise—Set-off—Equitable defence—Suit by trustees to eject a trespasser from trust property—Civil Procedure Code (Act XIV of 1882), *s.* 539.

Dharnidhar was the manager of a religious endowment called the Chinchvad *Sansthan*. On his death in 1852, disputes arose betwen Chinto and Ganesh regarding the management of the *sansthan*, each claiming to be the heir and successor of Dharnidhar. After a long litigation they entered into a compromise in 1881, by which a portion of the *sansthan* property, consisting of certain *inam* villages, lands, and *varshasans*, were assigned to Ganesh, and Chinto was left in charge of the rest of the *sansthan* property, together with all the rights, privileges, and *manpans* enjoyed by the hereditary trustee of the endowment. In 1886 by a decree made in a suit called the "Charity suit," Chinto was removed from his office, and the plaintiffs were appointed trustees in his place. In 1889 the plaintiffs filed the present suit to set aside the compromise of 1881, and recover back the *sansthan* property assigned to Ganesh under that compromise. Ganesh pleaded, by way of set-off or equitable defence, that if the plaintiffs were at liberty to set aside the compromise, they were bound to restore to him in lieu of the trust property assigned to him under the compromise certain private property belonging to his adoptive father which he had given up.

Held, that Ganesh could not claim—as a set-off or as an equitable defence—to recover from the plaintiffs the private property in question, there being nothing in the compromise to show that there was any exchange of private property for trust property.

Held, also, that the suit did not fall under s. 539 of the Code of Civil Procedure (Act XIV of 1882).

[R., 20 B. 250 (253); 24 B. 170 (181) = 1 Bom. L.R. 649; 33 C. 789 (804) = 10 C.W.N. 581; 2 C.L.J. 431 (439).]

[722] APPEAL from the decision of Rao Bahadur Chunilal Maneklal, First Class Subordinate Judge of Poona, in suit No. 417 of 1889.

This suit was filed by the trustees of a religious and charitable endowment, called the Chinchvad *Sansthan*, to recover certain property belonging to the *sansthan*.

The circumstances out of which it arose were as follows:—

In 1852 Shri Dharnidhar Dev, the manager of the Chinchvad *Sansthan*, died, leaving behind him three widows, Bayabai, Laxmibai, and Bahinabai.

On his death disputes arose regarding the management of the *sansthan*. There were two claimants to the management: (1) Ganesh, the defendant,

---

* Appeal, No. 88 of 1891.

who alleged himself to be the adopted son of the deceased, and (2) Bajaji Govind, who disputed the alleged adoption, and claimed to succeed as the senior male representative of the eldest branch of the deceased's family.

In 1863 Bajaji filed a suit against Laxmibai, one of the widows of the deceased Shri Dharnidhar Dev, to recover possession of the *sansthan* property. Pending the suit Bajaji died, and the suit was continued by his son Chinto, who on July, 1874, obtained a decree in his favour. In execution of this decree Chinto took possession of nearly all the property belonging to the *sansthan*.

Meanwhile in 1871, and during the pendency of the litigation between Chinto and Laxmibai, Ganesh (the present defendant) filed a suit against Chinto (No. 957 of 1871) to establish his status as the adopted son of Shri Dharnidhar Dev. This suit was decided in 1874 by the First Class Subordinate Judge of Poona in favour of Ganesh. Chinto appealed against this decision, and thereupon on the 20th July, 1874, Ganesh withdrew his suit under s. 97 of the Civil Procedure Code (Act VIII of 1859).

In 1879, Ganesh filed a suit in *forma pauperis* against Chinto to recover possession of the *sansthan* property. His application for leave to sue as a pauper having been rejected by the Court of first instance, he appealed to the High Court.

In 1881, while this appeal was pending, both Ganesh and Chinto entered into a compromise under which certain *sansthan* **[723]** properties were to be made over to Ganesh, and in return Ganesh was to abandon all claim whatever in respect of the Chinchvad *Sansthan*. In pursuance of this compromise, Chinto assigned the specified properties to Ganesh.

In 1883 a suit was brought with the sanction of the Advocate-General, under s. 539 of the Code of Civil Procedure (Act XIV of 1882), for the removal of Chinto from the management of the *sansthan* on account of his misconduct as a trustee. In this suit the High Court ultimately passed a decree (1) ordering his removal from the office, and appointing a receiver to take charge of the property belonging to the *sansthan*.

In 1889 the receiver filed the present suit against Ganesh to recover possession of certain *sansthan* property, particularly the property which had been assigned to him by Chinto under the compromise of 1881. This suit was continued by the trustees of the *sansthan* who were appointed by the Court in 1890.

The defendant Ganesh pleaded (*inter alia*) that he was the adopted son of Shri Dharnidhar Dev and as such had a right to manage the property in dispute in accordance with the past practice of the *sansthan*. He further pleaded, by way of set-off or equitable defence, that the plaintiffs were not entitled to recover the trust property unless and until they restored to him the private property which had belonged to his deceased adoptive father.

The First Class Subordinate Judge held that the defendant was entitled to the set-off claimed. He was of opinion that the plaintiffs had improperly disputed the defendant's adoption and his right to the *private* property of Dharnidhar Dev. He ordered that the plaintiffs should recover from the defendant certain specified properties on condition that they relinquished certain other property to him.

The decree was as follows:—

"I, therefore, award the plaintiffs' claim for Khar Narangi and Chinchavli, the *fad* at Narangi and the Alibag treasury allowance and a

(1) 15 B. 612.

1893
NOV. 13.
APPELLATE CIVIL.
18 B. 721.

portion of Charholi, *on condition* that they (plaintiffs) do relinquish the *sansthan's* claim to Rs. 582-12-0 out of Banere and 2 chahurs and 9 bighas of land as described in the second *farkhat*, and to one-half of the self-acquisitions of Dharnidhar Dev, which consist of the villages [724] of Tandli, Gozegaon, Dewas, Baroda allowance, Chandrapur, Dasak, and the Nizam's grant, and on the further condition that they do deliver possession of so much of the said properties as might be in their hands or might hereafter fall into their hands. . . . . The plaintiffs have wrongly disputed the defendant's adoption and his right to the private property of Dharnidhar Dev. The defendant in his turn has wrongly contended that the *sansthan* is not a public charitable institution. I, therefore, order that parties do bear their own costs."

From this decision the plaintiffs preferred an appeal to the High Court.

Ganpat Sadashiv Rao, for appellants (plaintiffs).—The lower Court was wrong in passing a conditional decree. The defendant is not entitled to claim in this suit the private property belonging to his alleged adoptive father. His cross claim is in the nature of a set-off. The Court had no jurisdiction to entertain it. Under s. 111 of the Code of Civil Procedure (XIV of 1882) a set-off is allowed in those cases only in which there are cross claims for money. This is not a case of that kind. If it does not fall under s. 111 there is no other provision in the Code allowing a set-off of the kind claimed by the defendant.

[FULTON, J.—What is the effect of s. 216 of the Code of Civil Procedure? Its provisions apply whether a set-off is admissible under s. 111 or *otherwise*.]

I admit that s. 111 is not exhaustive. It does not take away any right of set-off, whether legal or equitable, which parties would have independently of its provisions. But even then, in the case of a set-off not falling within s. 111 of the Code, the cross claims must both be for money. Section 216 is clear on the point. It shows that where a set-off is allowed, the decree shall state what *amount* is due to the plaintiff and what amount is due to the defendant, and shall be for the recovery of any *sum* that may appear to be due to either party. It is, therefore, perfectly clear that a set-off is admissible only when both the original claim and the counter-claim are for money and for money only. Here the claim is not for money. It may be urged that the defendant has what may be called an equitable right of set-off. But before an equitable set-off can be allowed, it must be shown that the claim of the plaintiff as well as that of the defendant arises out of one and the same transaction [725] or are so connected together as to make it inequitable that one party should succeed and the other be driven to a separate suit. This is the principle laid down by a series of decisions of all the Courts in India—*Kishorchand* v. *Madhowji* (1); *Bhagbat* v. *Bamdeb* (2); *G. Chisholm* v. *Gopal Chunder* (3); *Pragji Lal* v. *Maxwell* (4); *Niaz Gul Khan* v. *Durga Prasad* (5); *Brojendra Nath Das* v. *The Budge-Budge Jute Mill Company* (6); *Stephen Clark* v. *Ruthnavaloo* (7). Here there is no connection whatever between the plaintiffs' claim to the trust property in dispute and the defendant's claim to his private property. The defendant's counter

(1) 4 B. 407. (2) 11 C. 557. (3) 16 C. 716. (4) 7 A. 284.
(5) 15 A. 9. (6) 20 C. 527. (7) 2 M. H. C. R. 296.

claim is, therefore, unsustainable in the present suit. He should be referred to a separate suit. The conditional decree passed by the lower Court is, therefore, bad.

Macpherson (with him *Mahadev Bhaskar Choubal*), for the respondent (defendant).—Our claim is not in the nature of a set-off. It is a claim to an equitable restitution of property. We say, he who seeks equity must do equity. If the present trustees of the *sansthan* are at liberty to repudiate the compromise between Chinto and Ganesh, and treat it as a nullity, the parties must be restored to the *status quo ante*. The trustees cannot recover the trust property without restoring to the defendant his private property and all the rights that he gave up at the time of the compromise. Under s. 64 of the Indian Contract Act (IX of 1872) a party to a voidable contract may rescind it; but he is bound to restore any benefit that he may have received thereunder to the person from whom it was received. So, too, under the Transfer of Property Act (IV of 1882) a transferor under a voidable contract of sale is bound to restore the purchase-money on the rescision of the contract. See also Story's Equity Jurisprudence, s. 709. The defendant gave up considerable private property at the compromise; he is, in equity, entitled to get it back if the compromise is set aside. The compromise was in the nature of a family arrangement between two rival claimants to the management of the Chinchvad **[726]** *sansthan*. Both were engaged in litigation for a long series of years. That litigation was ultimately brought to an end by this compromise. It was, therefore, valid and binding on both. The compromise of a doubtful claim, if made *bona fide*, will be upheld even though the claim may not be well founded—*Trigge* v. *Lavallee* (1); *Miles* v. *New Zealand Alford Estate Co.* (2) Chinto could not have repudiated this compromise without restoring all the benefits he received under it. His successors in the trust have no better right than he had. We say, therefore, that the condition attached to the award of the plaintiffs' claim is perfectly just and equitable. We say further that the plaintiffs cannot sue to recover the trust property without the sanction of the Advocate-General, as provided under s. 539 of the Code of Civil Procedure. The suit should, therefore, be dismissed.

Ganpat Sadashiv Rao in reply.—The compromise between Chinto and Ganesh does not show that there was an exchange of *sansthan* property for private property belonging to Ganesh's family. The compromise relates solely and entirely to *sansthan* property. It purports to divide the *sansthan* property between the two claimants. But it makes no mention whatever of any private property belonging to Ganesh. What he gave up was his righs to the bulk of the *sansthan* property, and to all the rights and *manpans* of the chief ministrant at the shrine of Shri Mangal Murti. There was no dispute, at the time of the compromise, about the private property of Ganesh. That being so, there can be no restitution of private property. If Ganesh has any claim to it, he must be referred to a separate suit. But he cannot claim it in this suit by way of set-off. Then, as to the applicability of s. 539 of the Code of Civil Procedure, I submit that this case does not fall within its provisions. This is not a suit to remove a defaulting trustee from the management of a public charity. It is a suit brought by the trustees of a charity to recover trust property from the possession of a trespasser. In such a case the consent of the Advocate-General is not necessary—*Vishvanath Govind* v. *Rambhat* (3).

---

(1) 15 Moore's P. C. C. 270 (292). (2) 32 Ch. D. 266. (3) 15 B. 148.

1893

NOV. 13.

APPELLATE CIVIL.

18 B. 721.

JUDGMENT.

[727] CANDY, J.—This suit was commenced in December, 1889, by the manager and receiver of the Chinchvad Devasthan appointed under the decree of the District Judge, Poona, in suit No. 2 of 1883 (known commonly as the Charity suit), and was continued by the trustees of the said *devasthan* appointed under the scheme drawn up by the High Court on 19th February, 1890, in appeal from and confirming the said decision of the District Judge (I. L. R., 15 Bom., 612). By cls. 18 and 19 of the said scheme the trustees are to institute suits and other proceedings and to continue and carry on such as have already been initiated by the present receiver on behalf of the *devasthan* for the purpose of recovering possession of the properties belonging to the *devasthan*, which have improperly gone into the possession and enjoyment of strangers, and the revenues of which are not applied for the purposes of the *devasthan*.

The circumstances under which the present suit was commenced are as follows:—Chinto Bajaji was the manager of the *devasthan*, and had succeeded in obtaining possession of nearly all the property appertaining thereto. One Genesh or Ganpat was a rival claimant to the *gadi*. He asserted that he had been adopted by a late manager, Dharnidhar, on his death-bed. This alleged adoption was, however, disputed. Suit No. 957 of 1871 had been filed by Ganesh against Chinto (and Venubai, widow of a son of Dharnidhar who had predeceased his father) for a declaration of his title as adopted son of Dharnidhar. On 3rd January, 1874, the Subordinate Judge decreed in his favour; but on Chinto appealing to the District Court, Ganesh on 20th July, 1874, withdrew his suit under s. 97 of Act VIII of 1859 without obtaining leave to bring a fresh suit. On 6th November, 1874, Ganesh applied to the District Court for permission to withdraw his previous withdrawal; but this was refused (28th November, 1874); and the High Court on 7th December, 1874, refused to interfere with this order.

In the meanwhile, Ganesh had brought a suit (No. 16 of 1873) in the Court of the Agent for Sardars against Laxmibai, widow of his alleged adoptive father, and on 10th January, 1874, he obtained a consent decree awarding him possession of the *devasthan* [728] property. On 31st July, 1874, Chinto also obtained a decree in the Court of the Agent for Sardars (No. 12 of 1873) against Laxmibai, awarding him possession of the *devasthan* property, and Chinto at once in August, 1874, executed that decree. So when Ganesh attemped execution of his decree, No. 16 of 1873, he was obstructed by Chinto. In June, 1878, Ganesh applied to the District Court for permission to bring a suit, in *forma pauperis*, against Chinto, on the ground that Chinto obstructed him in executing his decree, No. 16 of 1873. But he withdrew that application on Government reversing the decree of the Agent of Sardars (No. 12 of 1873). Subsequently, on Government restoring the decree of the Agent, Ganesh renewed his application (May, 1879), which was rejected by the District Court on 13th February, 1880.

Ganesh then appealed to the High Court, but subsequently withdrew his appeal, Chinto and he having made an amicable settlement dated 23rd July, 1881. This document No. 157 (73 in the Charity suit), after reciting the disputes between the parties, goes on to state that the following property "belonging to the *sansthan*" should be given to Ganesh:—

1. The whole of the village of Khar Naranji and half the village of Chinchavli. 2. The wada at Khar Narangi. 3. The nawa wada at

Chinchvad. 4. In order to pay off a mortgage on Khar Narangi and Chinchavli, Chinto was to pay Rs. 16,000 to Ganesh, and for that purpose was to pay him Rs. 500 annually, with interest, from the revenues of the village of Charholi. 5. Ganesh was to perform the worship of the deity of the temple of Moroya at Chinchvad; but all other rights of worship and *manpan* at Chinchvad, Moreshvar and Theur were to belong to Chinto. 6. Ganesh was within three months to give up peaceable possession to Chinto of the five shares in Tulapur belonging to the *sansthan*, which Ganesh had got entered in his name, and till this was done Ganesh was to pay Rs. 160 annually to Chinto, the same being deducted from the payments out of the revenues of Charholi above mentioned. 7. The *dasak* allowance, Rs. 20, received annually from the Haveli kacheri, was to be entered in Chinto's name, and received by him. 8. Ganesh on recovering **[729]** the village of Tandli, for which he had filed a suit, was to give the same into the possession of Chinto.

Except as regards the properties above mentioned, Ganesh was to abandon all claim whatever in respect of the Chinchvad *sansthan*.

Chinto thus remained manager unmolested; but in 1883 the "Charity suit" was commenced under s. 539 of the Civil Procedure Code, and Chinto was eventually removed from his office.

The receiver of the *sansthan* then brought the present suit against Ganesh to recover the following properties as belonging to the *sansthan*, and, therefore, wrongfully in possession of any one other than the manager, *viz.*:—

1. The villages of Khar Narangi, and, 2, Chinchavli; 3, the wada at Khar Narangi; 4, an allowance paid from the Alibag treasury; 5, the portion of the revenues of Charholi, as shown in the settlement above noted; 6, the new wada at Chinchvad; 7, the five shares of Tulapur; 8, the wadi (garden or irrigated land) at Naigaum.

The Subordinate Judge awarded the claims numbered 1 to 5, and as defendant made no appeal and paid no stamps on cross-objections, it was impossible for us to hear any arguments of counsel against the award of item No. 5. He did not dispute the award of items Nos. 1 to 4.

It remains then to consider the items 6, 7 and 8 which the Subordinate Judge did not award to plaintiffs, and against the rejection of which items plaintiffs have filed this appeal, No. 88 of 1891. During the course of the argument, Mr. Rav for plaintiffs abandoned the claim as regards the item No. 8. Therefore the only items remaining for consideration are Nos. 6 and 7. The Subordinate Judge would have awarded these to the plaintiffs, had he considered them to be *sansthan* property; but he held that they were the private property of the late manager, Dharnidhar, and, therefore, the trustees could not claim to recover possession of the same. No doubt, if they are not *sansthan* property, the trustees have no concern with them: **[730]** but we think that it is clear that one at least of these items has for many years been treated as *sansthan* property.

[The Court then examined the evidence and found that property No. 6 above mentioned was not private property, but belonged to the *devasthan*, and that the plaintiffs (trustees) should recover it. As to No. 7, the Court found that it was private property and that the plaintiffs were not entitled to it. The Court then continued:—]

So far we have treated of the items disallowed by the Subordinate Judge. Leaving aside for the present the question of mesne profits,

1893
NOV. 13
APPELLATE CIVIL.
18 B 721

which the plaintiffs also claimed, but which the Subordinate Judge disallowed, and against the rejection of which plaintiffs have appealed, we come now to the condition attached by the Subordinate Judge to his award of the various items of *devasthan* property to the plaintiffs. That condition is that the plaintiffs do relinquish the *sansthan's* claim to the *private* property of Dharnidhar II, *viz*:—(*a*) Half share of the village of Banere ; (*b*) two chahurs, nine bighas of land as described in Ex. 288 [it was admitted in argument that this should be half a chahur nine bighas] ; (*c*) half the self-acquisitions of Dharnidhar II, *viz*. :—(1) The village of Tandli ; (2) the Gozegaon allowance ; (3) the Dewas allowance ; (4) the Baroda allowance ; (5) the Chandrapur allowance ; (6) the Dassak allowance; (7) the Nizam's grant.

[The Court then stated the evidence and held as to items (*c*), (1) to (7) inclusive that they belonged to the *devasthan*. As to items (*a*) and (*b*), there was a difficulty arising from the fact that the manager of the *devasthan* had never made any distinction between the portion which he enjoyed as private property and those managed by him for the *devasthan*. The Court then continued :—

But it is unnecessary to consider this difficulty further. For, we are of opinion that plaintiffs have rightly appealed against the condition attached by the Subordinate Judge to his award. It is not such an equitable defence as can be raised by the defendant in the present suit. This is apparent when we consider the position of the parties. Chinto was the manager of the **[731]** *sansthan* ; he had succeeded in obtaining recognition from Government and possession of all or nearly all the *sansthan* property. Ganesh was a rival claimant, who had indeed obtained a decree against Chinto establishing his position as adopted son of Dharnidhar, but who on appeal made by Chinto was persuaded to entirely withdraw his claim. Under the compromise or settlement of July, 1881, Ganesh relinquished all claim to be manager of the *sansthan* in favour of Chinto, and was content to take in satisfaction of all claims certain items of "*sansthan* property." For the sake of argument it may be assumed that Chinto, were he still the manager of the *sansthan*, would be unable to repudiate the compromise, and would be bound to act up to its terms. Possibly the compromise would raise an equity between Chinto and Ganesh. But here the plaintiffs are the trustees appointed by the Court after ordering the removal of Chinto, the defaulting trustee. Chinto must be regarded as dead. His successors in the trust claim to recover part of the trust property. Chinto's act in buying of a rival claimant cannot be regarded as a proper and reasonable exercise of his office as trustee. His proceeding was not for the benefit of the trust. On the contrary, if Ganesh was really Dharnidhar's adopted son, Chinto had no authority to act ; and if Ganesh was not Dharnidhar's adopted son, then Chinto had no right to alienate trust property to him. We adopt with full concurrence the language of the late Mr. Justice Telang, who, when referring to this compromise wrote (I. L. R., 15 Bom., 637) :— "When Chintaman Bajaji parted with these two villages (Khar Narangi and Chinchavli) in favour of Ganesh Dharnidhar Dev, he was apparently acting as full owner of the villages, and not as trustee of them on behalf of the Chinchvad *sansthan*. He was certainly not professing to act as trustee, and at least impliedly he was repudiating the trust. Any estoppel, then, binding upon him in consequence of that act, would be binding, not on the succeeding trustee, who says Chintaman Bajaji was not full owner,

but on Chintaman Bajaji's legal representatives in his personal capacity." Accordingly the High Court upheld the objections of the trustee-respondents in that case, and refused to consider the settlement of 1881 as binding upon Chinto's successors in office. How, then, **[732]** can Ganesh in a suit for ejectment from trust properties plead that the trustees must relinquish all claim of the *sansthan* to the half share of Banere and the ½ chahur 9 bighas, and deliver the same into his (Ganesh's) possession ?

It was contended by the learned counsel for Ganesh that this was not a counter-claim or set-off, but an equitable defence ; and this apparently was the view taken by the Subordinate Judge, who seems to have regarded the settlement of 1881 as an exchange of properties, Ganesh giving up the *private* property of Dharnidhar, to which he was entitled as Dharnidhar's adopted son, and in exchange receiving part of the *sansthan* property. But we are of opinion that this view is directly contradicted by the language of the compromise, in which, the adoption not being admitted, there is not a word about the *private* estate of the late Dharnidhar, or about any exchange being effected. If Ganesh is really the legally adopted son of the late Dharnidhar, and if it is open to him now to establish that status, he must do so in a separate suit against the trustees. But he cannot raise this plea as an equitable defence in this suit, in which the trustees seek to eject him from the properties of which he obtained possession under the compromise with the late manager, the very basis of that compromise being that he abandoned his claim to be manager on the strength of his alleged adoption by Dharnidhar, Chinto's action was *ultra vires* in putting Ganesh in possession of *sansthan* property. Chinto's successors are bound to contest that action, and to recover for the benefit of the *sansthan* property belonging to the trust. If plaintiffs are entitled to eject defendant from *sansthan* property, then it is difficult to understand how defendant can claim, as a set-off or as an equitable defence, to recover possession from the plaintiffs of those portions of property which the plaintiffs hold as *sansthan* property, but which defendant says are Dharnidhar's private property, and to which defendant says he is entitled as Dharnidhar's son. For, as shown above, the trustees are not Chinto's representatives, but hold by an entirely independent title, Chinto having been removed from his office. For these reasons we are of opinion that the conditions attached by the Subordinate Judge to his award of the properties to the plaintiffs must be set aside.

[733] As to the further arguments urged by the learned counsel for defendant-respondent, that the *devasthan* properties are private and not public *devasthan*, and that the present suit should have been brought under s. 539, Civil Procedure Code, we are of opinion that the arguments are invalid. It is idle now, in the face of the decisions of this Court reported at I.L.R., 15 Bom., 612 and 625, to contend that the Chinchvad *sansthan* is not a *public devasthan*. It is true that Ganesh is not in one sense a "stranger," as he is apart from his alleged adoption a member of the Dev family, and by the compromise with Chinto he was permitted to perform the worship at Moroya's temple at Chinchvad ; but as a person who is not manager, he is a stranger and trespasser in possession of *sansthan* properties. The trustees, therefore, are clearly entitled to eject him.

It only remains to consider the question of mesne profits. Though, as just remarked, defendant must be regarded as a trespasser, due regard must be paid to the fact that the compromise by which defendant obtained possession of the *sansthan* properties was sanctioned, if not

1893
Nov. 13.
APPELLATE CIVIL
18 B. 721

brought about, by Mr. Kanitkar and Mr. Gadgil, the former being one of the present trustees, the latter being the gentleman who was subsequently the manager and receiver appointed by the District Court. There can be no doubt that at the time the arrangement was thought to be the best for all concerned. Under these circumstances we do not think it would be right to interfere with the Subordinate Judge's decision refusing to award mesne profits.

We amend the decree of the Subordinate Judge by awarding to the plaintiffs the new wada at Chinchvad, and by striking out the conditions attached by the Subordinate Judge to his award of the properties, possession of which he gave to plaintiffs.

Under the circumstances under which this litigation was commenced, we think that the most equitable order will be to let the plaintiffs recover their costs from the estate, and direct that defendant bear his own costs throughout.

---

18 B. 734.

[734] APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Bayley.

NAVALCHAND NEMCHAND (*Original Plaintiff*), *Applicant v.* AMICHAND TALAKCHAND AND ANOTHER (*Original Defendants*), *Opponents.** [14th November, 1893.]

Mamlatdar—Jurisdiction—Decree in possessory suit in Mamlatdar's Court—Execution of decree stayed by proceedings in Subordinate Judge's Court—Suit in Subordinate Judge's Court ultimately dismissed—Subsequent application to Mamlatdar for execution of decree in possessory suit—Jurisdiction of Mamlatdar to grant order for execution—Limitation—Deduction of time spent on proceedings in second suit—Limitation Act (XV of 1877), s. 14.

A Mamlatdar having in a possessory suit passed a decree awarding possession of certain land to the applicant, the opponents instituted a suit in the Court of the First Class Subordinate Judge for a declaration that the land in question was their property, and for an injunction to restrain the applicant from obstructing them in the enjoyment of their rights. Owing to this suit, the Subordinate Judge stayed execution of the Mamlatdar's decree. The opponents' suit was subsequently dismissed by the Subordinate Judge, whose decree was ultimately confirmed by the High Court in second appeal. The applicant then applied to the Mamlatdar for the execution of his decree in the possessory suit. The Mamlatdar rejected the application, on the ground that the decree of the High Court in the civil suit prevented him from executing his decree.

Held, that the applicant was entitled to obtain from the Mamlatdar an order for the execution of his decree unless it was barred by limitation. It was not barred, inasmuch as in computing the period of limitation allowance was to be made for the time during which the decree remained in abeyance by reason of the proceedings in the other suit. Section 14 of the Limitation Act (XV of 1877) applies to proceedings in execution (*Hira Lall* v. *Budri Dass*) (1).

[Diss., 7 Ind. Cas. 886 (889); F., 24 Ind. Cas. 195=27 M.L.J. 25.]

APPLICATION made under the extraordinary jurisdiction of the High Court (s. 622 of the Civil Procedure Code, XIV of 1882) to set aside the order of the Mamlatdar of Chorasi in possessory suit No. 57 of 1884 dated 17th December, 1892.

---

* Application No. 57 of 1893 under extraordinary jurisdiction.

(1) 7 I.A. 167.

In possessary suit No. 57 of 1884 in the Court of the Mamlatdar of Chorasi the applicant obtained a decree for possession of the land in dispute against the defendants.

The opponents then sued him in the Court of the First Class Subordinate Judge at Suart to obtain a declaration that [735] the land was theirs, and an injunction restraining him from obstructing him in the enjoyment of their rights, and on the 17th January, 1885, the First Class Subordinate Judge, on their application, stayed the execution of the decree obtained by the applicant in the Mamlatdar's Court.

On 26th January, 1886, the opponents' said suit was dismissed by the Subordinate Judge, but in appeal the District Judge on 22nd December, 1887, partially awarded their claim, Against this decree the applicant (*i.e.* the defendants in that case) appealed to the High Court, which remanded the case to the District Judge. The District Judge, however, adhered to his previous decision, and on 23rd December, 1889, passed a decree similar to that which he had passed on the 22nd December, 1887. The applicant again appealed to the High Court, which on the 22nd April, 1891, reversed the decree of the District Judge and restored the decree of the Subordinate Judge dismissing the suit.

The applicant then on the 15th March, 1892, applied to the Mamlatdar for execution of the decree passed in his favour in possessory suit No. 57 of 1884, but the Mamlatdar on 17th December, 1892, made the following order :—

"You are informed that the decree of the Court of the First Class Subordinate Judge having been confirmed by the Honourable the High Court, the said decree cannot be (ordered to be) executed by this Court. If you like, you may take steps for the same in the Civil Court."

The applicant thereupon applied to the High Court under its extraordinary jurisdiction, and obtained a rule *nisi* calling upon the opponents to show cause why the order of the Mamlatdar should not be set aside on the ground that he had illegally refused to exercise jurisdiction vested in him by law.

Manekshah J. Taleyarkhan appeared for the applicant in support of the rule.—The Mamlatdar was wrong in rejecting our application for execution. In the suit before the Mamlatdar we claimed possession, and by his decree possession was awarded to us. In the civil suit the opponents had merely claimed a declaration of their right, and their suit was dismissed. The [736] civil suit, therefore, did not affect the previous decree in the possessory suit. That decree remained to be executed, and the Mamlatdar had full jurisdiction to execute it—*Shankar* v. *Martandrav* (1) *Baji Dev* v. *Sadashiv* (2). The time spent in the proceedings in the civil suit should be deducted in computing the period of limitation for the present application—Article 14 of the Limitation Act ; *Hira Lall* v. *Budri Dass* (3).

JUDGMENT.

SARGENT, C, J.—The Mamlatdar was wrong in holding that the decree of the High Court confirming that of the Subordinate Judge prevented his executing the order passed by him in the possessory suit on the 17th December, 1884. That decree had the effect of dismissing the opponents'

(1) P. J. (1889) p. 167. (2) 5 B.H.C.R.A.C.J. 158. (3) 7 I. A. 167.

1893
NOV. 14.
APPELLATE CIVIL.
18 B. 734.

suit, by which they asked for a declaration that the land in question was their property, and for an injunction to restrain the present applicant from obstructing them, and left matters altogether as they were under the Mamlatdar's order. That order, therefore, remains to be executed, unless barred by art. 179 of the Limitation Act. If the periods during which the interlocutory judgment of the Subordinate Judge passed on 17th January, 1885, and the decree of the District Court on 22nd December, 1887, were in force be omitted, the order would have been in force for less than three years when the application to the Mamlatdar to enforce his order for possession was actually made. See s. 14 of the Statute of Limitation and *Hira Lall* v. *Budri Dass* (1) which makes it applicable to proceedings in execution.

We must, therefore, in the exercise of our extraordinary jurisdiction, discharge the order of the Mamlatdar and direct him to execute his order of 17th December, 1884, by putting the applicant in possession.

Order discharged.

---

18 B. 737.

[737] APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Fulton.

SHIDDAPA (*Original Plaintiff*), *Applicant* v. IRAVA AND ANOTHER (*Original Defendants*), *Opponents.** [21st November, 1893.]

Practice—Procedure—Stamp—Evidence—Document not sufficiently stamped admitted in evidence by lower Court—Appeal Court cannot exclude it—Stamp Act (I of 1879), s. 4, cl. 3.

A Court of first instance having admitted in evidence a document improperly stamped, the appellate Court cannot question its admissibility.

[**F.**, 8 M.L.J. 66 (68); 15 M.C.C.R. 24 (25); **R.**, U.B.R. (1897—1901) 559.]

APPLICATION under the extraordinary jurisdiction of the High Court (s. 622 of the Civil Procedure Code, Act XIV of 1882) against the decision of J. L. Johnston, District Judge of Dharwar,

Suit for damages for breach of contract.

The plaintiff alleged that under a written contract he lent Rs. 350 to the defendant, and the latter in return agreed to supply him with wheat, at eighteen seers per rupee. The defendant failed to supply the wheat, and the plaintiff brought this suit.

At the hearing the contract was put in evidence. It bore a one-anna stamp and was attested by witnesses.

The Subordinate Judge found the execution of the contract proved, and ordered the defendants to give to the plaintiff 4,200 seers of wheat, or Rs. 350 with costs.

In appeal by defendant No. 2 the Judge held that the contract was inadmissible in evidence, on the ground that it was insufficiently stamped (s. 4, cl. (*c*) of the Stamp Act I of 1879), and as the plaintiff declined to pay the stamp penalty, he reversed the decree and dismissed the suit.

The suit being of a small cause nature, in which no second appeal is allowed, the plaintiff applied to the High Court under its extraordinary

---

* Application No. 105 of 1893 under the Extraordinary Jurisdiction.

(1) 7 I.A. 167.

jurisdiction, on the ground (*inter alia*) that the contract having been once admitted in evidence without any objection either by the Court of first instance or by the defendant, and no point with regard to the stamp having been raised in the memorandum of appeal, the Judge, in appeal, erred in excluding it from evidence. He obtained a rule *nisi* calling upon the defendant to show cause why the decree of the appeal Court should not be reversed.

1893
NOV. 21.
APPELLATE CIVIL.
18 B. 737.

[738] *Shivram V. Bhandarkar* appeared for the applicant in support of the rule :—The point as to the sufficiency of the stamp was not in any way raised in the first Court. The document was there admitted in evidence, and the Judge allowed the claim based upon it. Nor in appeal was the point taken by the defendant. Nevertheless the Judge refused to go into the merits of the case on the ground that the document was inadmissible not being properly stamped. It has been held that when a document is once admitted in evidence without any objection as to the stamp in the first Court, the appellate Court cannot exclude it—*Devachand* v. *Hirachand* (1); *Gurpadapa* v. *Naro* (2); *Bhaskar* v. *Prabhakar* (3), and *The Secretary of State for India in Council* v. *Byramji* (4).

Vishnu K. Bhatavdekar, for the opponents (defendants), showed cause :—On the merits the Judge has expressed an opinion adverse to the plaintiff. He framed two issues, *viz.* (1) whether the contract was made by defendants Nos. 1 and 2, and (2) what amount should be awarded to the plaintiff, and from which of the defendants ? On both these issues the Judge found in the negative. The finding of the Judge that the document sued upon was not proved, is a finding on the merits. The Full Bench ruling in *Devachand* v. *Hirachand* (1) is not applicable.

JUDGMENT.

SARGENT, C. J.—The District Judge, in holding that he could refuse to admit the document sued on in evidence as being improperly stamped, has omitted to notice cl. 3 of s. 34 of the Stamp Act and the decisions in *Devachand* v. *Hirachand* (1), *Gurpadapa* v. *Naro* (2), also *Bhaskar* v. *Prabhakar* (3) and *The Secretary of State for India in Council* v. *Byramji* (4) to the effect that the Subordinate Judge having admitted the document in evidence, the Court of appeal cannot question its admissibility.

We must, therefore, reverse the decree and send back the case for decision on the merits, as we cannot accept the mere opinion expressed by the District Judge on the first issue as a valid finding. Costs to abide the result.

Decree reversed and case sent back.

(1) 13 B. 449. (2) *Ibid*, 493. (3) P. J. (1889), 265. (4) P. J. (1892), 345.

1893
NOV. 21.

APPELLATE CIVIL.

18 B. 739.

18 B. 739.

[739] APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Bayley.

MAHALAVU (*Original Plaintiff*), *Appellant v.* KUSAJI (*Original Defendant*), *Respondent.** [21st November, 1893.]

Dekkhan Agriculturists' Relief Act (XVII of 1879), s. 225—Amending Act (XXII of 1882), s. 9—Mortgage by agriculturist—Subsequent money decree against mortgagor—Sale of his equity of redemption in execution—Such sale invalid—Equity of redemption is immoveable property—Suit for redemption.

Raghoji, an agriculturist, mortgaged the land in dispute to the defendant in 1872. In 1875 one Dagdu obtained a decree against Raghoji (the mortgagor), who was then represented by his widow, the plaintiff. In execution of this decree Raghoji's equity of redemption was sold on the 10th February, 1883, and was bought by the son of the defendant (the mortgagee). On the 12th April, 1883, the sale was confirmed, and on the 10th November, 1883, the purchaser took formal possession of the land. In 1891 the plaintiff (widow and heir of the mortgagor Raghoji) brought this suit to redeem the mortgage and to recover possession of the land, contending that under s. 22 of the Dekkhan Agriculturists' Relief Act (XVII of 1879) the sale of the equity of redemption was a nullity. The lower Court dismissed the suit, holding that although the sale might be illegal, so long as the certificate of sale remained in force it was a bar to the plaintiff's right to redeem.

Held, that the plaintiff, being found to be an agriculturist, the Dekkhan Agriculturists' Relief Acts (XVII of 1879 and XXII of 1882) applied. The provisions of that Act applied, although the decree and order for sale under which the sale took place **[740]** were made before the Act was passed. The Act expressly forbids the immoveable property of an agriculturist to be sold in execution, and an equity of redemption is immoveable property within the contemplation of the Act. The sale, therefore, on the 10th February, 1883, of the equity of redemption in the mortgaged lands was illegal and a nullity, and was no defence to the plaintiff's suit to redeem the mortgage.

[R., 21 B. 226 (228); 37 B. 415=15 Bom.L.R. 278=19 Ind. Cas. 591.]

THIS was a second appeal from the decision of A. D. Pollen, District Judge of Poona.

Suit for redemption.

On the 28th June, 1872, one Raghoji mortgaged the lands in question to the defendant Kusaji for Rs. 400 with possession.

In 1875 one Dagdu obtained a decree against the mortgagor Raghoji, who was then dead, but was represented by his widow the plaintiff

---

* Second Appeal No. 343 of 1892.

† Section 22 of the Dekkhan Agriculturists' Relief Act as amended by s. 9 of the Amending Act of 1882:—

2. No agriculturist's immoveable property shall be attached or sold in execution of any decree or order passed whether before or after this Act comes into force unless it has been specifically mortgaged for the repayment of the debt to which such decree or order relates, and the security still subsists.

But the Court, on application or of its own motion, may, when passing a decree against an agriculturist or in the course of any proceedings under a decree against an agriculturist passed whether before or after this Act comes into force, direct the Collector to take possession, for any period not exceeding seven years, of any such property of the judgment-debtor to the possession of which he is entitled, and which, in the opinion of the Collector, is not required for his support and the support of the members of his family dependent on him, and the Collector shall thereupon take possession of such property and deal with the same for the benefit of the decree-holder in manner provided by section twenty-nine.

The provisions of section thirty-one shall, *mutatis mutandis*, apply to any property so dealt with.

Mahalavu. In execution of this decree the lands were sold on the 10th February, 1883, and were purchased by the defendant's son. On the 12th April, 1883, the sale was confirmed, and on the 10th November, 1883, the auction-purchaser took formal possession.

In 1891 the plaintiff (widow of the mortgagor Raghoji) filed the present suit claiming to redeem the mortgage and recover possession of the land.

She alleged that she and her husband (the mortgagor) were agriculturists, and that the auction sale was void, inasmuch as the equity of redemption was immoveable property, and could not be legally sold under the Dekkhan Agriculturists' Relief Act (XVII of 1879), and, further, that the sale was fraudulent. She prayed that an account might be taken, and the balance of the debt, if any, should be made payable by annual instalments of Rs. 50 each.

The defendant denied that the plaintiff or her husband was an agriculturist, and contended that the Dekkhan Agriculturists' Relief Act did not apply; and that the suit not being one to set aside the sale could not be maintained.

The Subordinate Judge found (1) that the plaintiff was an agriculturist, and (2) that the plaintiff was not entitled to question the validity of the sale. He, therefore, dismissed the suit.

On appeal by the plaintiff the Judge confirmed the decree, holding that, as long as the certificate of sale remained in force, **[741]** it was necessarily a bar to the plaintiff's suit for redemption, and the sale could not be regarded as a nullity, and that in a suit to set it aside, the former decree-holder and the auction-purchaser were necessary parties.

The plaintiff preferred a second appeal.

Mahadeo Chimnaji Apte for the appellant (plaintiff) :—The sale of the land was a nullity, and the plaintiff is entitled to redeem the mortgage and to recover possession. The point involved is whether the equity of redemption held by an agriculturist can be sold. Under s. 22 of the Dekkhan Agriculturists' Relief Act (XVII of 1879) no immoveable property of an agriculturist is liable to sale. The equity of redemption of an agriculturist is immoveable property, and it, therefore, cannot be sold. Immoveable property of an agriculturist is not even liable to attachment—*Chatur Khushalchand* v. *Mahadu* (1); *Shivram Udaram* v. *Kondiba Muktaji* (2). The sale is a nullity. Further, the proviso to s. 22 added by the Amending Act (Act XXII of 1882) lays down that the immoveable property of an agriculturist shall not be sold even under decrees passed before the Amending Act came into force on the 1st February, 1883. The decree under which the property was sold, was passed before the Dekkhan Agriculturists' Relief Act came into force; still the order under which the property was sold was passed after that Act came into operation, and that being so, the sale is governed by the original Act and the Amending Act which is part and parcel of the original Act.

Ganesh Krishna Deshmukh for the defendant (respondent) :—We object to the finding that the appellant is an agriculturist. Her husband may have been an agriculturist at the time of the mortgage in 1872, but it is not shown that the appellant was an agriculturist in the year 1891 when she filed this suit. That fact should be shown in order that the

(1) 10 B. 91.

(2) 8 B. 340.

1893
NOV. 21.

APPELLATE CIVIL.

18 B. 739.

plaintiff may get the benefit of the Dekkhan Agriculturists' Relief Act—*Tulsidas* v. *Virbussapa* (1).

[742] Next, we contend that the auction sale was not void. If the order for sale and the proceedings under which the sale was ordered took place before the Amending Act (XXII of 1882, s. 9) came into force, then the sale would not be void. There is nothing in the case to indicate the time when the attachment was levied; but it is probable that the attachment was made before, and the sale and confirmation of sale after, the coming into operation of the Amending Act, which was on the 1st February 1883, and the sale took place on the 10th February of the same year.

The language of s. 312 of the Civil Procedure Code (Act XIV of 1882) shows that if objections contemplated by s. 311 be not raised, then the Court is bound to confirm the sale. The objections under s. 311 relate only to the publishing and conducting the sale. The confirmation of sale is a necessary step which the Court must take in the absence of objections under s. 311. The proceedings with respect to the confirmation follow as a natural consequence of the proceedings of sale. The plaintiff does not allege that the sale is invalid on the grounds mentioned in s. 311; and the Court cannot set aside the sale on any other ground; and that being so, the suit must fail.

The plaintiff was a party to the former suit and, therefore, she could have made an application to set aside the sale. She did not do so, and she cannot now contend that the sale is a nullity under the Dekkhan Agriculturists' Relief Act.

Immoveable property contemplated by s. 22 of the Act means tangible property. An equity of redemption is not of that class. No doubt the Registration Act (III of 1877) lays down that an equity of redemption is immoveable property. But as that Act deals with interests in immoveable property, it includes the equity of redemption in that kind of property. Further, the definition given in the Registration Act cannot be accepted for the purposes of the Dekkhan Agriculturists' Relief Act, because under the former Act a standing crop is moveable property, while under the latter it is immoveable property.

[743] We urge that it was necessary for appellant to join the decree-holder and auction-purchaser as parties to the suit. The Judge was right in holding that the suit was not properly framed.

Further, the decree in execution of which the property was sold, was satisfied by the purchaser's son. Therefore, if the sale be set aside, the amount which was paid in satisfaction of the decree should be refunded to us in justice and equity.

Mahadeo Chimnaji Apte, in reply:—According to s. 2 of the Dekkhan Agriculturists' Relief Act, it is not necessary for a party to be an agriculturist at the time of the suit. It is sufficient if he is an agriculturist at the time of the accrual of the liability. Therefore, the question to be considered is whether the mortgagor was an agriculturist at the time of the mortgage, and the Subordinate Judge found, on the evidence, that he was. The finding of the lower Court is, therefore, correct—*Banu* v. *Krishnambhat* (2). The provisions of the Civil Procedure Code do not apply in their entirety to proceedings in execution of a decree under the Dekkhan Agriculturists' Relief Act. The amending Act clearly

(1) 4 B. 624.

(2) P.J. (1886), 159.

lays down that the immoveable property of an agriculturist cannot be attached or sold.

Though the property was purchased by the mortgagee's son, he had purchased it out of the family funds. Therefore, the purchase was for the mortgagee himself. The mortgagee is now dead, and, therefore, the question of his being a necessary party cannot arise.

JUDGMENT.

SARGENT, C. J.—This is a suit by the appellant, who was found by the Subordinate Judge to be an agriculturist, to redeem certain land mortgaged by her late husband to the defendant.

It appears that subsequently to the mortgage the equity of redemption was on the 10th February, 1883, sold in execution of a money decree obtained by a third party against plaintiff's husband (represented in the suit by the plaintiff). The defendant's son became the purchaser, and the sale was confirmed on 12th April, 1883.

The plaintiff contends that the sale of the equity of redemption in execution of the above decree was void under s. 22 **[744]** of the Dekkhan Agriculturists' Relief Act of 1879. The lower appeal Court dismissed the suit on the ground that, whatever invalidity there might be in the sale, as long as the certificate of sale remained in force, it was necessariiy a bar to plaintiff's right to redeem, and that it could not be set aside without making the decree-holder and auction-purchaser parties.

A preliminary objection was taken for the respondent (defendant) that the Subordinate Judge's finding that plaintiff was an agriculturist was contrary to law. But this objection is not, in our opinion, well founded. The Court properly made use of the fact that plaintiff's husband and son were agriculturists as showing that she gained her livelihood wholly or mainly by agriculture, which was the test when the suit was brought—*Banu* v. *Krishnambhat*(1).

The appellant's contention is that in virtue of s. 22 of the Dekkhan Agriculturists' Relief Act she is entitled to treat the sale of the equity of redemption as a nullity although uncancelled. In *Tuffazal Hossein Khan* v. *Raghunath Prasad*(2), their Lordships of the Privy Council had to consider the effect of the attachment and sale of a particular description of property with reference to s. 205 of Act VIII of 1859, and speaking of the sale of such property (which they ultimately held not to fall within the several descriptions of property mentioned in the above section) they say: "The real objection, however, to this sale, if sustainable in law, is not one of irregularity; it is one which, from its nature, as founded on a want of power in the Court, affects equally, if it be valid in law, the title of a purchaser under a strictly regular sale.

"Assuming the decision under appeal to be correct, the sale would be simply inoperative, though uncancelled."

If, then, this sale was invalid under s. 22 of the Dekkhan Agriculturists' Relief Act (XVII of 1879), it was simply inoperative, and the defendant cannot set it up in this suit as a defence to the right of the plaintiff (who is the original mortgagor's heir) to redeem the mortgage.

[745] We proceed, therefore, to consider whether the sale in question falls under that section. We cannot doubt that an equity of redemption being

(1) P.J. (1886), 159.

(2) 7 B. L. R. 186 (193) (P.C.).

1893
NOV. 21.
APPEL-
LATE
CIVIL.
18 B. 739.

an estate in the land, as it has always been considered in England and in this country, is immoveable property within the contemplation of that section. The decree, in execution of which the equity of redemption was sold, was passed prior to the Dekkhan Agriculturists' Relief Act of 1879; but the Amending Act, XXII of 1882, came into force on 1st February, 1883, before the sale took place on 10th February, 1883, by s. 9 of which the words "passed whether before or after this Act comes into force" were introduced into s. 22 of the Act of 1879 after the words "decree or order." It was suggested that the order of sale was made before the Amending Act came into force. Whether this was so or not, does not appear on the evidence in the case. But it is, in our opinion, immaterial, as s. 9 of the Amending Act of 1882 expressly provides for the case of a sale in execution of an "order" made prior to that Act.

We must, therefore, reverse the decree of the Court below and send back the case for a decree on the merits. The plaintiff to have his costs of this appeal and in both the Courts below.

Decree reversed and case sent back.

---

18 B. 745.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Fulton.

GURUNATH SHRINIVAS DESAI (*Original Defendant*), *Applicant v.* CHENBASAPPA (*Original Plaintiff*), *Opponent.** [21st November, 1893.]

Registration—Evidence—Lease—Agreement to indemnify contained in lease—Suit for indemnity.

A lease of land for nine years contained a clause by which the lessor agreed to indemnify the lessee in case he should incur any loss in consequence of disputes which might arise as to the land between the lessor and his kinsmen. The lease was not registered. After the lessee had held the land under the lease for two years, a suit for possession was brought against him, and the lessor and he were dispossessed and obliged to pay mesne profits. He then brought this suit against the lessor under the above clause in the lease.

[746] *Held*, that the lease being unregistered was not admissible in evidence and could not be looked at. The clause on which the plaintiff sued could not be separated from the lease itself, and the plaintiff's claim must, therefore, be rejected.

[F., 10 Bom. L.R. 1146 (1150) = 33 B. 610; Appl., 1 N.L.R. 47 (48); Cons., U.B.R. (1904) 4th Qr., Registration 1.]

THIS was an application under the extraordinary jurisdiction of the High Court (s. 622 of the Civil Procedure Code, Act XIV of 1882) against the decision of J. L. Johnston, District Judge of Dharwar.

In December, 1881, the applicant Gurunath (the defendant) granted a lease of certain land for nine years to the opponent Chenbasappa (the plaintiff) which contained a clause by which Gurunath agreed to indemnify Chenbasappa for any loss which the latter might incur by reason of any dispute which might arise between Gurunath and his kinsmen with reference to the land. The lease was not registered.

Chenbasappa held the land under the lease for about two years, but in 1883 one Venkaji Krishnaji sued both him and Gurunath for possession

* Application No. 78 of 1893 under extraordinary jurisdiction.

and obtained a decree and dispossessed Chenbasappa. The decree also awarded Venkaji mesne profits which Chenbasappa had to pay and which he did pay in November, 1888.

In February, 1891, Chenbasappa brought this suit against Gurunath to recover Rs. 360 under the above stipulation in his lease.

Gurunath admitted the lease, but contended that the suit was barred by limitation.

The Subordinate Judge held that the lease was not admissible in evidence being unregistered, and accordingly dismissed the suit.

In appeal the Judge held that the lease was admissible in evidence to prove the agreement to indemnify the plaintiff. He further held that the suit was not time-barred, being brought within three years from the date of the above-mentioned payment by plaintiff to Venkaji. He, therefore, reversed the decree and allowed the claim with interest at 9 per cent. per annum on Rs. 288, the amount of mesne profits paid to Venkaji from the date of the institution of the suit till payment.

The defendant applied to the High Court under its extraordinary jurisdiction, and obtained a *rule nisi* calling upon the plaintiff **[747]** to show cause why the decree should not be set aside on the ground (*inter alia*) that the Judge was wrong in holding that the lease was admissible in evidence though unregistered.

Shivram V. Bhandarkar appeared for the applicant (defendant) in support of the rule.—The lease being unregistered could not be looked at even for the purpose of determining whether the plaintiff was entitled to recover damages. The clause of indemnity being incorporated in the lease cannot be separated from it—*Raju Balu* v. *Krishnarav* (1); *Venkatrayudu* v. *Papi Reddi* (2); *Martin* v. *Sheo Ram Lal* (3). The Judge has exercised his jurisdiction illegally, and we are entitled to apply to this Court under its extraordinary jurisdiction—*Chenbasapa* v. *Lakshman* (4); *Shri Vishvambhar Pandit* v. *Shri Vasudev Pandit* (5).

Narayan Ganesh Chandavarkar appeared for the opponent (plaintiff) to show cause:—Even if the Judge's decision be wrong in law, it cannot be disturbed under the extraordinary jurisdiction—*Amritrav* v. *Balakrishna* (6); *Sakharam* v. *Parvati* (7).

JUDGMENT.

SARGENT, C. J.—The District Judge was wrong in holding that the term in the lease on which the plaintiff sued could be looked at although the lease itself required registration. That term cannot be separated from the lease itself, as the lease must necessarily be looked at to determine whether the defendant had incurred liability under it. See *Raju* v. *Krishnarav*(1) and *Martin* v. *Sheo Ram Lal*(3).

The District Court has, therefore, exercised its jurisdiction illegally, as was held in *Chenbasapa* v. *Lakshman* (4), and we must, therefore, make the rule absolute and reverse the decree and reject the plaintiff's claim, with costs on plaintiff throughout.

Rule made absolute. Decree reversed.

---

(1) 2 B. 273 (281). (2) 8 M. 182. (3) 4 A. 232.
(4) P. J. (1893), 224 ; 18 B. 369. [8] (5) 16 B. 708.
(6) 11 B. 488. (7) P. J. (1868), 274.

1893
NOV. 21.

APPELLATE CIVIL.

18 B. 748.

18 B. 748.

[748] APPELLATE CIVIL.

Before Mr. Justice Parsons, and Mr. Justice Candy.

JAVERMAL (*Original Applicant*), *Appellant v.* THE NAZIR OF THE DISTRICT COURT OF POONA (*Opponent*), *Respondent.*

[21st November, 1893.]

Appeal—Reg. VIII of 1827*—Order refusing certificate of heirship appealable—Succession Certificate Act* (*VII of* 1889), *s.* 28*—Practice.*

An appeal lies from the order of a District Judge refusing to grant a certificate of heirship under Reg. VIII of 1827 by virtue of the provisions of s. 28 of the Succession Certificate Act (VII of 1889).

[F., 19 B. 399 (400).]

APPEAL from the decision of W. H. Crowe, District Judge of Poona, in Miscellaneous Application No. 132 of 1892.

The appellant Javermal Bahiravdas applied under Reg. VIII of 1827 for a certificate of heirship to one Hakamchand Parashram, deceased, alleging that he was the sole heir and legal representative of the deceased.

This application was opposed by Dhondai, who contended that the applicant was not the heir of the deceased.

The District Judge refused the application and passed the following order :—

"Read proceedings in Miscellaneous Application No. 269 of 1869. The certificate prayed for is refused."

Against this order the applicant appealed to the High Court.

Mahadeo Chimnaji Apte, for the respondent:—There is a preliminary objection to the hearing of the appeal. The lower Court's order refusing to grant a certificate of heirship is not appealable under Reg. VIII of 1827.

Daji Abaji Khare (with him *B. N. Bhajekar*), for the appellant:—Under s. 19 of the Act VII of 1889, an appeal lies from an order of the District Judge refusing a certificate under the Act. The provisions of s. 19 of the Act are expressly made applicable by s. 28 to applications for certificates under Reg. VIII of 1827. An appeal, therefore, lies from the lower Court's order in the present case. The lower Court has not given any reasons for refusing the certificate applied for. Its judgment is not, therefore, according to law. Moreover, the [749] evidence recorded in a different proceeding, to which the lower Court refers, is inadmissible in the present case.

JUDGMENT.

PARSONS, J.—We think that an appeal lies from the order of the District Court refusing to grant a certificate of heirship under Reg. VIII of 1827 by virtue of the provisions of s. 28 of the Succession Certificate Act, 1889—*Pitamber* v. *Ishvar* (1).

We are unable to accept the decision of the District Judge, as he has given no reason whatever for his refusal to grant the certificate applied for.

He records that he has read the proceedings in Miscellaneous Application No. 269 of 1869. These proceedings were not sent up with

(1) 17 B. 230.

the record to this Court, but we have been supplied by the pleaders with certified copies of them, and with reference thereto we think it right to remark that the evidence there recorded cannot properly be used as evidence in this case.

We reverse the order of the District Judge and remand the case for a decision according to law.

Costs to abide the result.

Order reversed.

1893 NOV. 21. — APPELLATE CIVIL. — 18 B. 748.

---

18 B. 749.

APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Candy.

BAROT PARSHOTAM KALU (*Applicant*), *Appellant v.* BAIMULI (*Opponent*), *Respondent.** [21st November, 1893.]

Probate—Will—Will by a Hindu widow in respect of property inherited from her deceased husband—Invalid will.

A Court is not justified in refusing to grant probate of a will because the testator had no power to dispose of some or even all of the property he purported to deal with.

[F., 26 B. 792 (797)=4 Bom.L.R. 637; 2 P.L.R. 1902=7 P.R. 1902; Appl., 19 A. 458 (462); R., 23 B. 644=6 Bom.L.R. 966 (973); 34 B. 589=12 Bom. L.R. 694 =7 Ind. Cas. 914; 10 Ind. Cas. 130=141 P.L.R. 1911.]

APPEAL from the order of G. McCorkell, Esquire, District Judge of Ahmedabad, in Miscellaneous Case No. 18 of 1893.

One Bai Amba, widow of Barot Bhagwan Jetha, made a will, disposing of all the property, moveable as well as immoveable, which she had inherited from her deceased husband.

[750] On Bai Amba's death, the appellants, who were appointed executors under her will, applied for probate under Act V of 1881.

This application was opposed by the respondent, a sister of the deceased's husband, on the ground (1) that the will was a forgery; (2) that it was invalid, as the deceased was not competent to dispose by will of property inherited by her from her husband.

The District Judge on the authority of *Gadadhar Bhat* v. *Chandrabhagabai* (1) held that the will was invalid. He, therefore, rejected the application, and refused probate.

Against this order the present appeal was preferred to the High Court.

Goverdhanram M. Tripathi, for appellant.—The District Judge was wrong in refusing to grant probate. The bequests in the will may be invalid, but that is not a reason why the will should not be admitted to probate—*Hormusji* v. *Bai Dhanbaiji* (1).

Ganpat S. Rao, for respondent.—The will of which probate is sought is absolutely null and void. The testatrix had no power to bequeath either the moveable or immoveable property which she had inherited from her husband—*Gadadhar Bhat* v. *Chandrabhagabai* (2). The will should,

---

* Appeal No. 77 of 1893.

(1) 12 B. 164. (2) 17 B. 690.

1893
NOV. 21.
APPELLATE CIVIL.
18 B. 749.

therefore, be treated as a nullity and ought not to be admitted to probate —*Annoda Sundari Dabi* v. *Jugutmoni Dabi* (1). See also Williams on Executors, p. 53.

JUDGMENT.

PARSONS, J.—The District Judge was wrong in refusing to grant probate because the testatrix had no power to dispose of some or even all of the property she purported to dispose of. See *Hormusji* v. *Bai Dhanbaiji* (2). We, therefore, reverse his order and direct that he hear and dispose of the application according to law.

Costs to abide the result.

Order reversed.

18 B. 751.

[751] CRIMINAL REVISION.

Before Mr. Justice Parsons and Mr. Justice Candy.

QUEEN-EMPRESS *v.* DANSANG DADA.* [22nd November, 1893.]

Criminal Procedure Code (Act X of 1882), s. 423, cl. (b)—Sentence—Alteration of sentence in appeal—Appellate Court's power to alter a sentence of fine into one of imprisonment.

A Sessions Judge has no power to enhance a sentence in appeal, by altering a sentence of fine into one of imprisonment.

[F., L.B.R. (1893—1900) 423 (425); R., 18 A. 301 (302.).]

THIS was an application under s. 435 of the Code of Criminal Procedure (Act X of 1882) under the revisional jurisdiction of the High Court.

The accused Dansang Dada and six others were convicted by the First Class Magistrate of Dhandhuka of the offence of voluntarily causing hurt under s. 323 of the Indian Penal Code (XLV of 1860). They were sentenced each to pay a fine of Rs. 51, or in default to suffer rigorous imprisonment for one month and fifteen days. They were also ordered to execute a bond for Rs. 100 for keeping the peace for a period of two years under s. 106 of the Code of Criminal Procedure (Act X of 1882).

On appeal the Sessions Judge upheld the convictions, but with respect to the sentences he passed the following order :—

"The offence is not one which, in my opinion, can be properly punished by a pecuniary fine. I, therefore, alter the sentence in each case from a fine of Rs. 51 to rigorous imprisonment for one month, leaving the order as to surety bonds unaltered."

Against this order the accused made the present application under the revisional jurisdiction of the High Court, contending that the Sessions Judge's order for alteration of the sentence in appeal was illegal, as it amounted to an enhancement of the sentence.

Branson (with him *Ganpat Sadashiv Rao*), for accused.

Kalabhai Lallubhai, for complainant.

---

* Criminal Revision No. 327 of 1893.

(1) 6 C. L. R. 176.

(2) 12 B. 164.

JUDGMENT.

PER CURIAM :—The sentence of the Sessions Judge is illegal, as he had no power to enhance, by altering a sentence of fine into one of imprisonment. We, therefore, reverse the sentence of the Sessions Judge and restore that of the First Class Magistrate.

1893
NOV. 22.
CRIMINAL REVISION.
18 B. 751.

---

18 B. 752.

[752] APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Candy.

APPA *(Plaintiff)* *v.* SADU *(Defendant).** [30th November, 1893.]

Watandar and deputy—Agreement for payment by deputy to the watandar out of the cash allowance for procuring the deputy's nomination—Watandar's Act (Bombay Act III of 1874), *ss.* 7† *and* 23‡.

An agreement between the watandar and a deputy nominated by him for the payment by the latter to the former, in consideration of procuring such nomination, of a sum of money out of the cash allowance received by the deputy as remuneration assigned to his office is not legal, being contrary to the spirit of s. 7 read with s. 23 of the Watandars' Act (Bombay Act III of 1874).

REFERENCE from Rav Saheb Bhau Yeshwant Gupte, Subordinate Judge of Kada, under s. 617 of the Code of Civil Procedure (XIV of 1882).

The Subordinate Judge referred the following question for the decision of the High Court :—

Whether an agreement between a watandar and the deputy nominated by him for the payment by the latter to the former of a sum of money out of the cash allowance, received by the deputy as remuneration assigned under s. 23 of the Bombay Watandars' Act (III of 1874), as consideration for procuring such nomination, is opposed to law?

With respect to the question referred, the Subordinate Judge made the following remarks :—

[753] "The language of s. 7 of Bombay Act III of 1874, which forbids alienation or assignment of the watan property assigned under s. 23 of the Act as remuneration to an officiator, is also sufficiently wide to include every species of alienation or assignment within the prohibition, and, unless there is any reason to place a restricted construction on these

---

* Civil Reference No. 9 of 1893.

† Section 7 of the Watandars' Act (Bombay Act III of 1874) :—7. Watan property assigned under s. 23 of this Act as remuneration of an officiator, and the profits of watan-property so assigned, shall not be alienated or assigned to any person whatever without the sanction of Government.

‡ 23. Subject to the provisions of this Act and of any other law for the time being in force regarding service-inams, cash allowances and pensions, it shall be the duty of the Collector to fix the annual emoluments of officiators, appointed under the provisions of this Act, and to direct the payment thereof to the officiators for the time being.

It shall be lawful for the Collector for this purpose to assign the watan property, or the profits thereof, towards the emoluments of officiators. The existing assignments shall, until altered by competent authority, be taken to have been made under this section. With the sanction of Government the Collector may, as occasion arises, alter the assignment and may increase or diminish it in value, such increase or diminution being made rateably among the holders in proportion to the profits derived by such holders respectively from the watan.

1893
NOV. 30.

APPELLATE CIVIL.

18 B. 762.

words, an agreement of the nature under notice must also be admitted to be opposed to the spirit of that section.

"However, the evident object which the Legislature must have had immediately in view in enacting the last mentioned section was probably this, *viz.*, that the allowance in the hands of Government should not be liable to be attached by a Civil Court or claimed by a stranger, and this view derives confirmation when we find that the Legislature have advisedly legalized the appointment of deputies by watandars under certain restrictions. All that is wanted in the case of a deputy appointed by a watandar is that the man proposed to be appointed should not be of known bad character, that he should be a fit and proper person capable of discharging the duties of the office to which it is proposed to appoint him, and that he should also be a watandar himself; and, if a candidate fulfils all these conditions, there does not seem to be any special reason why a watandar who has to nominate a deputy should not be at perfect liberty to engage the services of that deputy on the best terms on which he can manage to secure them. It is inconceivable why a watandar should be given the empty honour of nominating a deputy and invited to exercise that right if he is not allowed to secure any gain for himself. The possibility of the watandar and his deputy making some such arrangement for securing some advantage or fee to the principal must of course have been foreseen, and the absence, therefore, of any express provision in the Watan Act forbidding all such arrangements leads me to doubt if it was intended to make them altogether unlawful. If an agreement on the part of a deputy to pay a sum of money to his principal as consideration for his nomination to the deputyship would not be invalid, it is a question whether the mere addition of the words 'out of the amount of the cash allowance received by the deputy' ought to invalidate such an agreement when it is obvious that the parties could not have [754] intended that the sum agreed to be paid should come out of the identical money drawn from the treasury. Such an agreement is, when fairly analysed, nothing more than an agreement to pay a certain sum of money, and it is immaterial, as far as the legality of that agreement is concerned, to see if the promisor has pointed out the source from which he expects to procure the needful funds to discharge his obligation. But the prohibition is enacted in very general terms both in the Transfer of Property Act and also in s. 7 of the Watandars' Act, and I, therefore, doubt if it can be ignored when the terms of an agreement expressly contravene it.

"The case of *Naro* v. *Mahadav* reported at I.L.R., 12 Bom., 614, may be distinguished on the ground that the agreement set aside in that case was open to the objection that it did not leave the watandars free agents in their selection of a deputy, but the case is nevertheless important as showing that a previous concert among watandars for the appointment of a particular member of their own body to an office is not allowed by law."

The opinion of the subordinate Judge on the point was in the affirmative.

Vishnu K. Bhatavdekar (*amicus curiæ*), appeared for the plaintiff. This was a suit brought by the watandar against his deputy to recover a certain sum which was due to the watandar under an oral agreement which was to the effect that if the watandar plaintiff appointed the defendant as his deputy, the defendant would pay to the plaintiff half the money out of the cash allowance which the deputy would recover from the

Government treasury. We submit that such an agreement would not be against public policy—*Sitaram Vinayak* v. *Ramchandra Babaji* (1).

Mahadev B. Chaubal (*amicus curiæ*), for the defendant was not called upon.

1893 NOV. 30. APPELLATE CIVIL. 18 B. 752.

JUDGMENT.

SARGENT, C. J.—We think that the agreement must be held to be contrary to the spirit of s. 7 read with s. 23 of Bombay Act III of 1874 and to be, therefore, not legal.

Order accordingly.

---

18 B. 755.

[755] APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Bayley.

SUNDAR MALHAR PATEL (*Original Defendant*), *Appellant v.* BAPUJI SHRIDHAR AND ANOTHER (*Original Plaintiffs*), *Respondents.**

[4th December, 1893.]

Mortgage—Redemption—Right to redeem made conditional on payment by mortgagor of another debt as well as mortgage debt—Effect of that other debt becoming barred by limitation—Right to redeem mortgage still subject to condition.

A mortgage bond contained a clause stipulating that the mortgagors were not to redeem the mortgaged property without paying not merely the amount of the mortgage debt and interest, but also the amount due on a certain bond executed at the same time as the mortgage in respect of money due under a decree, and that "unless the whole was paid off, neither the mortgagor nor any one else should have a claim."

The mortgagee subsequently obtained a decree on the instalment bond and made several attempts to execute it, but failed, his *darkhast* being eventually rejected as time-barred.

Held that the right of redemption was made conditional on the payment of what was due on the instalment bond—a condition which was unsatisfied as long as such sum remained unpaid, although in contemplation of law there might be no longer a bond debt still in existence owing to a decree having been passed on the bond, and that decree having become barred by limitation.

[R., 22 B 520 (524); 28 B. 349 (353)=6 Bom. L. R. 313; 11 Bom. L. R. 318 (327); 8 O. C. 132 (135).]

THIS was a second appeal from the decision of S. Tagore, District Judge of Sholapur-Bijapur.

In January, 1868, the defendant was the holder of a decree against the plaintiff for Rs. 566. The plaintiff being desirous of buying certain land from the defendant, and being unable to pay the purchase-money, the defendant agreed to sell him the land in the following terms:—1st, that the plaintiff should execute to the defendant a mortgage of the land for the 700; 2nd, that the plaintiff should execute to the defendant an instalment bond for Rs. 500 in respect of the amount due under the decree. These terms were accepted by the plaintiff, who on 11th January, 1868, executed both documents, *viz.*, the mortgage-deed and the instalment bond. The mortgage-deed contained a stipulation to the effect that the mortgagor

---

* Second Appeal No. 898 of 1891.

(1) P. J. (1885) p. 24.

1893
DEC. 4.

APPELLATE CIVIL.

18 B. 755.

should not redeem the property without also paying the amount of the instalment bond, and that unless the whole amount of Rs. 1,200 was paid, neither mortgagor nor any [756] one should have a claim. The mortgage bond was engrossed upon a paper the stamp of which would have been sufficient to cover the amount of Rs. 1,200.

In 1873 the defendant sued the plaintiffs on the instalment bond and obtained a decree which he made several attempts to execute, but failed, his last application being dismissed as barred by limitation.

In the year 1888, plaintiffs brought the present suit to redeem the mortgage of the 11th January, 1868, and to recover possession of the lands, alleging that the mortgage-debt had been liquidated from the profits of the land, and praying that an account of the profits should be taken, and if any surplus be found to be due to the defendants, the same might be made payable by instalments of Rs. 50 a year, as the plaintiffs were agriculturists.

The defendant contended that as there was a stipulation in the mortgage bond that the property should not be redeemed without paying the amount of the instalment bond, the plaintiff could not redeem on payment only of the mortgage-debt. He claimed Rs. 2,924-14-0 as due to him on the whole transaction.

The Subordinate Judge disallowed the defendant's contention with respect to the payment of the instalment bond, and held that Rs. 1,424-8-2 (Rs. 700 principal, Rs. 700 interest, and Rs. 24-8-2 on account of the local found cess paid by the defendant) were due by the plaintiffs to the defendant. He made the amount payable by annual instalments of Rs. 200, and directed that on failure of the plaintiffs to pay any of the instalments at the stipulated time, defendant should realize the whole amount due by the sale of the mortgaged property.

Both parties appealed, and the Judge amended the decree by reducing the amount of each instalment to Rs. 150.

The defendant preferred a second appeal.

Ghanasham N. Nadkarni, for the appellant (defendant).

There was no appearance for respondents (plaintiffs).

JUDGMENT.

SARGENT, C. J.—The question in this case is as to the right of the defendant to insist on the payment of an instalment bond as [757] well as the mortgage-debt as a condition of the plaintiffs' redeeming the lands mortgaged by Ex. 11.

The mortgage bond commences by reciting that "it was given for the reason as follows":—That Rs. 1,200 were due to the defendant by the mortgagors, for part of which a bond for Rs. 500 had been given; that for the Rs. 700, the balance of the Rs. 1,200, the mortgagors say they will pay interest at 1¼ Re. per cent. per month. "As security for this, they say they have mortgaged the land, and direct the mortgagees to give credit for the annual produce in the interest account on the Rs. 700." In the proviso for redemption the principal Rs. 700 is spoken of as being the consideration of the mortgage-bond; but it also provides that the plaintiffs are not to take back the land until the Rs. 700 and interest and the amount of the instalment-bond for Rs. 500 are paid, and that "unless the whole is paid off, neither the mortgagor nor any one else should have a claim." It is further to be remarked that the mortgage bears the stamp required by a mortgage-debt of Rs. 1,200.

It was contended by Mr. Ghanasham for the defendant that upon the proper construction of this instrument it must be taken that it was the intention of the parties to make the amount due upon the instalment bond a charge on the lands mortgaged. We do not think it necessary to express a decided opinion on this contention of the defendant, as we think that in any case the right of redemption was made conditional on whatever was due at the time on this instalment bond being paid—a condition which remained none the less unsatisfied, as long as such sum remained "unpaid"—although there might be no longer a bond debt in contemplation of law still in existence owing to a decree having been passed on the bond and although that decree had become barred.

We must, therefore, reverse the decree and send back the case for a fresh decision having regard to the above remarks.

Defendant's costs here and in the Courts below to be paid by plaintiffs.

Decree reversed and case sent back.

---

18 B. 758.

[758] APPELLATE CRIMINAL.

Before Mr. Justice Jardine and Mr. Justice Ranade.

QUEEN-EMPRESS *v.* KAHANJI.* [11th December, 1893.]

Penal Code (Act XLV of 1860), *ss.* 153, 117—*Wantonly giving provocation with intent to cause riot—Abetment of riot by the public—Construction.*

In August, 1893, a riot took place in Bombay between Hindus and Mussalmans. The excitement caused by the riot had not entirely subsided, when the accused composed and published a poem, giving an account of the outbreak, and incidentally extolling certain classes of the Hindu community, namely the Ghatis and Kamatis, for the brave resistance which they had offered to the Mahomedan rioters. The poem extolled the Ghatis and Kamatis and then followed these lines:—

"May God give glory to you, confer joy on you night and day,
Fight again for your country's good.
Brave, brave are the Kamatis.
Why fear for dying, brother, why fear for dying?
Sooner or later, but only once, a man has to die."

The poem was written in Gujarati, a language not ordinarily spoken by the Ghatis and Kamatis or even by the Mahomedans. It did not appear that any copies of the work were distributed among the people who had taken part in the riot. Nor did any fresh riot take place subsequently to the publication of the work.

The accused were prosecuted and convicted under ss. 117 and 153 of the Indian Penal Code (XLV of 1860) on the ground that the lines quoted above, especially the words "Fight again," were a direct instigation to the Ghatis and Kamatis to renew the disturbances.

Held, that the meaning of the passages complained of was to be gathered from the whole poem. The general spirit of the poem was clearly in favour of peace and reconciliation. It consisted from beginning to end of a lamentation over the riots, and the destruction and death they had caused, and of repeated counsel to peace and harmony between Hindus and Mahomedans. And there was nothing to indicate that the author's intention was to instigate the Hindus or provoke the Mahomedans to renew the disturbances. The words "Fight again" were, no doubt, objectionable, but it would not be a proper construction of the words to allow them to override the whole context of the work.

---

* Criminal Appeal No. 382 of 1893.

1893
DEC. 11.

APPEL-
LATE
CRIMINAL.

18 B. 758.

The composition could not be regarded as an "illegal act," and its publication was not " malignant " or " wanton " within the meaning of s. 153 of the Indian Penal Code.

[R., 26 M. 554 (568) (F.B.) = 1 Weir 270.]

APPEAL from the judgment of C P. Cooper, Chief Presidency Magistrate, in the case of *Queen-Empress* v. *Kahanji Dharamsingh* and others.

[759] The material facts of this case were as follow :—

On the 11th August, 1893, a riot took place in Bombay between Hindus and Mussalmans. Within a fortnight after the suppression of the riot, but before the excitement caused by the outbreak had subsided, the accused wrote and published a poem, in Gujarati, entitled " The Bombay Dreadful Riot," containing a narrative of the causes and progress of the riot. In the course of this narrative the author incidentally extolled certain classes of the Hindu community, namely the Ghatis and the Kamatis, for the brave resistance which they had offered to the Mahomedan marauders. After much praise of the courage of the Ghatis and Kamatis the poem continued :—

" You are not women, but men. Brave, brave are the Kamatis.
May God give glory to you, confer joy on you day and night.
Fight again for country's good ; brave, brave are the Kamati people."

(8th stanza)

" Why fear for dying, brother, why fear for dying ?
Sooner or later, but only once, the man has to die ;
Either by disease, by destiny, or in the field of battle, there is no living, no,—
To be subject to ignominy, to be counted coward, to take steps backwards,
Than such living death is better, or going to heaven.
To the valiant warrior there is always victory,
Before courage the enemies fly, by suffering salvation is achieved.
By hiding to be counted panic stricken, and to make the hostile army the bolder."

It did not appear that copies of this poem were distributed among the Ghatis and Kamatis, or that they read the work or heard it read. Nor did any fresh riot occur subsequently to the publication of this pamphlet.

On the 17th September, 1893 a complaint was filed against the accused in the Court of the Chief Presidency Magistrate charging them with offences under ss. 153 and 117 of the Indian Penal Code.

The information filed by the Inspector of Police complained that portions of the paragraph were a direct instigation to the Kamatis and Ghatis to riot. The following paragraphs are material :—

" 4. I am informed that over hundred copies of the pamphlet were printed, when the words " Fight again, " which appear on the last line of the translation [760] from pp. 8 and 9, were altered to the words " Don't be daunted," and several thousand copies of the work were printed as so altered.

" 5. I am informed that the work was published on or about the 24th August last when the excitement caused by the riots at Bombay still existed, and large numbers of the work were published, sold, or distributed, and caused, I am informed, considerable irritation amongst Mahomedans."

The Magistrate convicted the accused under ss. 153 and 117 of the Indian Penal Code, and sentenced accused No. 1 to three months' simple imprisonment and a fine of Rs. 201, and accused Nos. 2 and 3 each to pay a fine of Rs. 201.

The Magistrate gave the following reasons for the conviction:—

"The three accused stand charged, firstly, under s. 117 of the Indian Penal Code with abetting the commission of the offence of rioting by more than 10 persons; secondly, under s. 153 of the same Code with wantonly giving provocation, knowing it to be likely that such provocation would cause the offence of rioting to be committed. They all pleaded they had a defence to make. They declined to make any explanation, and left their defences in the hands of their advocates. Those advocates contended that all that the accused had done had been done openly. Their names appeared upon the pamphlet, and the pamphlet contained an account of the riots, with many precepts advocating the restoration of amity and good feeling amongst the two communities; that as to the two stanzas of the poem complained of, they were written at a time of poetic excitement in praise of the Ghatis, and Kamatis, who had shown a bold front at a critical time, but that there was no intention to incite those communities to riot.

"The first stanza exhibits certain acts of the Ghatis and Kamatis during the riots, and states that they overcame or got the better of their enemies, &c. These enemies must, I think, allude to the Mahomedans.

"The second stanza is in praise of a disregard to death: 'To the valiant warrior there is always victory. Before courage the enemies fly. By concealing themselves the enemy grows bolder, &c.' At the time when the pamphlets containing these stanzas were publicly being sold in this city, the excitement caused by the riots had not subsided, and there were still strong feelings existing between the two communities of Hindus and Mahomedans. At such a time to have publicly extolled the acts of either of those communities in respect to the part they had taken in these disturbances and riots would most probably have been likely to incite the one community to fresh acts of disturbance or riot, or to provoke the other community to similar acts. It is the duty of every loyal citizen at such a time to be most careful as to what he writes and distributes or causes to be distributed amongst the public or these communities. In this case the accused have gone further than circulating pamphlets containing writings that merely extol the acts of one of these communities taking part in these disturbances, but they have in the last line of the first stanza circulated the line 'Fight again for your country's good, bravo, bravo, oh Kamatis,' and after that line there is the second [761] stanza written in disregard to death,' that the enemies fly before brave warriors, and concealment encourages the enemy to be bold.'

"I think, looking at these lines, that they do call upon the Kamatis and Ghatis to renew the disturbances or riots.

"The accused must be assumed to have known that the probable result of such publication at such a time would be to incite or instigate the one community to renew the riots or provoke the other community to do so. Coming to that conclusion I must convict all three accused of the offences under both charges. I consider the first accused to be the principal offender. Considering the facts proved in this case I may consider, in inflicting punishment that is provided for the second offence, I am inclined to think the lines were written wantonly. I have also to consider that though no riot or disturbance did take place, still it was a serious offence at the time."

The accused appealed to the High Court.

Jardine, for the accused.—The pamphlet, which is the subject-matter of the present prosecution, is a history, in verse, of the recent riots in

1893
DEC. 11.
APPELLATE
CRIMINAL.
18 B. 758.

Bombay between Hindus and Mahomedans. Exception is taken to only two lines in the whole poem It is alleged that the words "Fight again for your country's good; brave, brave, are the Kamatis" are a direct instigation to the Kamatis to commit a fresh riot. The meaning of this passage is to be gathered from the context. The whole poem must be read, and not merely isolated passages. One would not read from the Bible the expression "There is no God" and construe it by itself. You ought to read it in connection with the context; otherwise you would put a most absurd and unnatural construction upon it. In the present case the general spirit of the poem is distinctly in favour of peace and harmony between Hindus and Mussalmans. It condemns the riots from beginning to end. It speaks of the riots as "unprecedented and lamentable." The praise of the Ghatis and Kamatis for withstanding the rioters cannot be construed as an instigation to them to renew the disturbances. It would be far-fetched to suppose that by praising the Kamatis, the Mahomedans were provoked to commit acts of violence. The poem praises everybody. It praises the Police, the Military, the Magistracy, the Government,—in short, all who had exerted themselves in putting down the riots. The poem is indeed a panegyric on peace. It is a fair and impartial narrative of the outbreak. It is written in a language not commonly understood by the Ghatis or Kamatis. There is no evidence that **[762]** any Ghati or Kamati read this book or heard it read. Nor is it alleged that any fresh disturbances took place in consequence of the publication of this poem. The case, therefore, does not fall within s. 153 of the Indian Penal Code.

Lang (Advocate-General), for the Crown :—The contents of the pamphlet, as well as the time and circumstances under which it was published, justify the conviction. The work was published about a fortnight after the riots had occurred. The excitement caused by the riots had not then subsided. Public tranquillity had not been fully restored. The two factions still regarded each other with feelings of distrust and suspicion. It was, therefore, highly dangerous to publish a pamphlet like this at such a time. It was calculated to excite the Mahomedans against the Hindus and the Hindus against the Mahomedans. The greater part of the poem is, no doubt, harmless, but there are certain passages which cannot be excused, particularly the lines beginning with "Fight again for your country's good." These words are clearly intended to incite the Kamatis to a fresh riot. They are addressed to the Ghatis and Kamatis; and the way in which they are extolled is calculated to provoke the Mahomedans. The evidence shows that some Mahomedans did get angry on hearing the contents of this pamphlet. The trying Magistrate is, therefore, right in convicting the accused under s. 153 of the Indian Penal Code.

JUDGMENT.

JARDINE, J.—The illegal act with which the prisoner was charged is the instigation of Hindus to attack or fight Mahomedans found in the Gujarati poem, the subject-matter of this case. The defence is that Kahanji had no intention to instigate rioting, and that the words, read with the context, ought not to be construed as instigation, and that, although they may excite Mussalmans to anger, they contain no illegal matter and thus do not bring the case within the words or the mischief of s. 153 of the Penal Code, which section only punishes when the provocation, maliguantly or wantonly caused, arises out of doing something which is illegal. The Chief Magistrate convicted Kahanji on both heads of charge, holding

that the last line of the 7th song, which line begins "Fight again," and the 8th [763] song, which immediately follows, and exhorts men to dare to die, "do call upon the Kamatis and Ghatis to renew the disturbances or riots." The Magistrate was also inclined to think that the lines were written wantonly. He found that at the time of publication of the poem there were still strong feelings existing between the Hindus and Mussalmans, and that no riot and disturbance did take place in consequence of the poem. The accused does not dispute that he is the author of the poem, nor that he published it by letting the publishers and printers have his manuscript. The Crown takes no objection to any parts of the poem except the songs numbered 7 and 8, which Mr. Balaji Pandurang translates as follows :—

(7TH SONG)—BANJARA.

"The Banjara leaves me behind and goes away."
(To be sung in this manner.)

Brave, brave (are) the Kamati people,
Praiseworthy truly are the Ghatis—(To be repeated.)
They bathed (their) valiant bodies with blood, never did (they) turn back to see,
(They) broke the riotous *tata* (*i.e.*, wall).
Brave, brave (are) the Kamati people.
Valiants, you were not afraid, you foiled ths enemies.

(Original page 9.)

Forthwith you obtained glory ; brave, brave (are) the Kamati people.
Strong (are) you, very brave in firmness not deficient.
(You) have buried the enemies ; brave, brave (are) the Kamati people.
(You) besmeared yourselves with saffron, with manly zeal ;
Forthwith the rioter's spirit was broken ; brave, brave (are) the Kamati people.
(You) have blood in you of the Peshwa's times, good descendants of Shri Shivaji.
You are not women, but men ; brave, brave (are) the Kamati people.
May God give glory to you, confer joy (on you) night and day.
Don't be afraid for country's good ; brave, brave (are) the Kamati people.

(8TH SONG)—PAD.

"When will (you) remember Ram, now."
(This is the mode of singing.)

Why fear for dying, brother, why fear for dying ?—(To be repeated.)
Sooner (or) later, but only once, the man has to die ;
(Either) by disease, by destiny (or) in the field of battle, there is no living, no.—Brother, &c.

To be subject to ignominy, to be counted coward, to take steps backwards,
Than such living death is better, or going to heaven.—Brother, &c.
[764] To the valiant warrior there is always, victory, such everlasting position (renown) be taken up ;

Before courage the enemies fly, by suffering salvation is achieved.—Brother, &c.
By hiding to be counted panic-stricken, and to make the enemies' army the bolder. It being so, as to the body and mind, Kan (the author) says the same are to be sacrificed for others.—Brother, &c.

The Police Court translator gives a few variations from the above, mostly of no importance. He admitted at the trial that his rendering of the third line of song 7 as "Ye broke through files of rifles" was incorrect. As this translation would seem to imply that the Kamatis and Ghatis came into conflict with the troops who during the riots aided the civil authorities in preserving the public order, it is important to notice that the translation now admitted to be correct makes no allusion to rifle-men, and asserts only that the Kamatis and Ghatis broke through the wall, *i.e.*, I suppose, the serried ranks of the rioters. A police witness examined to show the seditious nature of the poems charged, says the words mean, "You have broken through the row of people who were going to create a

1893
DEC. 11.
APPELLATE CRIMINAL.
18 B. 758.

disturbance. So the line cannot be treated now as a praise of men audacious enough to attack the Queen's military forces engaged in the support of the Magistracy and Peace Officers.

The only question on which we have to decide is, whether the language used in the passages on which the Magistrate bases the conviction, does in the sense which fairly belongs to it—the sense that is most natural and obvious—bear the meaning put on it by the Magistrate. We have to look at the circumstances of the case and the occasion and the time. We have to consider the whole poem, giving its proper weight to every part—*Dean of St. Asaph's case* (1) and the *Trial of Mr. Moxon* for blasphemy in publishing Shelley's Works, 2, Townsend's Modern State Trials, at p. 388. Some evidence of police officers has been given about the passages complained of by the Crown to bring the case within the ruling of the *Rex.* v. *Harvey* (2), by showing that the lines were calculated to stir up the Kamatis and Ghatis to open violence against the Mussalmans in this city. These witnesses admit, as also does the Advocate-General, that much of **[765]** the poem is unexceptionable. No literary witness, accustomed to deal with poetical productions, has been called; although in such matters poets have no privilege, it is obvious that the construing of a long poem presents greater necessity for care than an ordinary prose publication. Even prose works often present difficulty in ascertaining the real meaning of the writer, as is shown in some of the cases about doctrine in the Church of England decided by the Privy Council (*e.g.*, *Heath* v. *Burder* (3)). A literary work is seen in different lights by different minds, even minds of culture, as we know by conspicuous instances. See how Erskine (*arguendo*) gives an entirely innocent meaning to the Dialogue between the Gentleman and the Farmer written by Sir William Jones, afterwards the distinguished Orientalist and Judge of the Supreme Court in Bengal—I mean to the suggestions that voters should get arms and learn drill, so as to be able to stand up for law and liberty—suggestions which the Government treated as seditious and prosecuted the Dean of St. Asaph for publishing. Take, again, another matter of public notoriety nearer home: the letter which a former Government of Bombay sent to the learned regents of the University of Bombay, taking exception to Bishop Butler's Analogy of Religion as in some way dangerous to native students. Take likewise Lord Chancellor Eldon's remarks on Lawrence's Lectures on Physiology at the College of Surgeons—*Lawrence* v. *Smith* (4). These are all prose compositions, and I suppose prose is more readily understood than poetry. No decided cases have been cited; and when we grope through the old reports, we fail to find any which show the process of literary criticism whereby the Judge (it was Lord Eldon) reached the conclusion that a certain poem, such as Southey's Wat Tyler, or Byron's Don Juan and Cain—*Southey* v. *Sherwood*(5), *Murray* v. *Benbow*(6)—was so immoral, seditious or blasphemous, that the Court had to refuse to protect the copyright. We, too, might imitate those Judges and simply state our own conclusions; but we have had to examine the drift of the whole of the poem, the subject of the present State trial; and as our estimate is different **[766]** to that of the Court below, we determine to express in detail the view we take of the work. The whole poem has been read and commented upon by the learned counsel for the appellant, and it becomes our duty to

---

(1) 21 Howell's State Trials, 847–1002.
(2) 2 B. & C. 257–9.
(3) 15 Moo. P.C. 1 82.
(4) 1 Jac. 471.
(5) 2 Meriv. 435.
(6) 1 Jac. 474 (note).

consider its words and spirit with careful judgment in order to see what the exhortation is and whether it is baneful, and if the other parts of the poem constitute an antidote. For this purpose we have read through the pamphlet, which is in the Gujarati language and is entitled "The Terrible Riot which took place at Bombay." (This poem begins with a statement of the horrors of the riots' dreadful deeds done in spite of the presence of police and troops. This part does not say which community is to blame. Then in the first song, to the tune of 'Lord, now you released the elephant from jeopardy,)' the poet takes refuge, as many a psalmist had done, in the mercy of God, and prays for peace, and that the two communities may be reconciled. In the second song the disturbances of the 11th August last are related with spirit and power. The poet tells how from the Jumma Masjid—

"Striking the bell issued forth the rioters uttering by mouth 'Din, Din.'
They gave beatings with clubs, saying many low words.
The Police became utterly unable, they also received beating; from the Fort the great Magistrate camp up; there came many officers."

The singer then tells how in spite of the presence of these officers the work of destruction went on, fifteen beautiful temples being made desolate and many people injured and shops looted. The triumphant rioters went on unchecked:—

"A madam was struck down—horses and carriages were stopped.
They outraged the modesty of Kamati women
So vengeance took hold of Kamatis; their hate was immeasurable."

This is the climax and crisis of the riots. These outrages caused the Kamatis to rise with big clubs, and the riots increased, and even when the troops used their arms, the riots broke out again somewhere else. The poet here shows the police and military at their wits' end in the dreadful storm, and mentions many appalling incidents and the suffering and fear which ensued when the arm of authority was weakened. He tells us how Her Majesty the Empress telegraphed next day, Saturday: "Resort to best measures to restore peace without making delay;" and how at last "the mighty riot began to subside" when Mr. Brewin, of the **[767]** police, had secured the Bandora butchers and taken their knives away. The poet uses many images to show how on that Friday and Friday night and Saturday, Bombay became desolate like a cremation ground overrun by the raging streams and proud swelling waves of riot and plunder, lust and murder.

In the third song the scene changes: the pious poet begins by thanking God for the mercy vouchsafed. Like the Rakshasas in the Ramayana of old, the wicked have been struck down. "The storm went on infinitely; it looked exceedingly fearful. They came to an untimely end the great wicked thereby. The world heartily hooted." Then after considering the causes of these outbreaks the mournful muse bewails the widows and children of the men murdered in the riots.

In song 5, to the air "A great calamity has happened in the Kali age," the writer in more warlike language appears to me to treat the Ghatis as restoring order by resisting the marauders while the other Hindus sat trembling and afraid. Mosques and *durgas* were burnt in retaliation: and,

"People like cats who were very timid,
Killed the enemy without restraint."

The sixth song describes the flight to Hindus out of Bombay and the levelling of ranks in the general fear. Braggart fellows became meek

1893
DEC. 11.
APPELLATE CRIMINAL.
18 B. 758.

and hid in corners, and the Mahajans put their pride on one side and said humble words. Then, in contrast to these faint-hearted castes, —men of Gujarati castes,—song 7 begins to extol the courage of the humbler Kamatis and Ghatis. The gist of the ode is that these people by standing up and fighting the victorious marauders checked the rioting which had defied the police and the Magistrates. The eighth song expresses the philosophic and poetical view of death. The ninth is set to the tune "Let all march to conquer, the bugles sound," but one is surprised to find that this trumpet call is a signal for peace. The song begins "Instantly make union." The brave are repeatedly warned that there is no benefit in fighting; and it is pointed out that the oppressive and unjust will be punished by the criminal law. Mussalmans and Hindus being but two halves of the same seed, the poet, turning slightly metaphysical, [768] condemns fighting altogether. Kindness and love seem to him, as they did to Shelley, the cure for the fearful evils of the world. By a natural transition the poet in the tenth song, to the air "It is light, remember thou the deity Shri Ganesh," triumphs in the victory of the Crown and the law over the miscreants—

> Silly foolish people, those great sinful rioters;
> By infliction of punishment they were suppressed by the valiant British."

So the faces of people bloom again like the lotus flower, and the darkness of quarrel having ceased, and the sun of union arisen, Bombay shines again in undimmed glory. In the eleventh song the poet, seemingly discouraged, implores the Lord of the Universe, the supporter of life, to save the people by creating peace and amity; and in the twelfth and last song the poem ends with a eulogy of the worthy Lakhmidas, the wise son of Khimji.

The Court cannot safely deal with a production like this without remembering the rhetorical forms used by the writer. Poetry often has more meaning than prose; read how Addison's Cato was applauded by both Whig and Troy. The transitions remind one of those of Dryden in Alexander's Feast; of Schiller in the Song of the Bell; of some of the Psalms; the attempt is to move by pity and terror; and the prosecution urge that the lines beginning "Fight again" and what follows are calculated to move to rage and violence, to incite the Ghatis and Kamatis to fire another Troy. Not every poet is as cautious as Addison, of whom Johnson says "When Pope brought him the prologue (to the tragedy of Cato), which is properly accommodated to the play, there were these words: 'Britons arise, be worth like this approved,'" meaning nothing more than Britons exert and exalt yourselves to the approbation of public virtue. Addison was frightened lest he should be thought a promoter of insurrection, and the line was altered to "*Britons attend.*" It may be conceded that the words "Fight again" are incautious; and this appears to have been felt by the publishers, who apparently, without reference to the poet, struck these words out after 300 copies (many of which were hawked about and sold) had been printed, and substituted the words "Be not afraid." But, then, we find the poem from beginning to end consists of a lamentation [769] over the riots, and the destruction and death they cause, and of repeated prayers for and counsel to peace and harmony between Hindus and Mussalmans. The actual words "Fight again" are qualified by "for your country's good." Judged by the context and the whole spirit of the poem, as well as by ordinary meaning, these qualifying words do not necessarily imply wanton outbreak and fighting. The poet

1893
DEC. 11.
APPELLATE CRIMINAL.
18 B. 758.

represents the Kamatis and Ghatis as men who when other Hindus, like the Gujarati-speaking castes, were cowering in concealment and confusion after the marauders had caused great loss of life and property, after they had got even so far as the Kamati quarter of the town and even gone so far as to knock down a European lady and outrage the Kamati women, as stated in song 5—as men, I say, who took up their clubs and retaliated vigorously on the hitherto successful invaders. To put the poet's view of this stage of the disturbances in the language of the law, the Kamatis were brave enough to use the right of private defence of the body and of property expressly given by ss. 100 and 103 of the Indian Penal Code: so that the people who had begun the lawless proceedings received a check. Although, as the poet seems to admit, the immediate result of the check was a series of fights, hardly to be controlled by police and troops combined, his sympathies are with the injured, and his expressed desire is the establishment of peace and the enforcement of the law. Supposing the words had been "Fight again, oh Light Horse, oh Police," or "Fight again, oh Magistrates and Justices of the Peace," we could not construe them to mean, fight without lawful orders, or fight without regard to the law at all. The criticism of Mr. Brewin, who thinks that the more amiable sentiments are put in merely to conceal a wicked design to excite bloody tumults again, does not appear justified by the general tenor of the work. Literature furnishes examples of poems wholly written for one object, *e.g.*, Swinburne's Ode on the Insurrection in Crete; and the Gujarati poem, translated in Kinloch Forbes' Ras Mala, on the Sutti-burning of the Queens and Concubines at Edur in 1836 on the death of the Maharaja Gambheer Singh. The one is a praise of the insurrection; the other of *suttis*. But the poem before us is far more a history than a praise of valour; the songs 7 and 8 arise **[770]** incidentally only out of an episode in the story. The latter song about contempt of death expresses sentiments adopted by many poets and religious moralisers in all ages and countries. They are found in the Bhagavatgita, and the Shakesperian remark that brave men die but once, and cowards often. That song by itself is not to be condemned, though such sentiments combined at the same moment with a call to fight may conceivably lead to a breach of the public order. Looking at the size of the poem and to the fact that the matter complained of is really contained in only one line thereof, it is right that the accused should have the benefit of such doubt as to the effect as may fairly exist. The improper matter does not, like the obscenity in the Confessional Unmasked—*Reg* v. *Hicklin* (1)—take up half the book. He appears to have done nothing except write his poem and send it to the press. He is no Tyrtæus singing in front of his men. Nor is the poem written in the tongue of either Kamatis or Ghatis, some only of whom understand Gujarati. It does not appear to have been written for, or read by, these classes of people; the heroism of these humbler castes, who resisting force with force checked the high advancing tide of murder and plunder, is used by the poet as a scornful contrast to the timid Mahajans and others who hid in corners of the house, and sought refuge by flight to Kathiawar, Gujarat and Marwar.

We entirely agree with the Magistrate that in the excited state of Hindu and Mahomedan feeling at the time it was the duty of the accused not to publish anything that had even a remote tendency to stir up ill-feeling. We mean a moral duty; not that he has transgressed the

(1) L. R. 3 Q. B. 360.

1893
DEC. 11.
APPELLATE CRIMINAL.
18 B. 758.

law. Even while acquitting him we do not look upon him as an object of public sympathy; he ought to have been more cautious. We have to add that there is evidence that the lines complained of made some Mahomedans angry, those to whom one of the witnesses read them. But this fact is hardly relevant to the question whether the accused in publishing the poem did what was illegal. Many sermons and comments on the acts or opinions of others, eulogies to and elegies on prominent leaders or the mighty dead may be delivered in a legal and peaceable way, and yet, especially in factious [771] times, raise much ill-feeling in the ranks of the opposite party. Yet this is not generally a reason for interference with the liberty of speech or of the press; such interference with legal rights would only cause oppression and give increased power to faction. People may be angry; but, if they allow themselves through anger to commit assaults, they expose themselves to criminal punishment. This is the answer of the law to people like the Mussalman witnesses, who sat down to hear this poem read, and then thought they did well to be angry. Milton shall not be silenced because Salmasius seeks to break his head; the peaceful lists of literature have long been open to Whig and Tory, Catholic and Protestant, Platonist and Materialist, Roundhead and Cavalier, Hindu and Mussalman. On the other hand, to prevent misconception, I must say that the Magistracy may, under s. 144 of the Code of Criminal Procedure, in circumstances where the public tranquillity is in danger, interdict for the occasion the exercise of legal right, and disobedience to the order is punishable under s. 188 of the Indian Penal Code. We reverse the conviction and sentence and discharge the appellant.

RANADE, J.—The appellant Kahanji with two others was convicted under ss. 117 and 153 of the Indian Penal Code by the Chief Presidency Magistrate, and sentenced to three months' imprisonment and a fine of Rs. 201. The offences with which he stood charged were (1) that of abetting the commission of the offence of rioting, in that he composed and caused to be published and sold a certain pamphlet extolling certain acts committed by Hindu Ghatis and Kamatis, and instigating them to fight with the Mahomedans again; and (2) that of wantonly abetting the commission of the offence of rioting, in that he composed and caused to be published and sold same pamphlet which contained lines instigating certain classes of Hindus to attack the Mahomedans, knowing that such a provocation would cause the offence of rioting to be committed. The Magistrate was satisfied that the lines on pages 7 and 8 of the collection of poems, on which special stress was laid by the prosecution called upon the Ghatis and Kamatis to renew the disturbances, and that the accused acted wantonly, and that he must be assumed to have known that the probable result of the publication at the time would be to instigate [772] one community to renew the disturbances, or provoke the other to do so. The appellant contends before us that the Magistrate was in error in the construction he put upon the lines, and that the pamphlet contained nothing which was calculated to instigate a renewal of the riots.

It thus becomes necessary to examine carefully the contents of the pamphlet. The prose preface gives a summary of the loses sustained in life and property both by the Hindu and Mahomedan communities, who are linked together in this place. The first stanza opens with a prayer to god Shiva, whose mercy is invoked, and concludes with a wish that venom and rage may be put out, and union and peace increase, so that Hindus and Mahomedans may be reconciled in mind, and entertain love and friendship to one another. In the second stanza, the author professes that his

intention is to write a history of the rise and progress of the riots. In this stanza it is no doubt stated that the riots were commenced by the Mahomedans. This was, however, admitted to be a fact by the chief police officer examined on behalf of the prosecution. In the first half of this stanza, allusion is made to the defilement of Hindu temples, and the fear and trembling which paralyzed the Hindus on Friday afternoon. About the middle of the stanza, it is stated that the modesty of Kamati women was outraged, and this circumstance roused the vengeance of the Kamatis. The latter portion of this stanza makes no distinctive mention of either community, but narrates how the rioters (scoundrels and budmashes) proved too much for the police, and were not brought under control till the military force arrived. In the third stanza, the history of the riots is continued, and the allusions show that the writer had chiefly in view the events of Saturday, when the Hindus successfully outnumbered their Mussalman assailants of the previous day. After mentioning the several causes assigned for the riots, the writer attributes them to mutual animosity of heart. The words apply to both communities, who are told that by "cherishing hatred, no benefit accrues, and that by friendship good happened to each other." The poet expresses a hope that, notwithstanding all that has happened, there is no cause for anxiety if people act prudently and cautiously. The police witnesses admitted that this was good advice. In the 4th [773] stanza there is an appeal made to the rich to give charity, and relieve the poor. No distinctive allusion is made to either community. In the 5th stanza, allusion is specially made to the scenes of plunder and looting, and individual murders which took place after Saturday till the riots ceased. Mention is here made for the first time of the Ghatis who saved their honour by fighting. Mosques and *durgas* are mentioned as having been burnt down by the rioters. The Mahomedans are by implication described as still fighting like desperadoes though outnumbered, while the ere while timid Hindus are stated to have killed the enemy without restraint. In the 6th stanza allusion is made to the help rendered by the rich Hindus to the poor people of their community. Next comes the 7th stanza in which occur the lines to which exception is taken. This stanza was no doubt intended to praise the Ghatis and Kamatis. The translation of one of the lines made by the Police Court translator as stating that the Ghatis and Kamatis broke through the serried array of the rifles was admitted by him to be a mistake in his evidence in Court. This stanza begins with the words "Brave, brave are the Kamati people, praiseworthy truly are the Ghatis," and concludes with the words "Fight again for country's good" in a few hundreds of the first issue or the pamphlet. These last words were altered into "Don't be afraid for country's sake" in the second and larger issue of the same pamphlet. The 8th stanza attempts to give reasons why no fear should be entertained. The reason is that death comes to all men only once, but to them who die in battle there is always victory. In the 9th stanza the chief verse inculcates that "there is no benefit in fighting, brothers reflect." "The law will punish the criminal and the oppressor, and people should not resort to a contrary course of action." "In reconciliation there is superior enjoyment and peace." The exhortation is intended for both communities, who are stated in one couplet to be the two halves of one seed, and the split between them is condemned by the poet, and both are asked "to make one affirmation of union and peace." In the 9th stanza there is again an invocation of God's mercy, and it is stated that "quiet was restored, and temples were reopened, and men's faces began to beam with

1893
DEC. 11.

APPELLATE CRIMINAL.

18 B. 758.

joy, thanks to the efforts of Government." In the 11th stanza God's aid is invoked [774] for the restoration of peace, and the 12th stanza concludes with the praise of Mr. Lakhmidas Khimji, who, it appears from the evidence, purchased a certain number of copies from the publisher. From this summary of the poem it appears to us clear that the general spirit of the poem, taking all the stanzas together, was clearly in favour of peace and reconciliation. The riots passed through several stages, and the narrative describes the stages separately in the several stanzas. The dominant idea was that Hindus and Mahomedans should not fight with one another, and there is no indication that the intention was to instigate the Hindus, or provoke the Mahomedans to renew the disturbances. The praise of the Ghatis and Kamatis was a rhapsody suggested by the course of events as they took place, and as the writer was a Hindu and a Gujarati, and the Mahomedans were admittedly aggressors in the first instance, such digression was not at all beyond the license allowed to ballad writers and rhapsodists. It appears to us that when the information was first laid before the Magistrate, a translation of the whole pamphlet should have been put in. This was not done, and only translations (subsequently admitted in part to be mistaken) of stanzas 7 and 8 were filed, and the Magistrate's attention was thus not sufficiently drawn to the whole poem. The words "Fight again" used in the first issues were, no doubt, very objectionable, but the mistake was admitted and corrected. When the whole spirit of the poem was decidedly in favour of peace and concord, it would not be a proper construction of the words so incautiously used to allow them to override the whole context of the work. It is also to be noted that the pamphlet was in Gujarati, which was not the spoken language of either Ghatis or Kamatis, nor of the lower classes of Mussalmans either. There is absolutely no evidence to show that the pamphlet was distributed among or read to or by the Ghatis or Kamatis, and the evidence about its distribution among the Mahomedans is also confined to the statements made by Mr. Brewin and one Mussalman charcoal dealer.

We do not think that, taking all these circumstances together, the publication can properly be regarded to be an illegal act as contemplated in s. 153. That section, moreover, requires that the provocation given by the commission of an illegal act must [775] be given malignantly and wantonly. The word wantonly occurs only in this section of the Code, while the word malignantly occurs once again in s. 270, which refers to the wicked spread of infectious poison. "Malignantly" implies certainly a sort of general malice, and very strong evidence must certainly be given to prove this malignity or wantonness in the publication of this pamphlet. In the first draft of the Indian Law Commission's Report, s. 136 stood in place of s. 153 of the present Code, and it only made the offence punishable as such in case a riot occurred in consequence. Admittedly no riot or disturbance took place, or was apprehended by the police in this case. The composition was not, taking the whole of it, an illegal act, and its publication was not malignant or wanton. We do not think the mere chance of a provocation was, under the circumstances, sufficient to justify the conviction under s. 153. The same remark applies to the charge under s. 117. There was no evidence of an abetment of any offence by the public generally, or by more than 10 persons which is necessary to justify a conviction under that section. We accordingly reverse the conviction and sentence passed on the accused Kahanji Dharamsi.

Conviction reversed.

GENERAL INDEX.

Abetment.

See PENAL CODE (ACT XLV OF 1860), 18 B. 758.

Account.

(1) See CHARITY, 18 B. 551.

(2) See LIMITATION ACT (XV OF 1877), 17 B. 341.

Acknowledgment.

(1) See HINDU LAW (JOINT FAMILY), 17 B. 512.

(2) See LIMITATION, 18 B. 614.

(3) See LIMITATION ACT (IX OF 1871), 17 B. 173.

(4) See LIMITATION ACT (XV OF 1877), 18 B. 586.

Acquiescence.

See LANDLORD AND TENANT, 18 B. 250.

I.—Imperial Acts.

Act XXXIV of 1850 (The State Prisoners).

See HABEAS CORPUS, 18 B. 636.

Act XXVIII of 1855 (The Usury Laws Repeal).

S. 2—See INTEREST, 17 B. 106.

Act III of 1858 (The State Prisoners).

See HABEAS CORPUS, 18 B. 636.

Act XIII of 1859 (The Workman's Breach of Contract).

S. 2—See HABEAS CORPUS, 18 B. 636.

Act II of 1864 (Civil and Criminal Justice. Aden).

See MAHOMEDAN LAW (WAKF), 18 B. 401.

Act III of 1864 (The Foreigners).

S. 3 —Validity and application of—Powers of legislation of the Governor-General in Council—Indian Councils Act (Stat. 24 and 25 Vict., c. 67), s. 22—Warrant to arrest and imprison—Form of warrant—Service of warrant—Procedure—*Habeas Corpus* -Crim. Pro. Code (X of 1882), s. 491—Foreigners—See HABEAS CORPUS, 18 B. 636.

Act XX of 1864 (Bombay Minors).

(1) See ACT VIII OF 1890 (GUARDIAN AND WARDS), 17 B. 560, 566.

(2) See HINDU LAW (PARTITION), 17 B. 271.

Act III of 1865 (Carriers).

See RAILWAY COMPANY, 17 B. 417.

Act XV of 1865 (The Parsi Marriage and Divorce).

(1) S. 30—See HUSBAND AND WIFE, 18 B. 366.

(2) S. 33—See HUSBAND AND WIFE, 17 B. 146.

Act XXI of 1865 (The Parsi Intestate Succession).

See WILL, 18 B. 1.

Act I of 1868 (The General Clauses).

(1) See LIMITATION ACT (IX OF 1871), 17 B. 173.

(2) S. 5—See ACT IX OF 1890 (RAILWAYS), 13 B. 440.

Act XIV of 1869 (Bombay Civil Courts).

S. 26—See STAMP, 18 B. 207.

Act XXI of 1870 (Hindu Wills).

See SUCCESSION CERTIFICATE ACT (VII OF 1889), 18 B. 608.

Act XXIII of 1871 (Pensions). PAGE

(1) S. 4—See SIRDAR, 17 B. 224.

(2) S. 4—Inamdar—Inam village—Suit by an inamdar against a *khot* to recover balance of land revenue—See INAMDAR, 18 B. 525.

(3) S. 4—Kulkarni vatan—Suit for partition and declaration of right to a specific share in the vatan and to officiate—Money grant—Vatan consisting exclusively of cash allowance — Collector's certificate—See KULKARNI VATAN, 18 B. 516.

(4) *Ss.* 4 *and* 6—*Collector's certificate—Certificate not obtained when suit filed—Certificate not produced at hearing—Adjournment asked for and refused—Certificate accepted in appeal and placed on record—Procedure—Practice.*—A suit under the Pensions Act (XXIII of 1871) is not bad *ab initio* by reason of its being filed without a Collector's certificate.

Where at the hearing of such a suit the necessary certificate was not produced.

Held, that the Judge ought to have granted the plaintiff's application for an adjournment, in order that the certificate might be obtained and produced. JIJAJI PRATAPJI RAJE v. BALKRISHNA MAHADEO, 17 B. 169 ... 110

Act II of 1874 (Administrator-Generals).

S. 18—See PRACTICE, 17 B. 388.

Act IX of 1875 (The Indian Majority).

S. 3—See HINDU LAW (PARTITION), 17 B. 271.

Act X of 1876 (Bombay Revenue Jurisdiction).

(1) S. 4, cl. (*a*)—See INAM, 18 B. 319.

(2) S. 4, cl. (*b*)—See INAMDAR, 18 B. 525.

(3) S. 4 (*c*)—Mortgage—Suit for redemption—Sale of mortgaged land by Native Chief for arrears of assessment—Purchaser at sale—Claim by purchaser against mortgagor and mortgagee—Jurisdiction—See JURISDICTION, 17 B. 681.

Act VI of 1878 (The Indian Treasure Trove).

S. 3—See PENAL CODE (ACT XLV OF 1860), 18 B. 212.

Act VII of 1878 (The Indian Forest).

Ss. 75, 76—*Ratnagiri District*—Khot—*Khoti Khasgi land—Trees—Right to cut trees—Dunlop's proclamation—Right of Government to rescind proclamation—Crown grant, construction of.*—In 1824 by a proclamation, known as Mr. Dunlop's proclamation, it was declared that the owners of land in the Ratnagiri District, on which teak and other forest trees were growing or should thereafter be grown, should be the owners of these trees and might dispose of them at their pleasure without any claim on the part of Government. In 1851, however, this proclamation was rescinded by a subsequent proclamation which declared that the "Government resumed, in regard to forest, all the seignorial rights which it possessed previously to 1823."

The accused was *khot* of the village of Asgoli in the Ratnagiri District. He was charged under s. 75, cl. (*c*) of the Indian Forest Act (VII of 1878) with the offence of cutting down two teak trees without obtaining the permission of Government as required by the rules framed by Government under the Forest Act. He contended that he was absolute owner of the trees under Dunlop's proclamation. He was convicted, and applied to the High Court under its revisional jurisdiction.

Held, that the conviction must be reversed. The land on which the trees in question were growing was the *khoti khasgi* land of the accused, and he was, therefore, entitled to the benefit of Dunlop's proclamation, by virtue of which the trees thereon became his property.

Held, also, that Dunlop's proclamation could not be withdrawn by Government in so far as it related to trees planted after that date.

Per FULTON, J.—*Khasgi* land of which the *khot* was actually in possession was clearly within Dunlop's proclamation and it granted the right to teak and other trees in *khasgi* lands held by *watandar khots* . . . . It is clear, too, that the right to trees having once been conceded could not be withdrawn by the proclamation of 1851, and it seems also manifest that

Act VII of 1878 (The Indian Forest)—(*Concluded*).

PAGE

the contention is untenable that the benefit of the first proclamation did not extend to the case of trees planted after its cancellation in 1851. Even though the *khot* may not be the proprietor of the soil in *khoti khasgi* lands, he is certainly the holder of an interest in it, and that interest having in 1823 been increased by the concession of all trees which he might grow thereafter, could not subsequently be reduced by the withdrawal of the right to such trees. *In re* ANTAJI KESHAV, 18 B. 670 ... 955

Act IV of 1879 (Indian Railways).

S. 11—See RAILWAY COMPANY, 17 B. 723.

Act XVII of 1879 (Dekkhan Agriculturists' Relief).

(1) *Special Judge—Finding of fact—Civ. Pro. Code* (XIV *of* 1882), *s.* 622—*Practice—Procedure.*—When the Special Judge under the Dekkhan Agriculturists' Relief Act (Bombay Act XVII of 1879) entertains a clear opinion that the findings of the Subordinate Judge on the questions of fact are erroneous and exercises his discretion in setting aside the decree, the High Court will not, in its extraordinary jurisdiction, interfere with that discretion, except under most exceptional circumstances. RAYACHAND MAYACHAND v. SULTAN RAHIMBHAI, 18 B. 347 ... 739

(2) *Suit on a document executed by defendant in which he was described as a trader—Plea in suit that he was an agriculturist—Estoppel.*—The mere fact that the defendant described himself in the instrument on which the suit was brought as a trader, would not of itself estop him from pleading at the trial that he was an agriculturist and entitled to the protection of the Dekkhan Agriculturists' Relief Act (XVII of 1879). There must be evidence to show that by describing himself as a trader he represented himself as a trader, and intended that that representation should be acted on by the plaintiff. KADAPPA v. MARTANDA, 17 B. 227. ... 148

(3) See HINDU LAW (JOINT FAMILY), 18 B. 505.

(4) *S.* 22—*Amending Act* (XXII *of* 1882), *s.* 9—*Mortgage by agriculturist—Subsequent money decree against mortgagor—Sale of his equity of redemption in execution—Such sale invalid—Equity of redemption is immoveable property—Suit for redemption.*—Raghoji, and agriculturist, mortgaged the land in dispute to the defendant in 1872. In 1875 one Dagdu obtained a decree against Raghoji (the mortgagor), who was then represented by his widow, the plaintiff. In execution of this decree Raghoji's equity of redemption was sold on the 10th February, 1883, and was brought by the son of the defendant (the mortgagee). On the 12th April, 1883, the sale was confirmed, and on the 10th November, 1883, the purchaser took formal possession of the land. In 1891 the plaintiff (widow and heir of the mortgagor Raghoji) brought this suit to redeem the mortgage and to recover possession of the land, contending that under s. 22 of the Dekkhan Agriculturists' Relief Act (XVII of 1879) the sale of the equity of redemption was a nullity. The lower Court dismissed the suit, holding that although the sale might be illegal, so long as the certificate of sale remained in force it was a bar to the plaintiff's right to redeem.

Held that the plaintiff, being found to be an agriculturist, the Dekkhan Agriculturists' Relief Act (XVII of 1879 and XXII of 1882) applied. The provisions of that Act applied, although the decree and order for sale under which the sale took place were made before the Act was passed. The Act expressly forbids the immoveable property of an agriculturist to be sold in execution, and an equity of redemption is immoveable property within the contemplation of the Act. The sale, therefore, on the 10th February, 1883, of the equity of redemption in the mortgaged lands was illegal and a nullity, and was no defence to the plaintiff's suit to redeem the mortgage. MAHALAVU v. KUSAJI, 18 B. 739 ... 1002

(5) Ss. 56 and 64—See LANDLORD AND TENANT, 18 B. 690.

Act V of 1881 (The Probate and Administration).

(1) See PRACTICE, 17 B. 388.

(2) S. 3—See HINDU LAW (WILL), 17 B. 686.

Act XV of 1882 (The Presidency Small Cause Courts). PAGE

(1) *S.* 18—*Jurisdiction—Foreigner—Non-resident foreigner carrying on business by his* munim *in Bombay—Small Cause Court.*—Where a foreigner who did not reside in Bombay carried on business there by his *munim*.

Held, that under s. 18 of the Small Cause Courts Act (XV of 1882) the Small Cause Court in Bombay had jurisdiction to try a suit brought against him in that Court.

Per SARGENT, C. J.—*Prima facie* the word "defendants" in cl. (*b*) of s. 18 has the same meaning in each of the three cases in which that clause gives jurisdiction to the Court; and as the word clearly includes non-British subjects among the defendants over whom the clause gives jurisdiction if they are "resident," or "personally work for gain," within the territorial limits of the Small Cause Court, it would be a strained construction to hold that it did not include them among the defendants over whom the clause gives jurisdiction, on the ground that they are "carrying on business" within the limits.

Although it is true that a non-British subject who does not personally carry on business within the territorial limits of the Court does not make himself personally subject to the municipal law of British India, still, by establishing his business in British India, from which business he expects to derive profit, he accepts the protection of the territorial authority for his business, and his property resulting from it, and may be fully regarded as submitting to the Courts of the country. GIRDHAR DAMODAR v. KASSIGAR HIRAGAR, 17 B. 662=Chitty's S.C.C.R. 375 ... 434

(2) *S.* 37—*Decree*—Ex parte *decree—Application to set aside* ex parte *decree—Limitation—Limitation Act* (XV *of* 1877), *sch.* II, *art.* 164.—S. 37 of the Presidency Small Causes Courts Act (XV of 1882) does not apply to an *ex parte* decree.

An application to set aside an *ex parte* decree passed by a Presidency Court of Small Causes falls within the terms of s. 108 of the Code of Civil Procedure (Act XIV of 1882), and the period of limitation for such an application is thirty days as prescribed by art 164 of Limitation Act (XV of 1877). ROSHANLAL v. LACHMI NARAYAN, 17 B. 507 ... 329

(3) Ss. 38 and 39—See SMALL CAUSE COURT, 17 B. 14.

(4) S. 69—See CONTRACT, 17 B. 129.

Act XXII of 1882 (The Dekkhan Agriculturists' Relief).

S. 9—See ACT XVII OF 1879 (DEKKHAN AGRICULTURISTS' RELIEF), 18 B. 739.

Act XVII of 1886 (The Jhansi and Morar).

See HABEAS CORPUS, 18 B. 636.

Act VII of 1887 (The Suits Valuation).

(1) S. 8—See COURT FEES ACT (VII OF 1870), 18 B. 100.

(2) S. 8—See STAMP, 18 B. 207.

(3) S. 8—See VALUATION, 18 B. 40.

Act IX of 1887 (The Provincial Small Cause Courts).

Sch. II, cls. 4 and 31, s. 23, cl. 1—See SMALL CAUSE COURT, 17 B. 42.

Act XII of 1888 (Supplementing the Bombay and Calcutta Municipal Acts, Bombay Act III of 1888 and Bengal Act II of 1888).

S. 3—See MUNICIPALITY, 18 B. 184.

Act VIII of 1890 (The Guardians and Wards).

(1) *Ss.* 7 (*cl.* 3), 13 *and* 48—*Minor—Guardian—Appointment of guardian by will—Application for certificate of guardianship—Practice—Procedure.*—When a person alleges that he has been appointed guardian of a minor under a will, no one else can be appointed guardian under s. 7 (3) of Act VIII of 1890, until it is found after due investigation that there is no valid will.

The Procedure under Act VIII of 1890 is not intended to be summary. SAYAD SHAHU v. HAPIJA BEGAM, 17 B. 560 ... 366

(2) *S* 39—*Guardian and ward—Minor—Removal of guardian—"Instrument"—Construction*—The word "instrument" in s. 39 of the Guardian and Wards Act (VIII of 1890) means instrument *ejusdem generis* with a will,

Act VIII of 1890 (The Guardian and Wards)—(*Concluded*), PAGE

and a decree of a Civil Court is not an instrument within the contemplation of the section. BAI HARKOR v. BAI SHANGAR, 18 B. 375 ... 758

(3) *S.* 41, *cl.* 3, *and s.* 51—*Its applicability to guardians who had ceased to be such before the Act came into force—Guardian and ward.*—The Guardians and Wards Act (VIII of 1890) does not apply to guardians whose powers had ceased by reason of their wards having attained majority, or otherwise, prior to the passing of the Act.

The word 'guardian' in s. 51 of the Act means a guardian who was such at the time the Act came into force.

A. was appointed a guardian of B.'s property under the Bombay Minors Act, XX of 1864. B. attained majority in 1886. In 1892 B. applied to the District Judge for an order directing A. to deliver to B. his property together with the accounts relating thereto. The District Judge made the order, as asked for, under s. 41, cl. 3 of Act VIII of 1890.

Held, that the District Judge had no jurisdiction under Act VIII of 1890 to make the order in question, as A. had ceased to be guardian before the Act came into force. VALLABDAS HIRACHAND v. KRISHNABAI, 17 B. 566 ... 370

Act IX of 1890 (Indian Railways).

(1) S. 54, cl. 1, s. 72, cls. (*a*), (*b*), sub-cls. (2) and (3)—See RAILWAY COMPANY, 17 B. 417.

(2) *S.* 113—*Railway—Excess charge and fare recoverable as a fine—Magistrate not competent to impose imprisonment in default—Fine—Imprisonment.*—S. 113, sub-s. (4) of the Indian Railways Act (IX of 1890), which directs that on failure to pay on demand excess charge and fare when due, the amount shall on application be recovered by a Magistrate as if it were a fine, does not authorize the Magistrate to impose imprisonment in default. The excess charge and fare referred to in the section is not a fine, though it may be recovered as such. QUEEN-EMPRESS v. KUTRAPA, 18 B. 440 802

Act VI of 1892 (The Indian Limitation Act and Civ. Pro. Code Amendment Act).

S. 4—See CIV. PRO. CODE (ACT XIV OF 1882), 18 B. 61, 429.

II.—Bombay Acts.

Act V of 1862 (Bombay, Bhagdari and Narwadari Tenures).

(1) See ACT III OF 1874 (BOMBAY HEREDITARY OFFICES), 17 B. 362.

(2) S. 3—See BHAG, 18 B. 283.

Act VII of 1863 (Bombay, Exemptions from Land Revenue in Territories not subject to Act XI of 1852).

(1) S. 2—See LAND REVENUE, 17 B. 407.

(2) S. 2, cl. 3—See RESUMPTION, 17 B. 431.

Act IV of 1864 (Bombay, The Native Law Officers).

See MAHOMEDAN LAW (WAKF), 18 B. 401.

Act V of 1864 (Bombay Mamlatdar's Court).

S. 15—See LANDLORD AND TENANT, 18 B. 348.

Act I of 1865 (Bombay, Survey and Settlement).

(1) See ACT III OF 1869 (BOMBAY, LOCAL FUNDS), 17 B. 422.

(2) See ACT VII OF 1878 (INDIAN FOREST), 18 B. 670.

(3) S. 2, cl. (*k*).—See ACT III OF 1869 (BOMBAY LOCAL FUNDS), 17 B. 54.

Act VIII of 1867 (Bombay, Village Police).

See EVIDENCE ACT (I OF 1872), 17 B. 485.

Act III of 1869 (Bombay, Local Funds).

(1) *S.* 8—*Local Fund cess*—Inamdar—*Superior holder—Liability of* inamdar *to pay the cess.*—An *inamdar* is a "superior holder" within the definitions of Regulation XVII of 1827 and Bombay Acts I of 1865 and V of 1879. He is, therefore, the person primarily liable to pay the Local Fund cess under s. 8 of Bombay Act III of 1869.

Act III of 1869 (Bombay, Local Funds)—(*Concluded*). PAGE

There is no provision of law entitling an *inamdar* to charge for his expenses in collecting the cess. SECRETARY OF STATE FOR INDIA v. BALVANT R. NATU, 17 B. 422 ... 275

(2) *S.* 8—*Local Fund cess—Landlord and tenant—Tenant's liability to pay cess imposed by an Act subsequent to the lease.*—Under s. 8 of Bombay Act III of 1869 a lessor, who is in the position of a superior holder, may recover the Local Fund cess from his lease. RAM TUKOJI v. GOPAL DHONDI, 17 B. 54 ... 36

Act VI of 1873 (Bombay, District Municipal).

(1) S 33—See MUNICIPALITY, 18 B. 547.

(2) S. 84—See JUDGE, 18 B. 442.

(3) *S.* 84—*Non-payment of taxes—Liability to penalty—Offence—Penal Code* (XLV *of* 1860). *ss.* 40, 64—*Penalty—Imprisonment in default of payment of penalty.*—There is no distinction between the word "penalty" as used in the Bombay District Municipal Act (VI of 1873) and the word "fine" as used in s. 64 of the Indian Penal Code (XLV of 1860). Imprisonment can, therefore, be awarded in default of any penalty inflicted under S. 84 of the Municipal Act. *In re* LAKMIA, 18 B. 400 ... 775

(4) *S.* 84—*Proceedings taken under s.* 84 *for the recovery of municipal taxes—Such proceedings are judicial and not ministerial—Magistrate's duty under the section.*—A proceeding before a Magistrate for the recovery of Municipal cesses and taxes instituted under s. 84 of Bombay Act VI of 1873, is a criminal prosecution, and must be conducted in the manner prescribed for summary trials under chap. XXII of the Code of Criminal Procedure (Act X of 1882).

In such a proceeding a Magistrate is not bound to order payment of the full amount claimed by the municipality, but must satisfy himself as to the extend of the defaulter's legal liability before passing any order against him. MUNICIPALITY OF AHMEDABAD v. JUMNA PUNJA, 17 B. 731 ... 479

(5) S. 86—See MUNICIPALITY, 18 B. 19.

Act III of 1874 (Bombay Hereditary Offices).

(1) See INAM, 18 B. 319.

(2) See WATAN, 18 B. 22.

(3) Ss. 7 and 23—See WATANDAR, 18 B. 752.

(4) S. 9—See KAZI, 18 B. 103.

(5) *S.* 10—*Certificate issued by Collector more than* 12 *years after death of last holder—Court bound to act on certificate—Limitation—Limitation Act* (XV *of* 1877), *art.* 178.—In execution of a decree against Nijaling Naik his lands were sold in February, 1876, and Hanmanbhatt purchased them and took possession on 10th August, 1876. Nijaling Naik died in July, 1877, and in February, 1888, his son and heir alleging that the lands were *watan* applied to the Collector for a certificate under s 10 of the Watandars Act (Bombay III of 1874). The Collector referred the matter to his subordinates for inquiry, and the certificate was not issued until the 13th March, 1890,—that is, more than twelve years after the death of the last holder, Nijaling Naik.

Held, that, although more than twelve years had elapsed, the Court could not refuse to act on the certificate of the Collector, as provided by s. 10 of the Watandars Act. CHANDRA NAIK v. BAHINABAI, 17 B. 362 ... 235

(6) S. 67—See KULKARNI VATAN, 18 B. 516.

Act III of 1876 (Bombay Mamlatdar's Courts).

(1) *Suit in a Mamlatdar's Court—Procedure where one of several plaintiffs in such a suit dies and the right to sue does not survive to the surviving plaintiffs—Code of Civil Procedure* (*Act* XIV *of* 1882), *chap.* XXI—*Its applicability to a suit in a Mamlatdar's Court—Practice—Procedure.*—The Bombay Mamlatdar's Act (III of 1876) makes no provision for the substitution of the names of heirs in the case of the death of one of the parties, and chap. XXI of the Code of Civil Procedure (Act XIV of 1882) cannot be held to apply to proceedings in a Mamlatdar's Court. Accordingly where a possessory suit was filed by two persons in a Mamlatdar's

Act III of 1876 (Bombay Mamlatdar's Courts)—(*Concluded*). PAGE

Court, and one of them died pending the suit, and it appeared that the right to sue did not survive to the surviving plaintiff alone.

Held that the Mamlatdar had no alternative but to dismiss the suit. GANPATRAM JEBHAI v. RANCHHOD HARIBHAI, 17 B. 645 ... 423

(2) *S.* 4, *cl.* 2—*Suit for disturbance of possession—Possession by tenant—Physical possession—Jurisdiction.*—There must be physical possession to enable an aggrieved person to invoke the Mamlatdar's assistance in a case falling under the second clause of s. 4 of the Mamlatdars' Act (Bombay Act III of 1876).

A person who is in possession through his tenant cannot sue for an injunction for disturbance of possession under the Act. ABA BIN SADOBA v. PARVATRAO BIN GANPATRAO, 18 B. 46 ... 539

(3) *S.* 15, *cl.* (*a*), *sub-cl.* (1), *sub cl.* (2), *s.* 18—*Possessory suit—Execution of decree—Actual possession—Execution of decree against a third party—Want of jurisdiction—Exercise of the extraordinary jurisdiction discretionary.*—A third party cannot be ousted from possession of property in the execution of a decree for possession made by a Mamlatdar against a defendant under Bombay Act III of 1876, and it is beyond the power of Government by Resolution to give a Mamlatdar authority to oust a third party.

A. obtained an order in a Mamlatdar's Court against G. for possession of a house, and in execution N., who was found in possession of the house and who was reported by the village officers as holding possession for G., was evicted by order of the Mamlatdar. N. then applied to the High Court.

Held, that the Mamlatdar's order was, strictly speaking, beyond his authority, but that as N.'s petition to the High Court contained no distinct denial that he was occupying merely on behalf of the defendant, the High Court would not interfere in its extraordinary jurisdiction. NATHEKHA v. ABDUL ALLI, 18 B. 449 ... 808

(4) S. 18—See LANDLORD AND TENANT, 18 B. 348.

Act V of 1878 (Bombay, Abkari).

(1) *Ss.* 3, *cl.* 11, *and* 43, *cl.* (*f*)—*Drawing toddy is not manufacturing liquor.*—Drawing toddy is not 'manufacturing liquor' as defined in cl. 11 of s. 3 of the Bombay Abkari Act (V of 1878).

The mere possession of implements for the purpose of drawing toddy is not an offence punishable under cl. (*f*) of s. 43 of the Act. QUEEN-EMPRESS v. PIRIO KALIO, 18 B. 428 ... 794

(2) *S.* 55—*Construction—"Or" read "nor"—Order of confiscation.*—S. 55 of the Bombay Abkari Act V of 1878 provides that "no order of confiscation shall be made until the expiration of one month from the date of seizing the things intended to be confiscated or without hearing any person who claims a right thereto, and the evidence, if any, which he produces in support of his claim." Certain casks of vinegar belonging to the plaintiffs were seized by the Collector of Bombay on the 5th November, 1891, and an order of confiscation was made on the 17th November, 1891. The order was made after hearing the plaintiffs.

Held, that under the provisions of the Abkari Act, s. 55, the Collector could not make a valid order of confiscation before the expiration of one month from the date of seizure. FRAMJI MANEKJI PUNJAJI v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL, 17 B. 154=Chitty's S.C.C.R. 345 ... 100

Act V of 1879 (Bombay Land Revenue Code).

(1) See ACT III OF 1869 (BOMBAY, LOCAL FUNDS), 17 B. 422.

(2) See ACT VII OF 1878 (INDIAN FOREST), 18 B. 670.

(3) See LANDLORD AND TENANT, 17 B. 475.

(4) S. 37—See CRIM. PRO. CODE (ACT X OF 1882), 17 B. 293.

(5) S. 50—See ACT III OF 1869 (BOMBAY, LOCAL FUNDS), 17 B. 54.

(6) *S.* 83—*Landlord and tenant—Commencement and origin of tenancy—Tenancy forty years old—S. 83 of the Land Revenue Code (Bombay Act V of 1879), applicability of.*—S. 83 of the Land Revenue Code (Bombay Act V of 1879) does not apply to a tenancy which commenced about forty years ago, but it applies to a tenancy with respect to which there is no satisfactory evidence

Act V of 1879 (Bombay Land Revenue Code)—*(Concluded)*. PAGE

to show the commencement as well as the terms of a tenancy. LASHMAN v. VITHU, 18 B. 221 ... 655

(7) S. 83—Landlord and tenant—Permanent tenancy—See LANDLORD AND TENANT, 18 B. 433.

(8) S. 85—See PRACTICE, 17 B. 547.

(9) Ss. 86, 153—See KHOTI LANDS, 17 B. 677.

(10) S. 216, cls. *(a)*, *(b)* and *(c)*—Village partially alienated—Inamdar—Inam village—Suit by an inamdar against a *khot* to recover balance of land revenue—Assessment—Survey made by the British Government—Collector's certificate—Change in rate of assessment—Pensions Act XXIII of 1871, s. 4—Jurisdiction of Civil Courts—Revenue Jurisdiction Act (Bom. Act X of 1876), s. 4, sub-cl. *(b)*—Land Revenue Code (Bom. Act V of 1879), s. 216, cls. *(a)*, *(b)* and *(c)*—See INAMDAR, 18 B. 525.

Act VI of 1879 (Bombay Port Trusts).

Ss. 43 and 62—See SALE OF GOODS, 17 B. 62.

Act I of 1880 (Bombay Khoti Settlement).

(1) *Ss.* 17, 20, 21 *and* 22—*Entry in the Settlement Officer's record*—"*Conclusive and final evidence of the liability*"—*Reference to debate in Legislative Council*—Khot—*Construction.*—An entry in the Settlement Officer's record referred to in s. 17 of the Khoti Act (Bombay Act I of 1880) is conclusive as to the nature and amount of rent. The words "conclusive and final evidence of the liability" in s. 17 have the effect of shutting out any other evidence on the subject which might be adduced before the Civil Court.

The words "when not final" in s. 21 of the Act refer to the finality ascribed in s. 17 to the entries of the nature therein mentioned, and which follow as contemplated in s. 20 on the survey officer arriving at his decision.

For the purpose of construing an Act, the debate upon the Bill when before the Legislative Council is not to be referred to. GOPAL KRISHNA PARACHURE v. SAKHOJIRAV, 18 B. 133 ... 597

(2) *Ss.* 17, 20, 21, 22 *and* 37—*Settlement Officer's decision*—Dhara *lands*—*Suit for a declaration that lands were* khoti *lands*—*Decree of a Civil Court*—Khot—*Adverse possession*—*Art.* 14, *sch. II of the Limitation Act* (XV *of* 1877)—*Six years' limitation.*—A survey settlement officer decided in the year 1882 that certain lands situate at the *khoti* village of Tadil, in the Ratnagiri District, were *dhara* lands of S. and another, but the entry in the survey register that they were *dhara* lands was not made till 1889.

In the meanwhile, F. and others, who were the *khots* of the village, made an application to the special survey officer to revise the decision of the settlement officer of the year 1882, and the special settlement officer having rejected this application in 1885, they brought the present suit in 1887 against S. and others for a declaration that the lands were their *khoti*.

The Judge dismissed the suit on the ground that the settlement officer's decision being final under ss. 20 and 21 of the Khoti Settlement Act (Bombay Act I of 1880), and it having not been set aside within one year from its date, the suit was time-barred under art. 14, sch. II of the Limitation Act (XV of 1877).

Held, reversing the decree, that the claim was not time-barred. Under ss. 20 and 21 of the Khoti Settlement Act, it is the "decision" on the rival claims of the parties which is open to reversal by the Civil Court and not the consequences of that decision, which as provided by s. 22 are left to the Collector himself to undo or modify in accordance with the decision of the Civil Court.

Held, further, that s. 21 does not contemplate any "Order" being made by the survey officer between the parties; and even if framing the register be regarded as an "act" of the survey officer, s. 22 provides for its being amended by the Collector, himself, in accordance with the decision of the Civil Court.

Held, further, that although the defendants might have paid only the assessment before 1878-79, their adverse possession of the lands as *dhara*

Act I of 1880 (Bombay Khoti Settlement)—(*Concluded*). PAGE

did not begin to run against the plaintiffs until 1878-79, when such a claim was actively advanced by the defendants. The plaintiff's cause of action arose in 1882, when the survey officer determined that the lands were *dhara*, and the present suit, which was brought within six years to reverse that decision, was, therefore, in time. FAKI GULAM MOHIDIN v. SAJNAK, 18 B. 244 ... 671

Act II of 1884 (Bombay District Municipal Amendment Act).

(1) S. 48—See ESTOPPEL, 17 B. 510.

(2) S. 48—See MUNICIPALITY, 18 B. 19.

Act IV of 1887 (Bombay Prevention of Gambling).

S. 3—Gambling—"Common gaming house"—"Instruments of gaming"—"Used"—Meaning of these words in s. 3 of the Act—See GAMBLING, 17 B. 184.

Act III of 1888 (Bombay City Municipal).

(1) *S.* 158—*Tax—Drawbacks — General conditions prescribed by Standing Committee limiting right to drawback under s.* 158, ultra vires.—Under s. 158 of the City of Bombay Municipal Act (Bombay Act III of 1888) the following general conditions were prescribed by the Standing Committee with reference to claims for drawback of the general property tax leviable in Bombay :—

"(1) Except with the special sanction of the Commissioner, no claim for drawback shall be entertained unless submitted to the Commissioner not less than 30 days before the commencement of the half year to which such claim relates.

(2) Drawback of the one-fifth part of the general tax shall be sanctioned by the Commissioner in cases falling within either of the following classes and in no others :

(*a*) Chawls or buildings let out for hire in single rooms either as lodging or godowns for the storage of goods.

(*b*) Properties which, in the opinion of the Commissioner, are usually or frequently vacant either wholly or partially.

(3) No sanction for drawback shall extend or apply to any floor on which trade or manufacture is carried on, or any goods are sold."

The Commissioner having refused to sanction a drawback of the tax leviable on certain properties of the plaintiff on the ground that they did not fall within the terms of the above conditions, the plaintiff filed this suit. It was contended in his behalf that the second and third of the above conditions were bad, and that the Standing Committee could not by so-called general conditions limit or curtail the right given to tax-payers by s. 158.

Held, that the conditions prescribed by the Standing Committee were not *ultra vires*, and that the Commissioner was justified in refusing the drawback. GOVARDHANDAS GOCULDAS TEJPAL v. THE MUNICIPAL COMMISSIONER, 17 B. 394 = Chitty's S.C.C.R. 363 ... 256

(2) Ss. 298, 299 and 301—See MUNICIPALITY, 18 B. 184.

(3) S. 527—Notice of suit—What is sufficient notice—Negligence—Easement—Right of support of house by adjoining soil—Principal and agent or contractor—Liability of principal for acts of contractor—See NEGLIGENCE, 17 B. 307.

Act VI of 1880 (Bombay, Gujrat Talukdar's).

(1) S. 11—See COURT FEES ACT (VII OF 1870), 18 B. 100.

(2) *S.* 31, *cl.* 2—*Construction—Retrospective operation—Alienation of estate—Sanction.*—A decree upon a mortgage-bond passed against part of a *talukdar's* estate on the 15th August, 1887, was transferred under s. 320 of the Civ. Pro. Code (Act XIV of 1882) to the Collector for execution. The property was sold on the 5th August 1889, but the Collector refused to confirm the sale, as the sanction of the Governor in Council under cl. 2, s. 31 of the Talukdars Act (Bombay Act VI of 1888), which came into force on the 25th March, 1889, had not been obtained.

Act VI of 1880 (Bombay, Gujrat Talukdar's)—(*Concluded*). PAGE

Held, that the section was not retrospective in its operation, and that the sale should be confirmed, although no sanction had been obtained. When the Act passed, the plaintiff had already acquired a vested right by the decree to have the property sold, and the presumption was that the Legislature did not intend to interfere with that vested right. That presumption was not rebutted by any intention to interfere appearing in the Act itself. KALIAN MOTI v. PATHUBHAI FALJIBHAI, 17 B. 289 ... 188

Act I of 1890 [Bombay Gambling (Amending Act IV of 1887)].

S. 3—"Common gaming house"—"Instruments of gaming"—"Used"—Meaning of these words in s. 3 of the Act.—See GAMBLING, 17 B. 184.

Act IV of 1890 (Bombay District Police).

S. 44—See CAUSE OF ACTION, 18 B. 693.

Act of State.

(1) *Idol—Property bequeathed to an idol—Owner of shrine—Deposition of owner from his position by an act of State of foreign power—Effect of deposition on right to property in Bombay—Trustee—Will—Power of appointment.*—Under a power given to her by the will of her husband, one Custur had the right to bequeath a certain house situate in Bombay. She died in 1873, and by her will she bequeathed the house in question to trustees, their heirs, &c., in trust to pay and apply the rents thereof to the shrine or *gadi* of Shri Nathji for ever, and she gave the trustees and their heirs, &c., the right to reside for life in the first storey of the said house free of rent. The Shri Nathji is situate at Nathdwara in the territory of High Highness the Maharana Oodeypore. It is held in great veneration by the Vaishnava sect of Hindus and is extremely wealthy. The plaintiff held the position of Maharaja of Nathdwara (Tikait Maharaja) up to the year 1876, and as such sat on the *gadi* and managed the property of the said shrine. In that year, however, he was deposed from his position by the principal authorities of Oodeypore and deported from Nathdwara, and his son, the second defendant, was raised to the *gadi* in his place. Since that time the plaintiff had never been permitted to go back, nor had he had anything to do with the shrine. The second defendant (his son) had since his elevation performed the worship and managed the property belonging to the shrine. The plaintiff, however, claimed in this suit to be still the legal owner and representative of the shrine, and as such entitled to the house in question and to the rents and profits thereof since the death of Custur. The first defendant was one of the trustees named in the will of Custur to whom the house was bequeathed in trust. The plaintiff in his plaint also contended that the clause in Custur's will giving the said trustees a right to reside in the house free of rent was *ultra vires* of the power of appointment given to her by the will of her husband.

The defendants denied that since his deposition the plaintiff was the legal owner and representative of the shrine of Shri Nathji. They contended that having been deposed and reported from Nathdwara he could no longer apply the rents to the support of the shrine, and that if the house were given to him, the trusts of Custur's will would be defeated. They contended that the second defendant in virtue of his position was entitled to receive the rents, and that this suit should be dismissed.

Held, that the plaintiff was entitled to the said house. The house was validly bequeathed to the *gadi*. At the date of the bequest the plaintiff was *de facto* as well as *de jure* in possession of the shrine and of its property. His deposition from the *gadi* was an act of a foreign State and did not affect his right to property in Bombay. If he was regarded as owner of that property he had not lost his right as such to the said property in consequence of his deposition, and if he was merely a trustee he had not been removed from his office by any competent tribunal.

Held, also, that under the will of Custur the first defendant was entitled to reside rent free in the first storey of the house in question during his lifetime. GOSWAMI SHRI GIRDHARJI v. MADHOWDAS PREMJI, 17 B. 600. 393

(2) *Of foreign power—Effect of such act on title to property outside foreign State—Idol—Property of idol—High-priest and manager of shrine—Deposition*

Act of State -(*Concluded*).

PAGE

of high-priest by act of State—Appointment of new high-priest—Suit by latter for property belonging to shrine.—For thirty years prior to 1876 the defendant had been the high-priest of the shrine of Shri Nathji at Nathdwara in the territory of His Highness the Maharana of Oodeypore and as such was manager of the property of the shrine. The shrine is held in great veneration by the Vaishnava sect of Hindus, and large bequests and offerings of money, land, &c., are made to it by members of that sect. To facilitate the collection of such offerings and the employment of the funds belonging to the shrine, *pedhis* or firms are established in various parts of India, including Bombay. The firm in Bombay was carried on under the name of Navnitdas Purshottam, and the house in which it was carried on was built with monies belonging to the shrine. On the 8th May, 1876, by order of the Political Agent of Meywar and the Maharana of Oodeypore he was deposed from that office for alleged misconduct and deported from Nathdwara. In his place his son, the plaintiff, was placed on the *gadi* as high-priest. In 1878 the plaintiff brought this suit praying for a declaration that as high-priest of the shrine he was entitled to the property in Bombay belonging thereto, and for delivery of the same to him, and for an injunction against the defendant, and for a receiver, &c. He obtained a rule *nisi* calling on the defendant to show cause why he should not be restrained from receiving or dealing with the monies of the said firm of Navnitdas Purshottam and from tampering with the books, &c.

Held, discharging the rule, that the plaintiff had shown no title to the property in question. The defendant was in possession and had been for many years in possession of the property. His deposition by a foreign power and the election of the plaintiff to the *gadi* in the place of the defendant did not transfer the title to property in Bombay from the defendant to the plaintiff. As an act of State, it could not be made the basis of an action, and it could not be regarded as a foreign judgment. SHRIMAN GOSWAMI v. GOSWAMI SHRI GIRDHARLALJI, 17 B. 620-N. 406

Adjournment.

See ACT XXIII OF 1871 (PENSIONS), 17 B. 169.

Administrator.

Liability of, for loss to estate—Compromise of claim by administrator—Subsequent suit by a creditor of estate to set aside the compromise and for damages for negligence of administrator—Indian Succession Act (X of 1865), Ss. 280 and 328—Administrator's liability for neglect to get in any part of the deceased's property.—One Phirozsha Shapurji mortgaged certain property to Homjibhai Jamasji for Rs. 2,667. Homjibhai sued Phirozsha to recover the mortgage debt. Pending the suit Phirozsha died in 1878. Thereupon Hormajsha, the son of Phirozsha, took out letters of administration to the deceased's estate and contested Homjibhai's claim. Homjibhai obtained a decree in the Court of first instance for the sale of the mortgaged property, and in execution of this decree the property was sold for Rs. 810 and purchased by Homjibhai. The decree was afterwards—*viz.*, on 2nd August, 1883—reversed, on appeal, by the Assistant Judge. Thereupon Homjibhai entered into a compromise with Hormajsha by which it was arranged that Hormajsha should give up his claim under the appellate decree of the Assistant Judge, to be repaid by Homjibhai the sum of Rs. 810 which he had realized by sale of the mortgaged property, and that Homjibhai should pay to Hormajsha Rs. 240 on account of his costs incurred in the suit and in taking out letters of administration. This compromise was effected on 16th November, 1883.

In the meantime on 4th September, 1883, the plaintiff had purchased from one Bai Bhikaiji an old decree which was outstanding against the estate of the deceased Phirozsha. On 10th September, 1883, the plaintiff sought to execute this decree against the mortgaged property. Having failed in this attempt, the plaintiff filed a suit against Hormajsha for a declaration that the compromise of the 16th November, 1883, had been fraudulently effected with the object of defeating his (the plaintiff's) claim, and to recover Rs. 1,000 as damages from the defendant on account of his fraudulent and negligent conduct as administrator of his deceased father's estate. This suit was dismissed by both the Lower Courts, on the ground that

Administrator—(*Concluded*). PAGE

as there were other creditors who had claims against the estate, the plaintiff's proper remedy was an administration suit, which would enable the Court to assess the claims of all the creditors.

Held, reversing the lower Court's decree, that the plaintiff was entitled to recover. By the compromise of the 16th November, 1883, the defendant had given up his right under the appellate Court's decree of the 2nd August, 1883, to be repaid by Homjibhai the sum of Rs. 810 and had thereby occasioned a loss to the estate of that amount. He was, therefore, liable to the plaintiff to make good the amount under s. 328 of the Indian Succession Act (X of 1865), subject, however, to a deduction, under s 280 of that Act, of the expenses incurred by him in obtaining letters of administration, and the costs of any judicial proceeding that might be necessary for administering the estate. KHUSRUBHAI NASARVANJI v. HORMAJSHA PHIROZSHA, 17 B. 637 ... 418

Admission.

See STAMP ACT (I OF 1879), 18 B. 369.

Adultery.

See HUSBAND AND WIFE, 17 B. 624.

Adverse Possession.

(1) *Burden of proof—Evidence—Limitation—Limitation Act* (XV *of* 1877), *sch. II, arts.* 127, 144—*Suit for possession of land alleging a previous partition—Partition—Co-sharers.*—The defendant had purchased the land in question at a sale in execution of a decree obtained by him against cousins of the plaintiff. The plaintiff claimed to recover the land, alleging that it was his share of ancestral property which had been allotted to him on partition four or five years before suit, and of which he had actually been in separate possession. The lower Court upon these allegations rejected the plaintiff's claim, holding that the suit was not one for partition and did not fall within art. 127 of the Limitation Act (XV of 1877), but that art. 144, applied, and that the plaintiff had failed to show that the defendant's adverse possession had begun within twelve years preceding the suit. On appeal to the High Court,

Held, reversing the decree and sending back the case, that under art. 144 it was for the defendant to prove adverse possession for twelve years before suit. HANMANTA KOLAJI v. MAHADEV KONDAJI, 18 B. 513 ... 851

(2) Lease—Expiry of lease—Continued possession after expiry of lease—Permissive possession—Tenants' heirs continuing in possession after the expiry of tenancy—Limitation—Landlord and tenant—Possession—See LANDLORD AND TENANT, 18 B. 256. ... 679

(3) *Limitation Act* (XV *of* 1877), *sch.* II, *art.* 141—*Reversioner.*—Nathu, a Hindu, died in 1863, leaving two widows (Tulsa and Gama) and a daughter Mukta him surviving. In 1874 the widows divided the property left by Nathu between them, and one of them (Tulsa), in 1876, sold her share to one Ganpatrav who again sold it to the plaintiff. Gama died in 1887, Tulsa having died previously. After the death of the two widows, Mukta, the daughter of Nathu, was heir to the property, but the plaintiff in this suit alleged a title by adverse possession.

Held, that the plaintiff had no title as against the defendant Mukta. Under art. 141 of the Limitation Act (XV of 1877) the possession of Tulsa's vendee and of the plaintiff was not adverse to the defendant Mukta, who took as Nathu's heir, until the death of Gama, the surviving widow of Nathu. Gama did not die until 1887. MUKTA v. DADA, 18 B. 216 ... 652

(4) *Manager during minority—Limitation Act* (XV *of* 1877), *sch.* II, *arts.* 91 *and* 144.—The plaintiffs sued to recover lands which they claimed as their own and of which they alleged the defendant to have had the management during their minority, he having been appointed a manager of all their (the plaintiffs') property by their mother and grandmother, who were dead at the date of suit. The defendant alleged that the land in question had been sold to him, and produced a deed of sale, dated 3rd October, 1876, purporting to have been executed by the deceased ladies and by the plaintiffs. The plaintiffs denied all knowledge of the deed,

Adverse Possession—(*Concluded*).

PAGE

and prayed that it might be cancelled. The defendant (*inter alia*) contended that the suit was barred by limitation and pleaded adverse possession.

Held, that the suit was not barred, and that the plaintiffs were entitled to recover: (1) supposing the deed not to have been executed at all, the possession of the manager would not become adverse until he distinctly repudiated the management; (2) if the deed were executed by the ladies only, then art. 144 and not art. 91 of the Limitation Act (XV of 1877) would apply: (3) even if the minors whose names appeared in the deed, did actually execute it, nevertheless as the defendant did not get into possession under it, but only used it to defend his position, art. 91 would not apply. NABAB MIR SAYAD ALAMKHAN v. YASINKHAN, 17 B. 755 ... 496

(5) Mortgage—Mortgagee in possession—Dispossession of mortgagee by trespasser—Adverse possession as against mortgagee when effectual also as against the mortgagor—Evidence—Burden of proof—Limitation Act (XV of 1877), sch. II, art. 144.—See LIMITATION ACT (XV OF 1877), 18 B. 51.

(6) See ACT I OF 1880 (BOMBAY KHOTI SETTLEMENT), 18 B. 244.

(7) See EXECUTION OF DECREE, 18 B. 37, 260.

(8) See MATH, 18 B. 507.

(9) See WATAN, 18 B. 22.

Advocate-General.

See CHARITY, 18 B. 551.

Agent.

Principal and—Principal and factor—Consignment for sale—Advances by factor on consignment—Right of factor to sell goods consigned to him for sale below the limit of price prescribed by consignor—See PRINCIPAL AND AGENT, 17 B. 520 ... 338

Agent for Sardars.

See RESUMPTION, 17 B. 431.

Agreement.

(1) See CIV. PRO. CODE (ACT XIV OF 1882), 18 B. 464.

(2) See CONTRACT, 17 B. 457; 18 B. 342.

(3) See REGISTRATION, 18 B. 745.

(4) See SPECIFIC PERFORMANCE, 18 B. 702.

(5) See WATANDAR, 18 B. 752.

Agriculturist.

See ACT XVII OF 1879 (DEKKHAN AGRICULTURISTS' RELIEF), 17 B. 227.

Alienation.

(1) See ACT VI OF 1888 (BOMBAY, GUJARAT TALUKDAR'S), 17 B. 289.

(2) See LANDLORD AND TENANT, 18 B. 603.

Alimony.

Husband and wife—Parsi Matrimonial Court—Act XV of 1865—Suit by wife for judicial separation—Alimony after decree dismissing wife's suit and pending appeal—Alimony pending petition for review of judgment—Practice in allotment of alimony—See HUSBAND AND WIFE, 17 B. 146.

Allotment.

See COMPANY, 17 B. 469.

Alteration.

(1) Of decree—Execution—Decree—Decree in terms of an award ordering (*inter alia*) delivery of moveable property—Loss of part of such moveable property and consequent failure to deliver—Application to insert in decree an order to pay value of such moveable property in event of failure to deliver—Civ. Pro. Code (XIV of 1882), ss. 206 8—Practice—See EXECUTION OF DECREE, 17 B. 657.

(2) See CRIM. PRO. CODE (ACT X OF 1882), 18 B. 751.

Alternative Liability.

See PRACTICE, 17 B. 466.

Amendment. PAGE

(1) Of plaint—See PARTIES, 17 B. 413.
(2) See FRAUD, 18 B. 144.
(3) See HINDU LAW (PARTITION), 18 B. 611.
(4) See PRACTICE, 18 B. 542.

Appeal.

1.—GENERAL.
2.—SECOND APPEAL.

——1.—General.

(1) *Reg.* VIII *of* 1827—*Order refusing certificate of heirship appealable—Succession Certificate Act* (VII *of* 1889), *s.* 28—*Practice.*—An appeal lies from the order of a District Judge refusing to grant a certificate of heirship under Reg. VIII of 1827 by virtue of the provisions of s. 28 of the Succession Certificate Act (VII of 1889). JAVERMAL v. THE NAZIR OF THE DISTRICT COURT OF POONA, 18 B. 748 ... 1008
(2) See ARBITRATION, 17 B. 357.
(3) See CIV. PRO. CODE (ACT XIV OF 1882), 18 B. 464.
(4) See COMPANY. 17 B. 197.
(5) See COURT FEES ACT (VII OF 1870), 17 B. 56.
(6) See EXECUTION OF DECREE, 18 B. 203.
(7) See HINDU LAW (INHERITANCE), 17 B. 758.
(8) See INSOLVENCY, 17 B. 334.
(9) See MUNICIPALITY, 18 B. 184.
(10) See PARTIES, 17 B. 49.
(11) See PRACTICE, 17 B. 29, 466; 18 B. 224, 520, 542.
(12) See RES JUDICATA, 18 B. 597.
(13) See STAMP, 18 B. 207.
(14) See VALUATION, 18 B. 40.

——2.—Second Appeal.

(1) Finding of fact not accepted in second appeal—Practice—Procedure—Inam land—Sub-alienee—Wrongful surrender by the village inamdar to Government—Khalsat—Landlord and tenant—Non-payment of rent by tenant to landlord—Acquiescence of landlord—Effect of acquiescence—Subsequent suit by landlord for possession—See LANDLORD AND TENANT, 18 B. 250.
(2) See HINDU LAW (INHERITANCE), 17 B. 100, 303.
(3) See HINDU LAW (MAINTENANCE), 18 B. 679.
(4) See INSTALMENTS, 17 B. 555.
(5) See LANDLORD AND TENANT, 18 B. 110.
(6) See LIMITATION, 18 B. 84.

Appellate Court.

(1) See CIV. PRO. CODE (ACT XIV OF 1882), 17 B. 428.
(2) See CRIM. PRO. CODE (ACT X OF 1882), 18 B. 751.
(3) See PRACTICE, 18 B. 737.

Appropriation.

See SALE OF GOODS, 17 B. 62.

Arbitration.

(1) Appointment of umpire by arbitrators—Mode of appointment prescribed by contract—Delegation by arbitrators of their right to appoint umpire—See CONTRACT, 17 B. 129.
(2) Award—Civ. Pro. Code (XIV of 1882), s. 525—Application for filing the award registered as a suit—Objections taken by the defendant—Court precluded from filing the award—See AWARD, 17 B. 674.
(3) *Award—Decree in terms of award—Appeal—Award by three out of four arbitrators—Illegal award.*—Where a decree has been passed in terms of an

Arbitration—(*Concluded*).

award, an appeal lies only where the question is whether the award was illegal, being void *ab initio*. NANDRAM DALURAM v. NEMCHAND JADAVCHAND, 17 B. 357 ... PAGE 232

(4) *Award—Setting aside award—Arbitrator receiving evidence from one side in absence of other side—Misconduct—Civ. Pro. Code* (XIV *of* 1882), *s.* 521—*Contract—Contract to sell from* 2,500 *to* 3,500 *tons of coal—Breach of contract—Non-delivery of coal—Damages—Number of tons on which damages to be calculated.*—An arbitrator ought not to hear or receive evidence from one side in the absence of the other side, without (if he does) giving the other side affected by such evidence the opportunity of meeting and answering it. This proposition is, however, subject to the qualification that the parties may agree that a reference may be conducted in any particular way, and such an agreement may be either express or implied from their conduct during the arbitration, and they may also expressly or by their conduct waive their objection to an irregular course of conduct on the part of the arbitrator.

Where an arbitrator received certain papers and documents from the defendants in a suit referred to his arbitration, together with a letter from the defendants containing certain comments on the documents sent to him and made his award without giving the plaintiffs an opportunity of seeing the said papers and documents, and of meeting the inference deducible from them.

Held, that there was such a breach of duty on the part of the arbitrator as entitled the plaintiffs to have the award set aside.

On the 18th May, 1893, the defendants sold to the plaintiffs "the entire cargo of coal per steam-ship——May shipment, *via* canal, amounting to 2,500 to 3,500 tons or thereabouts." The defendants intended a certain steam-ship called the "Ethelaida," which carried a cargo of 3,395 tons of coal, to satisfy this contract. This ship, however, did not load in May, and consequently her cargo did not fulfil the conditions of the contract. From the day of making the contract the plaintiffs had been urging the defendants to declare the name of the vessel in which the coal contracted for was to be shipped. On the 14th June the defendants by letter informed the plaintiff that the "vessel chartered for their May shipment" had not loaded in May, and they offered to cancel the contract. On the same day, however, and about an hour after the plaintiff had received this letter, and before they had replied to it, the defendants sent them another letter as follows:—"We have now been informed that the boat our coals have been loaded in is the 'Ethelaida,' and we now beg to declare it." Correspondence subsequently passed between the parties. On the 15th June the plaintiff wrote to the defendants as follows:—"Please inform us finally what you intend. In case the 'Ethelaida' is declared as bringing coals sold to us under contract of 18th May, please let us know the date of her sailing, landing and the particular date of her arrival in Bombay, and also how much coals she has on board." On the following day the defendants replied: "The 'Ethelaida' is the boat chartered for the cargo we sold you .....We do not positively know whether she commenced to load in May or June. She was expected to load about 3,300 tons." On the 28th June the defendants wrote definitely stating that the "'Ethelaida' did not load in May." The plaintiffs refused her cargo, and sent in a statement of their alleged loss calculated upon 3,300 tons, the amount stated to be the cargo of the "Ethelaida" in the defendants' letter of the 14th June.

Held, that the damages must be calculated upon a cargo of 2,500 tons only. The "Ethelaida" was never incorporated into the contract. The defendants declared her against the contract; but after they had informed the plaintiffs that she had not loaded in May, the plaintiffs refused her cargo. The contract which the defendants failed to fulfil was a contract to deliver a cargo of 2,500—3,500 tons, and not a contract to deliver the "Ethelaida" cargo, which they were always ready and willing to deliver. The option rested with the defendants whether they would deliver 2,500 or 3,500 tons, or any intermediate quantity, and upon no principle could the Court exercise that option for them and daclare that they were liable to deliver more than a cargo of 2,500 tons. CURSETJI J. KHAMBATTA v. W. CROWDER, 18 B. 299 ... 707

Arbitrator.

See ARBITRATION, 17 B. 357 ; 18 B. 299.

Arrears.

See JURISDICTION, 17 B. 681.

Assessment,

(1) See INAMDAR, 18 B. 525.

(2) See JURISDICTION, 17 B. 681.

Assessor.

See LAND ACQUISITION ACT (X OF 1870), 17 B. 299.

Assignment.

See LANDLORD AND TENANT, 18 B. 348.

Attachment.

(1) Execution—Application by third party for removal of attachment—Order refusing to remove attachment—Omission by third party to bring subsequent suit to establish right to attached property—Subsequent withdrawal of attachment by attaching party—Effect of such withdrawal—Subsequent claim to property by the party who had failed to remove attachment—Civ. Pro. Code (XIV of 1882), ss. 278, 283—Decree—See CIV. PRO. CODE (ACT XIV OF 1882), 18 B. 241.

(2) See CIV. PRO. CODE (ACT XIV OF 1882), 17 B. 94, 629.

(3) See CRIM. PRO. CODE (ACT X OF 1882), 18 B. 581.

(4) See EXECUTION OF DECREE, 18 B. 260, 458.

(5) See PRACTICE, 17 B. 772.

(6) See REGISTRATION, 18 B. 13.

Attestation.

(1) See COMPANY, 17 B. 472.

(2) See HINDU LAW (GIFT), 18 B. 688.

Attorney and Client.

(1) Practice—High Court Rule No. 183—Order made by a Judge in chamber on client to pay taxed costs of his attorney—Right of attorney to execute such order as a decree—Application under s. 622 of Civ. Pro. Code (XIV of 1882) to review such order—Civ. Pro. Code (XIV of 1882), s. 267—See CIV. PRO. CODE (ACT XIV OF 1882), 17 B. 514.

(2) *Professional communication—Privilege—Extent of the privilege—Solicitor bound to give the name of the client on whose behalf the privilege is claimed, but not the nature of his employment—Evidence Act (I of 1872), s. 126—Evidence.*—The law relating to professional communications between a solicitor and a client is the same in India as in England.

It is not every communication made by a client to an attorney that is privileged from disclosure. The privilege extends only to communications made to him confidentially, and with a view to obtaining professional advice.

Where a solicitor claims privilege under s. 126 of the Indian Evidence Act (I of 1872), he is bound to disclose the name of his client, on whose behalf he claims the privilege. The mere fact that the client's name had been communicated to him in the course and for the purpose of his employment as solicitor by another client, affords no excuse, unless it was communicated to him confidentially, on the express understanding that it was not to be disclosed.

But a solicitor is not at liberty, without his client's express consent, to disclose the nature of his professional employment. Section 126 of the Indian Evidence Act protects from publicity not merely the details of the business, but also its general purport, unless it be known *aliunde* that such business falls within proviso I or II to the section.

At an interview between a solicitor and a client, the solicitor took down a certain statement made by a person named A.B. who was in his client's company, and whose name was communicated to him in the course and for the purpose of his professional employment. A. B. was afterwards tried

Attorney and Client—(*Concluded*).

PAGE

for defamation. At the trial, the solicitor was called as a witness for the prosecution, and was asked (*a*) the name of his client, (*b*) the name of the person who accompanied the client, and made a statement to him, and (*c*) the matter in which his client employed him. The solicitor declined to answer all these questions on the ground of privilege.

Held, that (*a*) the solicitor was bound to disclose the name of the client.

(*b*) He was bound to disclose the name of the person who accompanied the client and made a statement to him.

(*c*) He was not bound to disclose the matter in which the client employed him. FRAMJI BHIKAJI v. MOHANSING DHANSING, 18 B. 263 ... 684

(3) Trustees—Bills of costs paid by majority of trustees—Right of dissenting trustee to have bills taxed even after payment—Costs—Taxation—See COSTS, 18 B. 189.

Award.

(1) *Civ. Pro. Code* (XIV of 1882), *s.* 525—*Application for filing the award registered as a suit—Objections taken by the defendant—Court precluded from filing award.*—An application for filing an award being registered as a suit, the defendant raised objections and the following issues were framed:—

(1) Whether a certain arbitrator was nominated or accepted as one of the arbitrators by the defendant?

(2) Whether there was any and what illegality apparent on the face of the award?

(3) Whether the proceedings conducted by the arbitrators were illegal?

Held, that the objections taken by the defendant, which were the subject of the above issues, precluded the Court from filing the award. VENKATESH KHANDO v. CHANAPGAVDA, 17 B. 674 ... 442

(2) Decree in terms of award—Appeal—Award by three out of four arbitrators—Illegal award—Arbitration—See ARBITRATION, 17 B. 357.

(3) See ARBITRATION, 18 B. 299.

(4) See EXECUTION OF DECREE, 17 B. 657.

Bail.

Insolvency—Insolvent convicted and sentenced to imprisonment under s. 50 of the Indian Insolvent Act (Stat. 11 and 12 Vic., c. 21)—Appeal by insolvent under s. 73—Bail—No power in High Court to admit insolvent to bail pending appeal—See INSOLVENCY, 17 B. 334.

Bailment.

Railway Company—Indian Railway Act (IV of 1879), s. 11—Loss of goods—Liability of Company—Carrier—Declaration of nature and value of goods and payment of increased charge, effect of—Contract Act IX of 1872, s. 151—Limitation Act XV of 1877, art. 30—See RAILWAY COMPANY, 17 B. 723.

Banker.

See STAMP, 17 B. 684.

Bankruptcy.

See SALE OF GOODS, 17 B. 62.

Bhag.

Bhagdari Act (*Bombay*) V *of* 1862, *s.* 3—*Mortgage—Alienation of a portion of* bhag—*Deed—Property comprised in deed—Construction—General words—Particulars of property stated in deed—Leading description*—Falsa demonstratio—*Vendor and purchaser.*—A mortgage-deed of certain *bhagdari* lands stated that "all the properties appertaining to the entire *bhag*" were thereby mortgaged to the plaintiff. The *bhag* comprised (*inter alia*) four *gabhans* (building sites). But the clause which set forth the particulars of the property mortgaged thereby, specified only two *gabhans*, one only of which belonged to the *bhag* and the other did not. The deed then proceeded:—"According to these particulars, lands, houses and *gabhans*, barnyards, wells, tanks, *padars* and pasture lands also, together with whatsoever may appertain to the *bhag*—all the properties appertaining to

PAGE

Bhag—(*Concluded*).

the whole *bhag* have been mortgaged and delivered into your possession . . . . . There is no other property appertaining to the said *bhag* of which mention is not made here."

Held, that the particulars were "the leading description," and the supplementary description of them as constituting the entire *bhag* should be regarded as "*falsa demonstratio*."

Held, also, that the mortgage, so far as it included property belonging to the *bhag*, was void under the 3rd section of the Bhagdari Act (Bombay) Act V of 1862, but was valid as to property not comprised in the *bhag*. TRIBHOVANDAS JEKISANDAS v. KRISHNARAM KUBERRAM, 18 B. 283. 696

Bias.

See LAND ACQUISITION ACT (X OF 1870), 17 B. 299.

Breach of Contract.

(1) See ARBITRATION, 18 B. 299.

(2) See CIV. PRO. CODE (ACT XIV OF 1882), 18 B. 537.

Building.

(1) See LANDLORD AND TENANT, 17 B. 736 ; 18 B. 66.

(2) See MUNICIPALITY, 18 B. 184, 547.

Burden of Proof.

(1) See ADVERSE POSSESSION, 18 B. 513.

(2) See CIV. PRO. CODE (ACT XIV OF 1882), 17 B. 94.

(3) See HINDU LAW (WIDOW), 18 B. 534.

(4) See LIMITATION ACT (XV OF 1877), 17 B. 341 ; 18 B. 51.

(5) See PRACTICE, 18 B. 520.

Burial Ground.

See CIV. PRO. CODE (ACT XIV OF 1882), 18 B. 699.

Bye-laws.

See SALE OF GOODS, 17 B. 62.

Carrier.

See RAILWAY COMPANY, 17 B. 723.

Cause of Action.

(1) *Religious procession—Public road—Suit to enforce a right to conduct a religious procession along a public road—Obstruction to a public road—Public nuisance—Special damage—Injunction*—A civil action will not lie to enforce a right to conduct a religious procession along a public road without an allegation of some personal loss or damage to the plaintiff. KAZI SUJAUDIN v. MADHAVDAS, 18 B. 693 ... 971

(2) See ESTOPPEL, 17 B. 510.

(3) See HINDU LAW (CASTE), 18 B. 115.

(4) See HUSBAND AND WIFE, 18 B. 316, 327.

Certificate.

(1) of Collector—See ACT XXIII OF 1871 (PENSIONS), 17 B. 169.

(2) of Collector—See ACT III OF 1874 (BOMBAY HEREDITARY OFFICES), 17 B. 362.

3) of Collector—See INAMDAR, 18 B. 525.

(4) of Collector—See KULKARNI VATAN, 18 B. 516.

(5) of Collector—See SIRDAR, 17 B. 224.

(6) of guardianship—See ACT VIII OF 1890 (GUARDIAN AND WARDS), 17 B. 560.

(7) of heirship—See APPEAL (GENERAL), 18 B. 748.

(8) of heirship—See SUCCESSION CERTIFICATE ACT (VII OF 1889), 18 B. 608.

(9) of sale—See STAMP, 18 B. 175.

(10) of sale—Decree—Execution sale—Purchasers at successive execution sales—Title obtained by first purchaser—Certificate of sale obtained by second

Certificate—(*Concluded*).

PAGE

purchaser before certificate obtained by first purchaser—Priority—Civ. Pro. Code (Act XIV of 1882), s. 316—What is the title which vests under the section—Limitation in application of provisions of section—Confirmation of sale—See CIV. PRO. CODE (ACT XIV OF 1882), 17 B. 375.

(11) See CIV. PRO. CODE (ACT XIV OF 1882), 17 B. 228.

Charge.

(1) Alternative charge—Contradictory statements—Statement made to a police officer during a police investigation—Contradictory statement made before a Magistrate holding a preliminary inquiry—Giving false evidence—Indian Penal Code (Act XLV of 1860), s. 193—Separate charges—Criminal Procedure—See PENAL CODE (ACT XLV OF 1860), 18 B. 377.

(2) See CRIM. PRO. CODE (ACT X OF 1882), 17 B. 369.

Charity.

(1) *Bequest to charity*—Sadavarat—*Bequest to a definite* sadavarat—*Bequest to two charitable objects, one of such bequests being invalid—Bequest of interest of a fund to A, with invalid gift over of interest after A.'s death—A. takes corpus of fund—Will—Construction.*—Where a testator by his will directed certain rents to be used "for *sadavarat*," and where from the wording of the will it appeared that the testator intended his executors to establish a definite *sadavarat* in some definite place, and not merely, at their discretion, themselves to distribute the income of the property at any indefinite place, and perhaps at many places, to Brahmins and travellers.

Held, that the bequest to charity was good, and an enquiry was directed as to the place at which such *sadavarat* should, at the proper time, be established, and a scheme for its administration was ordered to be prepared.

A testator by his will directed that, if his daughters died without issue, the property of his daughters should be used by his executors for *dhurm* and for *sadavarat*.

Held, following *Hoare* v. *Osborne* (L. R. 1 Eq. 585), that the bequest was good to the extent of one-half in favour of the *sadavarat*. The gift to *dhurm* being invalid, the other half was undisposed of.

A testator by his will directed that his wife should enjoy for life the interest of Rs. 4,000 which were deposited with a certain firm, and that after her death the interest should be given to *dhurm*. There was no residuary clause in the will.

Held, that the gift to *dhurm* being clearly bad, and there being no residuary clause in the will, the *corpus* of the Rs. 4.000 was undisposed of and went to the testator's widow. MORARJI CULLIANJI v. NENBAI, 17 B. 351 ... 228

(2) Suit against directors or mushavirs of a mosque — Liability of directors—Board of directors not properly constituted under the rules of the mosque—Liability of directors for acts done by Board not properly constituted—Appointment of officers—Management of property—Liability of provisional committee assuming authority to act—Trustees—Limitation—Kazi—Act II of 1864 and Bombay Act IV of 1864—Nazir of mosque, liability of—Parties to suit against trustees of mosque—Practice—Mahomedan law—Mosque—See MAHOMEDAN LAW (WAKF), 18 B. 401.

(3) *Trust—Will—Deeds not carrying out will—Misapplication of funds—Mistake—Liability of trustee—Limitation—Fraud—Accounts when directed—Discretion of Court to order accounts—Jurisdiction of Court where charity established by will is outside the jurisdiction—Advocate General, right of—Advocate General, barred by decree in prior suit brought by trustees of charity—Civ Pro. Code* (XIV *of* 1882), *s.* 43.—One Bhimsi Ruttonsi, a Jain, died in February, 1863, leaving a will. His widow Bai Punjabai (defendant No. 1) obtained letters of administration with the will annexed. The testator died possessed (*inter alia*) of a half share of certain property in Bombay known as the "Bhimpura property." The remaining half share belonged to two other persons, *viz.*, Hirji Dossa and Muddon Tejsi. By his will the testator directed that a moiety of the rental of his half share should be spent on the *sadharm* (charitable or religious) endowment of a temple at Jackhoo in Cutch, and the other moiety thereof in establishing two *sadavarats*, one at Jackhoo and the other in Palitana. He also set apart a sum of Rs. 1,26,000, of which Rs. 1,01,000 were to be expended in building

Charity—(*Continued*). PAGE

a temple at Jackhoo, and the balance of Rs. 25,000 in erecting a market near the temple at Jackhoo, or, if that was impossible, it was to be spent in Palitana. The plaint complained that of the Rs. 1,26,000 about Rs. 60,000 had been spent in buying a property in Bombay, called the "school property," for the purpose of establishing a school there, and about Rs. 50,000 had been expended in erecting a temple at Jackhoo, but that nothing had been done with the balance, nor had a market been established at Jackhoo. All that had been done there was to erect three shops which cost about Rs. 2,000. The plaintiff further stated that in 1868 Bai Punjabai (defendant No. 1) had made over the "school property" and the "Bhimpura property" to three trustees on trusts, not strictly in accordance with the testator's will as above set forth. Under this deed the trustees were to apply one moiety of the net rents (1) in *sadavarat* or alms-giving at Jackhoo and Palitana; (2) in feasting the caste people in Bombay and Jackhoo annually; (3) in the worship called *satarbhadi* at the *derasar* (temple) in Bombay and Jackhoo; and (4) in entertaining and clothing the *gorip* (poor) in Bombay and Jackhoo Of the remaining moiety of the rents (5) one-half was to go to *sadharm* (charities) of the *derasar* (temple) at Jackhoo, and (6) the other half to charities at such places as the trustees should think fit.

In the following year, *viz.*, on 17th April, 1869, Bai Punjabai (defendant No. 1) and the owners of the other moiety of the "Bhimpura property" conveyed the whole of that property to trustees, who were to apply a moiety of the rents (which was to be considered as rent from Punjabai's share of the property) (1) in *sadavarat* and alms-giving at Jackhoo and Palitana; (2) in feasting the caste people in Bombay and Jackhoo annually on the anniversary of Bhimsi Ruttonsi's death; (3) in the worship of the *derasar* called *satarbhadi*, and in the entertainment and clothing of the *gorip* (poor) in Bombay and Jackhoo. The deed also directed the application of the rents of the other moiety of the "Bhimpura property," part of which was to go to a temple at Tera in Cutch and part to another temple at Jackhoo. This later deed, it will be observed, omitted altogether trusts (5) and (6) of the earlier one of 1868 in favour of *sadharm* for the temple of Jackhoo and for *sadharm* generally. The trustees appointed by the two deeds were not the same, though some of the trustees of the first were also the trustees of the second. The second deed did not recite or in any way refer to the first. At the date of suit all the trustees named in the deeds were dead except the second defendant. By subsequent deeds, however, new trustees had been appointed, and they were all parties to the present suit. Defendants Nos. 2, 3, 4, 5, 6 and 7 were trustees of the Bhimapura property, and defendants Nos. 8, 9, 10 and 11 of the school property. The plaint filed on the 10th March, 1892, at the relation of two members of the Jain community of Cutch prayed that the charitable trusts of the testator's will might be carried out, and sought for accounts against the widow of the testator and the trustees of both the deeds, and for a scheme, &c.

Held, that the High Court of Bombay had jurisdiction to make a decree declaring the trusts upon which the trustees of the deed of October, 1868, held the property comprised in that deed and for rectifying the deed in accordance with such declaration, but that the Court could not go further in settling a scheme.

Semble when money is bequeathed for the purpose of founding a charity outside the jurisdiction, the Court hands the money to the trustees named by the testator, leaving it to the Courts of the country in which the charity is to be established to settle the scheme.

Held, also, that the suit was not barred by limitation. It was not one for rectification of the deed of 1868, but rather one against Punjabai (defendant No. 1) and her assigns the trustees of the deed of 1868 and 1869 for the purpose of following the trust property in their hands and having it applied to the proper purposes of the trust, and, therefore, came within s. 10 of the Limitation Act (XV of 1877).

Charges of fraud and dishonesty made against trustees of a charity must be established at the hearing of the case, and cannot be allowed to be reserved and proved subsequently in the course of taking accounts.

Charity—(*Concluded*).

PAGE

Where the trust deed of a charity executed subsequently to the death of a testator under whose will the charity was established, does not strictly conform to the provisions of the will, it is not the practice of the Court, when the discrepancy has been made by mistake, to visit the past consequences of the mistake upon the trustees.

The plaintiff in this suit demanded an account from Bai Punjabai of the Bhimpura property from the testator's death to the execution of the deed of 13th October, 1868, and of the school-house property from the date of its purchase to the same time, and also an account against the trustees of the deed of 17th April, 1869, of the income of the Bhimpura property, and of its application.

Held, that accounts ought not to be required from Bai Punjabai. She had made over the property in question to trustees in 1868. There was no evidence that she had ever used any of the income for her own purposes, and the presumption was that she had faithfully discharged her duty. The account was probably barred by art. 120 of the Limitation Act (XV of 1877). The trustees of the deed of 1869 had paid over the income received by them to the trustees of the earlier deed of 1868, who were entitled to receive it; and, therefore, no account would be decreed against them.

The plaintiff further prayed for an account against the representatives of Rupsi Bharmal, who had been trustee of the deed of 1868 from the date of its execution to his death in 1889. Under a decree passed in a previous suit (No. 113 of 1889), dated 10th August, 1893, brought by the trustees, they had received from Rupsi's estate the balance which in that suit they had claimed to be due from him to the charity. In that suit the trustees had not asked for an account against him.

Held, that the Advocate General as plaintiff in the present suit was barred by the decree in that suit under s. 43 of the Civ. Pro. Code (XIV of 1882). The trustees having then omitted to ask for an account could not sue again. The Advocate General represented the same interests as they did, and was, therefore, equally bound. Even, however, if that were not the case, the Court in the exercise of its discretion would not direct the account asked for. ADVOCATE GENERAL OF BOMBAY v. BAI PUNJABAI, 18 B. 551 ... 876

Chits.

See STAMP, 17 B. 684.

Civ. Pro. Code (Act VIII of 1859).

(1) See CIV. PRO. CODE (ACT XIV OF 1882), 17 B. 503.

(2) See EXECUTION OF DECREE, 18 B. 458.

(3) S. 5—See CIV. PRO. CODE (ACT XIV OF 1882), 17 B. 570.

(4) S. 246—See EXECUTION OF DECREE, 18 B. 260.

Civ. Pro. Code (Act XXIII of 1861).

S. 11—See PARTIES, 17 B. 49.

Civ. Pro. Code (Act XIV of 1882).

(1) S. 13—*Res judicata*—Issue in previous suit—Unnecessary issue—Finding on an unnecessary issue inserted in decree—Appeal—See RES-JUDICATA, 18 B. 597.

(2) Ss. 13 and 43—See LIMITATION ACT (XV OF 1877), 17 B. 341.

(3) *S.* 13, *Expl. II, and s.* 43—*Suit for specific performance of a contract of sale and to execute a sale-deed—Sale-deed subsequently executed by the Court under s.* 262 *of the Civ. Pro. Code—Suit on sale-deed to recover possession.*—The plaintiff claiming specific performance of a contract of sale sued the defendant to compel him to execute a deed of sale, alleging that he had paid the purchase money to the defendant and had obtained possession, but was subsequently dispossessed. The plaintiff had claimed the value of standing crop or damages for the same. The Court found that the plaintiff had paid the purchase-money, but had not got possession, and ordered defendant to execute a deed of sale. On failure of the defendant to do so, the Court executed a deed of sale in plaintiff's favour under s. 262 of the Civ. Pro. Code (Act XIV of 1882). The plaintiff thereupon brought the

Civ. Pro. Code (Act XIV of 1882)—(*Continued*). PAGE.

present suit to recover possession on the strength of the deed of sale. Defendant pleaded that this second suit was barred under ss. 13 and 43 of the Civ. Pro. Code.

Held, that s. 43 was not applicable and did not bar the present suit, because the alleged cause of action was not the breach of the contract, but a new and distinct one arising from the deed of sale which the defendant had contracted to pass.

Held, also, that s. 13, expl. II, was not applicable, because the object of that explanation would seem to be to compel the plaintiff to rely on all grounds which were open to him in support of the claim made by his plaint, which in the first suit was confined to obtaining a regular deed of sale. NATHU PANDU v. BUDU BHIKA, 18 B. 537 ... 867

(4) Ss. 13 and 244—See HUSBAND AND WIFE, 18 B. 327.

(5) *S.* 16—*Suit to recover mortgage-debt by sale of mortgaged property out of jurisdiction—Jurisdiction.*—A suit by a mortgagee to recover the mortgage-debt from the mortgagors personally, as well as by sale of the mortgaged property, is one falling within cls. (*c*) or (*d*) of s. 16 of the Code of Civil Procedure (Act XIV of 1882), and can only be instituted in that Court within the local limits of whose jurisdiction the mortgaged property is situate.

A Court has no jurisdiction to entertain such a suit relating to property situate outside the local limits of its jurisdiction. VITHALRAO v. VAGHOJI, 17 B. 570 ... 373

(6) *Ss.* 25 *and* 647—*Decree—Execution—Transfer of execution proceedings from one Court to another—Small Cause suit—Act* VI *of* 1892, *s.* 4—*Rateable contribution—Civ. Pro Code* (XIV *of* 1882), *ss.* 295 *and* 223 (*d*)—*Discretion of District Judge—Extraordinary jurisdiction of High Court.*—A District Judge has power, under s. 25 of the Civ. Pro. Code (XIV of 1882), or under that section read with s. 647, to transfer execution proceedings in a Small Cause Court to the Court of a Subordinate Judge. The ruling in the case of 5 B. 680, that these sections apply to execution proceedings in Small Cause Courts, is not affected by the explanation to s. 4 of Act VI of 1892.

Execution proceedings under a decree against A in a Small Cause Court were transferred by a District Judge to a Subordinate Judge's Court where execution was proceeding against A under another decree, and it was objected that, as by the concluding paragraph of s. 25 of the Civ. Pro. Code (XIV of 1882), the attachments under the two decrees would be in different Courts, s. 295 of the Code would not apply, and rateable distribution could not be granted.

Held, that the last paragraph of s. 25 did not convert the Subordinate Judge's Court into a Small Cause Court, but only provided for the trial of the suit, which had been transferred, being conducted by the Subordinate Judge's Court as a Small Cause suit.

The High Court will not in its extraordinary jurisdiction interfere, except under circumstances of a very special nature, with the discretion of a Judge who has transferred execution proceedings under a decree from one Subordinate Court to another.

Quære—Whether a Subordinate Judge, under cl. (*d*) of s. 223 of the Civ. Pro Code (XIV of 1882), can transfer a decree for execution to a Court of Small Causes when the property attached is situate within the local jurisdiction of the Subordinate Judge. KRISHNA VELJI MARWADI v. BHAU MANSARAM, 18 B. 61 ... 549

(7) S. 26—See PARTNERSHIP, 17 B, 6.

(8) S. 27—See PARTIES, 17 B. 413.

(9) *S.* 30—*Burial ground—Land belonging in common to all the Mahomedan inhabitants of a village—Encroachment by some of the Mahomedans—Right of suit of some members of a community* —Where certain Mahomedans of a village brought a suit against other Mahomedans of the same village for the removal of a wall built by the defendants upon a land which was found to belong in common to all the Mahomedan inhabitants of the village for the purpose of a burial ground, the Judge, in appeal, dismissed the suit on the grounds that all the Mahomedans were not joined

Civ. Pro. Code (Act XIV of 1882)—*(Continued)*.

PAGE

as parties to the suit, and that the plaintiffs had not obtained the permission of the first Court to file the suit under s. 30 of the Civ. Pro. Code (Act XIV of 1882). On second appeal,

Held, reversing the decree, that s. 30 of the Civ. Pro. Code was not applicable to the suit, which must be regarded as one in which the plaintiffs claimed to restrain the defendants from violating the common interest they all had in the land.

Held, further, that the defendants having erected the wall in dispute so as to exclude the plaintiffs from a part of the common land, there was a violation of the plaintiffs' right, and that, therefore, the plaintiffs were entitled to bring the suit for the removal of the wall. TANUDIN v. PANDU, 18 B. 699

(10) Ss. 42, 43—*Res judicata*—Suit on a mortgage against several defendants—Dismissal of suit as against some of the defendants for want of jurisdiction—Subsequent suit on the mortgage against same defendants in another Court—See RES JUDICATA, 17 B. 562. ... 975

(11) Ss. 82 and 622—Material irregularity—Practice—Procedure—Service of summons—Service by post—Return through post of packet containing the summons endorsed "refused"—Evidence—See PRACTICE, 18 B. 606.

(12) Ss. 100 and 647—Dismissal of suit for default—Application to restore suit—Notice of application—Service of notice—Negligence—Second application for issue of notice—Costs—Practice—Procedure—See PRACTICE, 18 B. 59.

(13) Ss. 106 and 108—See PRACTICE, 18 B. 142.

(14) S. 108—See ACT XV OF 1832 (PRESIDENCY SMALL CAUSE COURTS), 17 B. 507.

(15) Ss. 129 and 131—Practice—Inspection—Production—Discovery—Co-defendant—Inspection granted to defendant against co-defendant—See PRACTICE, 17 B. 384.

(16) S. 131—See PRACTICE, 17 B. 581.

(17) S. 206—See PRACTICE, 18 B. 542.

(18) Ss. 206—8—Practice—Decree—Execution—Alteration of decree—Decree in terms of an award ordering *(inter alia)* delivery of moveable property—Loss of part of such moveable property and consequent failure to deliver—Application to insert in decree an order to pay value of such moveable property in event of failure to deliver—See EXECUTION OF DECREE, 17 B. 657.

(19) S. 221—Set off—See MORTGAGE (REDEMPTION), 17 B. 32.

(20) Ss. 234, 248, 361—372, 583—See PRACTICE, 18 B. 224.

(21) *S.* 244—*Decree—Execution—Questions arising in execution between the parties—Decree incapable of execution by reason of events subsequent to decree—Decree giving an option to the parties—Practice—Procedure.*—A partition suit brought by a son against his father was referred to arbitration. On the 9th January, 1890, the award was published, and on the 27th March, 1890, the defendants moved for and obtained a decree in terms of the award. By this decree it was ordered that in satisfaction of the plaintiff's claim the defendant should pay to him Rs. 1,05,000 in the manner therein stated, *viz.*, Rs. 40,000 to be paid forthwith and the balance of Rs. 65,000, to be paid "upon the plaintiff's delivering to the defendant certain specified property, which included two vessels or buglows, called respectively the 'Nasri' and 'Sambuk'." In no event was defendant to be required to pay the Rs. 65,000 before the 15th November, 1890. At the date of the decree the vessel "Sambuk" was at sea on a voyage, and on the 18th June, 1890, while still on the voyage, she was lost. On the 15th November, 1890, the plaintiff's attorneys demanded payment of the balance of Rs. 65,000. They offered to deliver the other properties specified in the decree, but stated that the vessel "Sambuk" had been lost. They offered to pay its value, which they estimated at Rs. 1,000. The defendants, however, demanded the delivery of the buglow, which they stated to be worth a very large sum. The defendant having, under the circumstances, refused to pay the Rs. 65,000, the plaintiff applied for execution of the decree, which was refused. He then obtained a rule calling on the defendant to show cause why the decree of the 27th March should not be amended or rectified by

Civ. Pro. Code (Act XIV of 1882)—(*Continued*).

stating therein the amount of money to be paid to the defendant as an alternative of, if delivery of the vessel "Sambuk" could not be made, such delivery having become impossible.

That rule was discharged. The plaintiffs then took out a summons calling on the defendant to show cause why an order should not be made, under s. 244 of the Civ. Pro. Code, directing the plaintiffs to pay to the first defendant, in lieu of the delivery of the vessel "Sambuk," such sum of money as might be fixed by the Court as the value of or compensation for the loss of the vessel "Sambuk" in the decree mentioned, and why an order should not be made that on payment of such sum and delivery of the other properties mentioned in the decree which the plaintiffs were to deliver under the decree to the first defendant on payment by the latter to them of Rs. 65,000, the first defendant should pay to the plaintiffs Rs. 65,000 and interest thereon from the 15th day of November, 1890, mentioned in the said decree, and in the event of its being held that the first defendant was not bound to pay the said sum of Rs. 65,000, then why an order should not be made that the property mentioned in the decree which the plaintiffs were to hand over to the first defendant on payment of Rs. 65,000 should not be retained, used and appropriated absolutely by the plaintiffs for their own use and benefit, freed and discharged of all claims on the part of the first defendant, and why the first defendant should not be directed to withdraw the claims made by him to the said debt of Rs. 22,000, or thereabouts mentioned in the said affidavit of Ahmed bin Essa Khaliffa, and why such further or other order as to the Court might seem fit and the justice of the case may require should not be made in the premises and in relation to the properties mentioned in the decree which were to be delivered over by the plaintiffs to the first defendant on receiving from him Rs. 65,000, and why, in the alternative, this suit should not be restored on the board for trial.

It was contended by the plaintiff that the questions raised in the summons were questions arising in execution to be dealt with by a Judge in chambers under s. 244 of the Civ. Pro. Code (XIV of 1882), and that a fresh suit was not necessary.

Held, (dismissing the summons) that the application was not one in execution of a decree, nor was the question one arising in the course of execution, but that the decree having become incapable of execution, the summons asked the Judge to decide what were the rights of the parties in consequence of its non-execution.

Held, also (as to the part of the summons asking for restoration of the suit) that the matters in issue in the suit had been fully heard and determined and the rights of all parties had been settled by the decree, and consequently there was nothing further to be tried. The Court could not in this suit after passing a decree proceed to ascertain the rights of the parties under a state of facts quite different from those which appeared in the pleadings and arising subsequently to the decree. AHMED BIN SHAIK ESSA KHALIFFA v. SHAIKA ESSA BIN KHALIFFA, 18 B. 495 ... 839

(22) S. 244, cl. (*c*)—See PARTIES, 17 B. 49.

(23) Ss. 244, 257-*a*, 258, 373—Decree—Execution—Agreement not to execute a decree—Suit to restrain execution—Agreement not to execute regarded as satisfaction of decree—*Res judicata*—See EXECUTION OF DECREE, 17 B. 23.

(24) S. 252—See ADMINISTRATOR, 17 B. 637.

(25) S. 258—Landlord and tenant—Mirasi tenure—Mirasi tenure declared in a decree—Subsequent payment of rent by defendants not a payment under decree but under the tenure, and so need not be certified under s. 258 of the Civ. Pro. Code—See LANDLORD AND TENANT, 18 B. 690.

(26) *S.* 266—*Attachable interest—Vested remainder—Gift—Gift to a woman gives a life interest.*—The plaintiff sued to have it declared that a certain house was liable and sold in execution of a decree obtained by him against the defendant's son. The defendant, who was 80 years of age, claimed the house as her absolute property, alleging that her son by a deed had given it to her as a provision of her maintenance. The deed stated that she had been made the owner of the house; that the donor had no right to it, and that it wholly belonged to her.

Civ. Pro. Code (Act XIV of 1882)—(*Continued*).

PAGE

Held, that the plaintiff was entitled to the declaration prayed for. The surrounding circumstances showed that the house was revertible to the donor on the defendant's death. He had what in English law would be termed a vested remainder on her death, and he had, therefore, a saleable interest during her life. He had an interest which could be attached and sold under s. 266 of the Civ. Pro. Code (Act XIV of 1882).

In the case of gifts, as in the case of wills, the well-established rule must be followed that in the absence of express words showing such an intention, a gift to a woman does not confer an absolute estate of inheritance which she is enabled to alienate. ANNAJI DATTATRAYA v. CHANDRABAI, 17 B. 503

(27) *S.* 267—*Practice—High Court Rules, No.* 183—*Order made by a Judge in chamber on client to pay taxed costs of his attorney—Right of attorney to execute such order as a decree—Application under* s. 622 *of Civ. Pro. Code (XIV of* 1882) *to review such order.*—An order obtained from a Judge in chambers by an attorney against his client for the payment of costs, is a decree or order to the execution of which the provisions of Chap. XIX of the Civ. Pro. Code (XIV of 1882) apply. ... 327

S. 267 of the Civ. Pro. Code is applicable to all the property of the judgment-debtor out of which the decree can be satisfied either by delivery in obedience to the decree or by sale.

The words "liable to be seized" contained in s. 267 of the Civ. Pro. Code are words of description pointing out the kind of property in respect of which an enquiry can be held, *viz.*, any property which is attachable under the decree.

Property of a judgment-debtor which he has mortgaged is *prima facie* liable to be seized in execution of a decree against him, and the fact that he has mortgaged it will not prevent its being attached and sold in execution of the decree subject to the mortgage-debt.

A person may be examined, under s. 267, in respect of property which is *prima facie* the property of the judgment-debtor, even although such person may allege that he is a mortgagee in possession of the attached property.

S. 622 of the Civ. Pro. Code (XIV of 1882) does not apply to a case where the order, of which review is sought, is made by the High Court. The Court referred to in s. 622 is a Court other than the High Court. *In re* PREMJI TRIKUMDAS, 17 B. 514

(28) S. 276—See REGISTRATION, 18 B. 13. ... 335

(29) Ss. 278, 273—See CRIM. PRO. CODE (ACT X OF 1882), 18 B. 581.

(30) *Ss.* 278 *and* 283—*Decree—Execution—Attachment—Application by third party for removal of attachment—Order refusing to remove attachment—Omission by third party to bring subsequent suit to establish right to attached property—Subsequent withdrawal of attachment by attaching party—Effect of such withdrawal—Subsequent claim to property by the party who had failed to remove attachment.*—The plaintiff was the assignee of a mortgage-decree, dated the 2nd May, 1885. In 1888 he attached the mortgaged property in execution of the decree, whereupon the defendant intervened and applied to have the attachment removed, on the ground that prior to the attachment she had purchased the land under a registered deed of sale, dated the 23rd June, 1888. Her application was rejected on the 27th September, 1888. Subsequently the judgment-debtors applied and obtained the Court's permission to sell the land by private contract, and on the 1st November, 1888, the plaintiff purchased it and withdrew his application for execution on the 20th November, 1888. In 1889 the plaintiff brought this suit against the defendant to obtain the removal of certain portions of a culvert erected by her on the land. The defendant pleaded that she was the owner of the property, having purchased it on the 23rd June, 1888.

The Subordinate Judge passed a decree for the plaintiff, on the ground that though the plaintiff's sale-deed was not entitled to preference over the defendant's, still as she had taken no steps to establish her right to the property in a regular suit after her application for the removal of the

Civ. Pro. Code (Act XIV of 1882)—(*Continued*). PAGE

plaintiff's attachment had been rejected, effect could not be given to her purchase. On appeal by the defendant the decree was reversed, and the plaintiff preferred a second appeal.

Held, confirming the appellate decree, that when the plaintiff withdrew his attachment on the 20th November, 1888, the parties were restored to the *status quo ante*. The object of the claim which was preferred by the defendant was, as contemplated by s. 278 of the Civ. Pro. Code (Act XIV of 1882), to obtain the removal of the attachment, and when that attachment was removed by the judgment-creditor's own act, there was no longer an attachment or any proceeding in execution on which the order could operate to the prejudice of the claimant, and, therefore, there was no necessity for her to bring a suit to set aside the order. The defendant's title to the property having been acquired on the 23rd June, 1888, was superior to the plaintiff's, which was not acquired before November, 1888. GOPAL PURSHOTAM v. BAIDIVALI, 18 B. 241 ... 669

(31) *Ss. 278 and 287—Jurisdiction—Mortgage—Decree on mortgage—Sale in execution—Claim on property ordered to be sold under a mortgage decree.*—Himatram obtained a decree upon a mortgage against Dewji in 1891, and applied in execution for the sale of the mortgaged property. On the proclamation of the sale being issued, Khushal intervened, alleging that the property had been sold to him by Dewji in 1883 at a private sale. The Subordinate Judge allowed his claim, and stopped the sale, being of opinion that he had power, under s. 287 of the Civ. Pro. Code, to make this order

Held, that the order was made without jurisdiction and must be discharged. Proceedings by way of claim as provided by s. 278 of the Civ. Pro. Code (Act XIV of 1882) are not applicable where the property is directed to be sold under a mortgage decree, and s. 287 had no application. HIMATRAM v. KHUSHAL JETHIRAM GUJAR, 18 B. 98 ... 574

(32) *S. 282—Order in attachment proceeding, effect of—Judgment debtor not necessarily a party to the investigation under an attachment proceeding.*—The plaintiff obtained a decree. The defendants appealed. At the hearing of the appeal in the District Court a question was raised as to whether the defendants were not barred by limitation from denying the genuineness and validity of the lease and mortgage, they having failed to do so in certain execution proceedings which had taken place in 1890. It appeared that in execution of a decree against the father and the uncle of the defendants these lands had been attached. The plaintiff on that occasion had intervened, and set up his mortgage and lease which he produced. They were then held to be proved, and the lands were ordered to be sold subject to the plaintiff's mortgage. Upon these facts the District Judge held that by the attachment of their lands in these execution proceedings the defendants had been subrogated either to the cause of the decree-holder or to that of the plaintiff who intervened, and, therefore, they were parties "against whom the order was made." That order became conclusive against them within one year from its date, as they did not bring a suit to establish their right (art. 11, sch. II, Limitation Act, 1877). He, therefore, confirmed the decree of the Court of first instance.

On second appeal to the High Court,

Held, reversing the lower Court's decree, that the defendants were not necessarily to be regarded as parties against whom the order in the execution proceedings was made. Whether they were or not, depended on the facts of the case. The Court accordingly remanded the case that the District Judge might investigate the facts and pass a decree accordingly. AJIBAL NARSINHA v. SHAIREKOLI TIMAPA, 17 B. 629 ... 412

(33) Ss. 282 and 287—Stamp—Stamp Act I of 1879, sch. I, arts. 16, 21—Decree—Execution—Sale of property subject to mortgage—Valuation of property sold—Computation of purchase-money—Certificate of sale—Proclamation of sale—Mortgages noted in proclamation of sale—See STAMP, 18 B. 175.

(34) S. 283—Decree—Execution of decree—Attachment—Order for removal of attachment—Suit for a declaration that the property was liable to attachment and sale—Suit to set aside on order removing attachment—Defendant's adverse possession—S. 246 of the Civ. Pro. Code (Act VIII of 1859)—

Civ. Pro. Code (Act XIV of 1882)—(*Continued*).

PAGE

Art. 15, sch. II of the Limitation Act (IX of 1871)—Art. 11, sch. II of the Limitation Act (XV of 1877)—See EXECUTION OF DECREE, 18 B. 260.

(35) *S.* 283—*Suit to establish right to attach*—Onus *of proof*—*Right of defendant in such suit to set up the title of a third person where defendant's own title derived from such persons is tainted with fraud*—*Decree*—*Execution*—*Registration*—*Registration Act III of* 1877, *ss.* 21 *and* 60—*Description of property not contained in body of the deed of conveyance, but inserted as a foot-note.*—Faizulla owned a house in Surat. On the 21st August, 1882, he was adjudged a bankrupt by the Supreme Court of the Straits Settlements, within whose jurisdiction he was then carrying on business as a merchant. On the 20th February, 1884, he executed a conveyance of the house to Mr. Carew, the trustee in bankruptcy, for the benefit of his scheduled creditors, of whom the defendant was one The defendant held a mortgage on the house for advances made by him to Faizulla. Mr. Carew had an agent in India, one Nazar Mahomed, with whom the defendant was a partner in business. On the 20th November, 1884, the plaintiffs obtained a decree for Rs. 78,000 against Faizulla and another person, and in execution of this decree they attached the house in question as the property of Faizulla. Prior to the attachment the defendant, in consideration of the mortgage-debt due to him, had obtained a transfer of the house from Carew with possession. No further consideration was paid by him at the time of the transfer. On the attachment being levied by the plaintiffs, the defendant claimed the house as purchaser from Carew, and the attachment was raised. The plaintiffs then filed this suit under s. 283 of the Civ. Pro. Code (Act XIV of 1882) to establish their right to attach the house as the property of their judgment-debtor. The plaintiffs (the respondents) contended that the transfer of the house by Carew to the defendant was fraudulent, the defendant being a partner of Carew's agent, and no consideration having been paid for the transfer. The defendant (appellant) contended that it was sufficient for him to show that Carew's title was good, and that, if the house had validly passed to Carew, it could not afterwards be attached for Faizulla's debt. The plaintiffs (respondents) on the other hand argued that the defendant ought not to be allowed to set up Carew's title; that the transfer by Carew to him was fraudulent, and that he ought not to be allowed to benefit by his own fraud.

Held, that the defendant was entitled to set up Carew's title as a defence, although he might have been guilty of fraud in his subsequent dealings with Carew. If Carew's title neither originated in, nor was upheld by, any fraud of the defendant, and if the plaintiff's claim failed on proof of Carew's title alone, the defendant would not benefit by his own fraud, but by the proof of a title paramount to that of both plaintiffs and defendant.

In a suit brought under s. 283 of the Civ. Pro. Code (Act XIV of 1882) to establish the right to attach property, it is for the plaintiff to prove that the property in question is the property of the judgment-debtors. The *onus* of proof is upon him. He can have no right to attach property which is proved either never to have belonged to his judgment-debtor, or having been his, to have passed out of his possession and ownership, and become, in law, the property of others prior to the time at which attachment is sought. The defendant in defending such a suit may, therefore, rely on the title of a third person.

A conveyance of immoveable property did not contain in the body of the deed, a description of it sufficient to identify it. In a foot-note, however, such a description was given, and it was signed by the assignee only. The deed was accepted by the Registrar, and was registered, and a certificate to that effect was given under s. 60 of the Registration Act (III of 1877). The deed being tendered in evidence was objected to on the ground that it ought to be treated as unregistered, since it had been improperly accepted for registration by the Registrar.

Held, that the error in accepting it, if error there was, did not invalidate the registration; see 2 I. A. 210. SHEKH ADAM ISUFBHAI v. JAMNADAS RANCHORDAS, 17 B. 94 ... 62

(36) Ss. 285, 295—Concurrent decrees—Distribution of assets among several decree-holders—Sale in execution by inferior Court of property while under

an attachment issued by superior Court—Practice—Procedure—Decree—Execution—See EXECUTION OF DECREE. 18 B. 458.

(37) S. 295—Decree—Execution — Rateable distribution of assets realised in execution—See EXECUTION OF DECREE, 18 B. 456.

(38) *Ss.* 313, 315 *and* 622—*Execution—Execution sale—Auction-purchaser—Return of purchase-money when judgment-debtor found to have no saleable interest in property sold—Fact how found—Judgment-creditor to have notice—Party—Procedure* —One Vithoba obtained a decree against Bapu, and in execution sold certain land which was purchased by Esat, who got a certificate of sale, and obtained possession. Subsequently the land was claimed by one Bhowani, who sued Bapu, the judgment-debtor, and Esat, the auction-purchaser, to set aside the sale and establish his title to the land. He succeeded in his suit, and in execution got possession of the land. Thereupon Esat (the auction-purchaser) applied under s. 315 of the Civ. Pro. Code (XIV of 1882), for a refund of his purchase-money, and the Subordinate Judge made an order directing Vithoba, the decree-holder, to repay it. Vithoba contended that he ought not to have been ordered to refund the money without having an opportunity of proving that the property had been properly sold in execution of his decree against Bapu, and that as he had not been made a party to Bhowani's suit he had had no opportunity of doing this. On application to the High Court,

Held, that the order of the Subordinate Judge for the restitution of the purchase-money was wrong. S. 315 provides that the purchase-money paid at an execution sale is to be returned when it is found that the judgment-debtor has no saleable interest in the property sold. It does not prescribe how the fact is to be ascertained, but the conclusion from s. 313 as well as from general principles is that it must be a finding on some proceedings to which the judgment-creditor was a party or at any rate of which he had notice. In the present case there was no finding on which the Subordinate Judge could base his order for the restitution of purchase-money.
VITHORA v. ESAT, 18 B. 594 ... 905

(39) *S.* 316—*What is the title which vests under the section—Limitation in application of provisions of section—Confirmation of sale—Certificate of sale—Execution sale—Decree—Purchasers at successive execution sales—Title obtained by first purchaser—Certificate of sale obtained by second purchaser before certificate obtained by first purchaser—Priority.*—On 27th February, 1886, the plaintiff purchased certain land at a Court sale held in execution of a decree. On the 10th March, 1886, the same property was put up for sale in execution of another decree, and purchased by the defendant. The sale to the defendant was confirmed on 3rd July 1886, and the sale to the plaintiff not until the 21st July, 1886. Certificates of sale were issued to both plaintiff and defendant on the same day, *viz.*, on the 22nd September, 1886, and on the 14th February, 1887, the defendant was put in possession. In 1889, the plaintiff brought this suit to recover possession.

The defendant relied on s. 316 of the Civ. Pro. Code (Act XIV of 1882). He contended that as under the section the title of a purchaser at a Court sale vests at the date of the confirmation of the sale to him, his (the defendant's) right was superior to that of the plaintiff, inasmuch as the sale to him was confirmed on the 3rd July, 1886, while the sale to the plaintiff was not confirmed until afterwards, *viz.*, on the 21st July.

Held, that the plaintiff was entitled to recover. By his prior purchase he had acquired an equitable or inchoate title to the property which was subsequently perfected by the certificate of sale. Nothing, therefore, passed to the defendant under his second sale.

The words "the title to the property sold" in s. 316 of the Code of Civil Procedure (Act XIV of 1882) mean the full perfected title arising on the sale becoming absolute. It is that title which under the section does not vest in the purchaser until confirmation. That provision, however, need not necessarily be construed as destroying any lesser interest which arises by reason of general equitable principles.

Quære.—Whether the provision in s. 316 as to the date at which the title of the purchaser is to vest does not apply only to as between the parties to the suit and persons claiming through or under them.

Civ. Pro. Code (Act XIV of 1882)—(*Continued*).

PAGE

Per JARDINE, J.—The reference to parties and persons claiming under them would be surplusage if the Legislature had intended the addition to apply to third parties. DAGDU v. PANCHAMSING, 17 B. 375

(40) *S.* 318—*Purchaser at Court-sale—Certificate of confirmation of sale—Application for possession of purchased property—Date of accrual of right to apply for possession—Limitation.*—The right of a purchaser to apply for possession under s. 318 of the Civ. Pro. Code (Act XIV of 1882) accrues to him when the certificate "has been granted,"—that is to say, when it has been issued to him, and the period of limitation for such an application is to be computed from that day. KASHINATH TRIMBAK v. DUMING ZURAN, 17 B. 228 ... 244

(41) Ss. 318, 332 and 333—See HINDU LAW (JOINT FAMILY), 17 B. 718. ... 150

(42) S. 320—See ACT VI OF 1888 (BOMBAY GUJARAT TALUQDARS), 17 B. 289.

(43) Ss. 328, 329 and 331—See EXECUTION OF DECREE, 18 B. 37.

(44) *S.* 335—*Principal and agent—Joint managers—Mortgage by one of such managers—Sale by mortgagee in execution of decree on mortgage and dispossession of the other manager—Application for restoration of possession by other joint manager.*—Kushambhat, the owner of certain property, gave the management of it to his three nephews, Govind, Gajanan and Narayan. Gajanan mortgaged the property to Kamalchand, who sued on the mortgage and got a decree. In execution of the decree the property was sold and purchased by Lakshman, who was put in possession by the Court. Govind, one of the managers, then applied for possession under s. 335 of the Civ. Pro. Code (Act XIV of 1882), alleging that he had been wrongfully dispossessed.

Held, that the mortgagee Kamalchand got no title to the property by his mortgage from Gajanan against the real owner Kushambhat; and Govind, who was in actual possession as his manager (whether or not there were others equally entitled to share in the management), was entitled to prevent the purchaser Lakshman taking possession, and having been dispossessed had a claim to be restored to possession under s. 335 of the Civ. Pro. Code (Act XIV of 1882). GOVIND BALVANT SHIVNEKAR v. LAKSHMAN BIN NANA TELI, 18 B. 522 ... 857

(45) *Ss.* 412, 414—*Costs—Appeal in* forma pauperis—*Withdrawal of appeal—Right of Government to costs—Agreement between the parties.*—The plaintiffs filed a suit in *forma pauperis* to recover possession of certain property. The Court of first instance dismissed the suit. Thereupon the plaintiffs preferred an appeal in *forma pauperis* to the High Court. Pending the appeal the parties entered into a compromise, under which it was agreed (*inter alia*) that the appeal should be withdrawn, and that the respondent should pay to Government the Court fees which the plaintiffs were liable to pay both in the first Court and in the Court of appeal. When the appeal came on for hearing, the appellants informed the Court of their intention to withdraw from the appeal. Thereupon the Government Pleader intervened, and applied for an order directing the respondent to pay; in accordance with the terms of the compromise, all the costs payable to Government on account of institution fees, &c., in the first Court as well as in the appellate Court. This application was opposed by both parties. The Government Pleader then moved the Court to dispauper the appellants under s. 414 of the Code of Civil Procedure (Act XIV of 1882).

Held, that the appeal having been withdrawn, no order could be made either under s. 412 or under s. 414 of the Code of Civil Procedure.

Held, also, that it was not open to the Court to order the respondent to pay any fees on the strength of any agreement between the parties. BAI CHANDABA v. KUVER SAHEB BAPU SAHEB, 18 B. 464 ... 819

(46) Ss. 470, 473—See INTERPLEADER, 18 B. 231.

(47) *S.* 491—*Claim made by defendant for compensation for arrest—Claim for compensation made by defendant in a summary suit when defendant has not got leave to appear and defend—Cross claim when allowed—Set-off—Practice—Procedure—Summary suit—Civ. Pro. Code (XIV of* 1882), *ss.* 532, 533.—In a summary suit, if a defendant has been arrested before judgment and claim compensation for such arrest under s. 491 he is

Civ. Pro. Code (Act XIV of 1882)—(*Continued*). PAGE

entitled on that ground to apply for leave to defend the suit and if a *prima facie* case is made out, leave to defend should be given.

Under the Civ. Pro. Code (XIV of 1882) a cross claim made by a defendant against a plaintiff cannot, in ordinary cases, be set up as a defence, except when it arises out of the very transaction sued upon and is in the nature of a set-off, but the special cross-claim provided for by s. 491 of the Code, *viz.*, a claim for compensation for arrest on insufficient grounds, may under that section be taken into account in any suit, and the amount awarded as compensation be awarded in the decree and thus *pro tanto* be a defence to the plaintiff's claim in the suit. ROULET v. FETTERLE, 18 B. 717 ... 987

(48) S. 521—See ARBITRATION, 18 B. 299.

(49) S. 525—Award—Application for filing the award registered as a suit—Objections taken by the defendant—Court precluded from filing award—See AWARD, 17 B. 674.

(50) S. 539—Suit by trustees to eject a trespasser from trust property—Compromise—Set-off—Equitable defence—See COMPROMISE, 18 B. 721.

(51) *S.* 562—*Remand—Practice - Procedure.*—The defendant in a suit on a mortgage applied, on the day fixed for the hearing, for an adjournment on the ground of illness. Her application was refused, and the Court heard the case *ex parte* and passed a decree for the plaintiff. The defendant appealed to the District Judge, who reversed the decree and remanded the case, on the ground that the defendant's application for an adjournment ought to have been granted. On appeal to the High Court.

Held, discharging the order of remand, that the suit having been tried on the merits, the District Judge could not remand the case under s 562, but ought to have proceeded under ss. 568 and 569. PARVATISHANKAR DURGASHANKAR v. BAI NAVAL, 17 B. 733 ... 481

(52) *S.* 574—*Judgment of appellate Court—Reasons for the decision to be stated.*—S. 574 of the Code of Civil Procedure (Act XIV of 1882) is imperative. Under that section the appellate Court is bound to state the reasons for its decision.

A Court of appeal framed certain issues under s. 566 of the Code of Civil Procedure (Act XIV of 1882), and remanded them for finding by the Original Court. On the return of those findings, as neither party filed any objections, the appellate Court accepted these findings, without giving any reasons for so doing, or even stating in its judgment whether it concurred in them or not, and confirmed the decree of the Original Court.

Held, that the judgment of the appellate Court was not a judgment according to law. BHAGVAN v. KESUR KUVERJI, 17 B. 428 ... 279

(53) *S.* 617—*Reference in execution of a decree—Final decree.*—A question arising in execution of a decree cannot be referred for the decision of the High Court under s. 617 of the Civ. Pro. Code (Act XIV of 1882), except where the decree is final. ORIENTAL LOAN ASSOCIATION, LIMITED v. GEORGE PELHAM HATCH, 17 B. 735 ... 482

(54) S. 622—See ACT XVII OF 1879 (DEKKHAN AGRICULTURISTS' RELIEF), 18 B 347.

(55) S. 622—See LAND ACQUISITION ACT (X OF 1870), 17 B. 299.

(56) *S.* 622—*Application and purpose of the section—Revision.*—An application under s. 622 of the Civ. Pro. Code (Act XIV of 1882) cannot be entertained in the case of those interlocutory orders against which, though no immediate appeal lies, a remedy is supplied by s. 591, which provides that they may be made a ground of objection in the appeal against final decree.

The purpose with which s. 622 was framed was to enable a party to a suit to get a decision or order of a lower Court rectified by the High Court where there would otherwise be no remedy. MOTILAL KASHIBHAI v. NANA, 18 B. 35 ... 532

(57) S. 638—See INSOLVENCY, 17 B. 334.

(58) *S.* 647 *as amended by Act VI of* 1892, *s.* 4—*Execution of decree—Application for execution dismissed for default—Power of the Court to restore such application to the file—Construction of Statutes.*—There is nothing in the Code of Civil Procedure (XIV of 1882) as amended by Act VI of 1892,

Civ. Pro. Code (Act XIV of 1882)—(*Concluded*).

PAGE

which authorizes a Court to apply to execution proceedings any of the procedure enacted in chap. VII of the Code.

Accordingly a Court cannot under s. 103 restore to the file an application for execution which has been dismissed for default.

Alterations in forms of procedure are retrospective in effect, and apply to pending proceedings. HAJRAT AKRAMNISSA BEGAM v. VALIULNISSA BEGAM, 18 B. 429

(59) *S.* 649, *para.* 2—*Decree against a* sirdar—*Political Agent's Court—Death of the* sirdar—*Application for execution against the heirs—Change of status—Jurisdiction—Civil Court.*—A *sirdar* against whom a decree was passed in the Court of the Political Agent having died, the decree-holder applied for execution against his heirs. The Political Agent rejected the application, holding that he had no jurisdiction over the heirs, who were not *sirdars*. The decree-holder then applied for execution to the Court of the First Class Subordinate Judge of Dharwar, who would have had jurisdiction to try the suit if the deceased defendant had not been a *sirdar*, but that Court also rejected the application on the ground that s. 649, para. 2 of the Civ. Pro. Code (Act XIV of 1882), applies in cases where the territorial jurisdiction of the Court is changed, and where the status of the parties is changed, and that the decree-holder should obtain a declaration that the decree was binding against the heirs, who were not *sirdars*.

Held, reversing the order, that the terms of the section are general, and draw no distinction as to the nature of the cause which puts an end to the jurisdiction. GAUSKHA v. ABDUL ROPKHA, 17 B. 162 ... 795

(60) Ch. XXI—See ACT III OF 1876 (BOMBAY, MAMLATDARS' COURTS), 17 B. 645. ... 106

Claim.

(1) See ADMINISTRATOR, 17 B. 637.

(2) See CIV. PRO. CODE (ACT XIV OF 1882), 18 B. 717.

(3) See INTER-PLEADER, 18 B. 231.

(4) See JURISDICTION, 17 B. 681.

(5) See LANDLORD AND TENANT, 17 B. 631.

Collector.

(1) See ACT XXIII OF 1871 (PENSIONS), 17 B. 169.

(2) See PAUPER, 18 B. 454.

Collusion.

See HUSBAND AND WIFE, 17 B. 624.

Committee.

See MAHOMEDAN LAW (WAKF), 18 B. 401.

Companies Act (VI of 1882).

(1) S. 11—See COMPANY, 17 B. 472.

(2) S. 13—See COMPANY, 18 B. 152.

(3) S. 28—See COMPANY, 17 B. 672.

(4) S. 125—See COMPANY, 17 B. 469.

(5) S. 134—See COMPANY, 18 B. 65.

Company.

(1) *Directors of company—Liability of directors for funds of company applied in transactions* ultra vires—*Dealing in shares of other companies—Stale demand—Limitation—Limitation Act* (XV *of* 1877), *s.* 10.—The plaintiff company was formed in 1864. By its memorandum of association its object was declared to be commission agency and general trading in cotton and also in goods and commodities suited for market in the interior of India. The memorandum contained the following words:—"If found desirable, the company may effect purchases of cotton and produce in Bombay and ship to England and carry on such local trade as may seem profitable." The company went into liquidation in 1867. In April 1890 the present suit was filed against the defendant, who had been one of the

Company—(*Continued*). PAGE

directors of the company, and it was alleged that after the formation of the company the defendant and his co-directors had carried on speculative dealings in shares of other companies and had used the funds of the company for this purpose, which was not warranted by the memorandum of association. The plaintiffs alleged that their dealings, which were duly set forth in their plaint, had resulted in a heavy loss to the company, and they now sought to recover from the defendant the sum of Rs.e3,37,700-13-5. There had been originally five directors of the company, but at the date of suit two of them were dead and two had become insolvent. The plaint was filed in April, 1890.

Held (affirming the decision of Parsons, J.) (1) that the memorandum of association did not justify the directors of the company in dealing in shares of other companies, and that the transactions complained of by the plaintiffs were *ultra vires*.

(2) That the directors were liable to replace the moneys of the company which they had misapplied by applying them to a purpose which was *ultra vires*.

(3) That s. 10 of the Limitation Act (XV of 1877) does not apply to directors of companies, the directors not being persons in whom the property of the company is vested as contemplated by that section.

(4) That in any case the staleness of the demand was a valid defence to the action, the liquidators of the company having had full knowledge of the facts since the company went into liquidation, but no suit was filed until the expiration of twenty-three years. KATHIAWAR TRADING COMPANY, LIMITED v. VIRCHAND DIPCHAND, 18 B. 119 ... 588

(2) *Indian Companies Act* (VI *of* 1882), *s.* 13—*Contributory—Increase of capital—Illegal issue of shares—Reduction of capital.*—The Nawab of Beyla Spinning, Weaving and Manufacturing Company, Limited, was registered under the Indian Companies Act (X of 1866). The original capital of the company consisted of Rs. 4,00,000 divided into 1,600 shares of Rs. 250 each. In 1882 the capital of the company was increased by Rs. 1,00,000 divided into 1,600 shares of Rs. 62-8. The resolution to increase the capital was not passed in accordance with the articles of association, *i. e.*, "with the sanction of a special resolution of the company passed at a general meeting." On the 5th November, 1884, a resolution was passed at a general meeting of the company that the shareholders should take up the 459 shares of the original capital and 1,027 shares of the increased capital, which were then in the hands of the company in the proportion of one share to every two shares already held by them. In pursuance of this resolution the appellants took up several shares of the original capital as well as of the new capital. On 19th October, 1885, a general meeting of the company was held at which it was resolved that the resolution of the 5th November, 1884, and all acts done in connection with it should be set aside, that the shares taken by the shareholders in pursuance of that resolution should be taken back by the company, and such amounts as had been paid by them on those shares should be credited to their names in the company's books. This was accordingly done, and the shares were transferred to the name of the company. In October, 1886, the company was wound up by order of the Court. In settling the list of contributories the District Judge of Surat held that the appellants were liable, as contributories, in respect of all the shares which they had taken up in pursuance of the resolution of 5th November, 1884. On appeal from this decision,

Held, that with respect to the shares of the original capital, the resolution of the 19th October, 1885, was illegal and invalid. It operated, not as an investment by the company of its funds in its own shares, but as an extinguishment of the shares, and such extinguishment was virtually a reduction of the capital, which could not be done without complying with the provisions of s. 13 of the Indian Companies Act (VI of 1882). The holders of such shares were, therefore, properly placed on the list of contributories.

Held, also, that the issue of the shares of the new capital was illegal, as the resolution to increase the capital had not been come to in accordance with the articles of association. It was, therefore, open to company to set

Company—(*Continued*).

PAGE

aside the resolution of 5th November, 1884. When it was set aside, the persons who held the new shares ceased to be shareholders, and could not, therefore, be held liable as contributories. BHIMBHAI v. ISHWARDAS JUGJIWANDAS, 18 B. 152

(3) *Indian Companies Act* (VI *of* 1882), *s.* 28—*Shares issued as fully paid up—Rights of a purchaser with notice taking from a purchaser without notice—Notice—Contributory.*—Twenty shares of the Bella Spinning, Weaving and Manufacturing Company, Limited, were originally allotted to A as fully paid up shares partly for work done and partly for work to be done for the company. The agreement under which the shares were so allotted was not registered as required by s. 28 of Act VI of 1882. ... 610

A sold three of these shares to D, who had no notice that they were not fully paid up. D sold the three shares to G, who was the managing director of the company. The company was wound up by the Court. At the date of the winding up, G was holder of the three shares. In settling the list of contributories, the Court ordered G's name to be placed on the list in respect of the three shares.

Held, that G was not liable as a contributory. Though G was a managing director of the company, and as such must have known that the shares had been issued as fully paid up shares without complying with S. 28 of Act VI of 1882, he was not on that account estopped from taking advantage of the equitable rule which protects a purchaser with notice taking from a purchaser without notice. *In re* GULABDAS BHAIDAS, 17 B. 672 ... 440

(4) *Indian Companies Act* (VI *of* 1882), *s* 134—*Winding up—Suit against a company—Stay of proceedings when petition to wind up is pending—High Court Rules No.* 10, *cl.* (*r*)—*Practice—Procedure.*—The plaintiff sued the defendant company to recover Rs. 10,000 The claim was not disputed, but shortly after the suit was filed another creditor filed a petition to wind up the company. This petition was pending when the suit came on for hearing, but no order to stay proceedings had been obtained by the defendants and the plaintiff contended that under the circumstances he was entitled to obtain a decree, having regard to the fact that no such order had been made, and that by the rules of the Court such order could only be made in chambers.

Held, on application by the defendants at the hearing, that the proceedings must be stayed. VIRBAIJI v. THE WADIA MILLS COMPANY, 18 B. 65... 552

(5) *Share-holder—Executor, or administrator of a shareholder, rights of—"Holding a share," meaning of—Agreement—Construction—Declaratory decree—Specific Relief Act* (I *of* 1877), *s.* 42—*Objection taken for first time in appeal—Practice—Procedure.*--Prior to the year 1863 W. Wallace carried on an extensive timber trade in Burmah. In that year the defendant company was formed for the purpose of taking over the business from him together with the capital and assets engaged therein. The nominal capital of the company was Rs. 25,00,000 divided into one thousand shares of Rs. 2,500 each. On the 22nd July, 1864, an agreement carrying out the above object was executed between W. Wallace and the defendant company. This agreement set forth the assets and property to be transferred, and classified them as (*a*) "fixed assets," which consisted of immoveable property, buildings, &c., valued at Rs. 2,76,000 or thereabouts; and (*b*) assets other than fixed assets which consisted of what were called "forest operations," and of valuable contracts, rights and concessions from the King of Burmah, &c The agreement further specified the consideration to be paid to W. Wallace for each of these classes of assets. For the "fixed assets" he was (under the 12th clause of the agreement) to receive one hundred fully paid up shares of the company. That clause contained certain provisions as to the payment of the ordinary dividend upon those shares, and concluded with the provision that the directors of the company should not be bound to consent to or to recognize as valid any assignment made by W. Wallace, his executors or administrators of the shares, or any of them, within five years from the date of the registration of the company.

For the remaining assets it was provided by the 13th clause of the agreement that W. Wallace, his executors, or administrators should be entitled, *so*

Company—(*Continued*). PAGE

long as he or they should hold the hundred shares, to an extra or preferential dividend payable out of such surplus net profits as might remain in any year after paying a dividend of twelve per cent. on all the shares of the company including the said hundred shares and after setting apart an amount (left to the discretion of the directors) for the reserve fund. The said extra or preferential dividend was to be one-third of such surplus net profits. The said 13th clause also provided that if W. Wallace died within the above stated period of five years, his executors or administrators should not be entitled to the said extra or preferential dividend after the expiration of the said period notwithstanding they might continue to hold the said shares.

Subsequently to the execution of this agreement the business and assets were transferred to the company by W. Wallace, and one hundred fully paid up shares were duly allotted to him under cl. 12, and his name was entered on the register of shareholders. In 1888, W. Wallace, then domiciled in England, died. By his will he appointed his three brothers--R. Wallace, L. A. Wallace and A. F. Wallace—his executors, and he directed that his executors should hold the said shares and all his interest therein and attached to the holding thereof upon trust for such of his said brothers as might survive him, if more than one, as joint tenants. R. Wallace died in the testator's lifetime and only A. F. Wallace proved the will. On the 27th September, 1888, letters of administration, with the will annexed, were granted by the High Court of Bombay to the plaintiff in this suit (F. Yorke Smith) as attorney for the said executor A. F. Wallace. On the 29th September, 1889, the said letters of administration were produced to and registered with the defendant company. The hundred shares continued to stand in the testator's name in the register of shareholders. In a parallel column in the register, under the heading "remarks," the following entry was made:—"Administration in India to the estate of W. Wallace has been granted to Mr. Frederick Yorke Smith as attorney for W. A F. Wallace." Save for this entry the register remained unaltered after the testator's death.

The plaintiff now sued to have it declared that cl. 13 of the agreement was still in operation, and that as such administrator as aforesaid he was entitled to the extra or preferential dividend payable on the said hundred shares if and when there should be sufficient net profits to allow payments thereof under the said clause. The company disputed the plaintiff's claim. They contended that A. F. Wallace, the proving executor of the testator's will, had ceased to hold the shares as executor, and was holding them as trustee under the specific bequest in the will, and that he was only entitled to the preferential dividends, if, at the time when such dividends were declared, he was holding the shares in the capacity of executor and as an undistributed part of the testator's estate. They insisted that the plaintiff should prove that he so held the shares before he could be entitled to the declaration sought for. The executor was examined in England on commission. He deposed that the estate had been got in, and the debts paid; that the estate had not been divided, because it would not be in accordance with the private wishes of the testator, which they (*i.e.*, he and his brother L. A. Wallace) were aware of; that, apart from these private wishes, there was no reason why the estate should not be divided between his brother and himself.

Held, by Farran, J., and by the Court of appeal, that the plaintiff was entitled to the declaration sought for. The executor or his attorney (the plaintiff) was still the registered holder of the shares, and under cl. 13 of the agreement it was intended that W. Wallace, his executors or administrators, should be entitled to the extra dividend so long as he or they should be the registered holder or holders of the shares, without reference to the beneficial interest therein. There was nothing to be found in the agreement, express or implied, showing the intention of the parties to regard anything but the legal holding, and to go beyond that holding would virtually be to add a new term to the agreement.

In appeal, the defendants contended that the Court would not make a declaratory decree with regard to a right which (as in the present case) was future and contingent, there being no fund actually in

Company—(*Concluded*).

PAGE

existence, when the suit was brought, from which a preferential dividend could be claimed, and no certainty that there ever would be such a fund.

Held, by the Court of appeal, that the present case was one in which in the interests of both parties the Court, in the exercise of a sound discretion, should make a declaration as to the right in question. The right was existent, and although the exercise of it was undoubtedly contingent on there being a balance of profits as contemplated by cl. 13 of the agreement, the very nature of the agreement assumed that there might and probably would be such a balance, and a large sum had been already applied towards the dividend in question. Further, it was intended that the directors should exercise their discretion as to the amount to be carried to the reserve fund upon which the balance of profit available for the preferential dividend depended. It was, therefore, from the very nature of the case, important that the directors should know for certain whether the right to a preferential dividend was still in existence as contended by the plaintiff, or had come to an end. The circumstance, moreover, that the objection had been taken for the first time on appeal would by itself be fatal to it. BOMBAY BURMAH TRADING CORPORATION, LIMITED v. F. YORKE SMITH, 17 B. 197 ... 129

(6) *Suit by liquidator against shareholder—Limitation—Commencement of liability of shareholder in respect of shares—Memorandum of association—Subscriber to memorandum—Attestation of signature of subscriber—Want of attestation—Irregular attestation—Indian Companies Act* VI *of* 1882, *s.* 11.—A suit against a shareholder to enforce liability in respect of his shares, if brought within three years from the date at which his name is inscribed in the register as the holder of such shares, is not barred by limitation.

Where a memorandum of association of a company has been registered, a subscriber cannot divest himself of his liability as a member of the company, although his signature to the memorandum may not have been properly attested. The transaction may be irregular, but it is not void. CHHOTALAL CHHAGANLAL v. DALSUKHRAM HARGOVINDAS, 17 B 472. 307

(7) *Suit by liquidator—Limitation—Allotment of shares—Commencement of shareholder's liability—Indian Companies Act* (VI *of* 1882), *s.* 125.—The liquidator of the Gujrat Company in September, 1889, sued the defendant as a registered shareholder of the company to recover a sum of Rs. 2,483 due from him in respect of his shares. The plaint set forth the particulars of demand, one of which was Rs. 250, being the amount of deposit payable before allotment on 15th July, 1886, and another a sum of Rs. 250 payable on allotment on 15th July, 1886. This suit was brought on 10th September, 1889, and the defendant contended that the above two items of claim were barred by limitation. The lower Courts, notwithstanding the statement in the plaint found, as a fact, that the allotment of the shares was really made in November, 1886.

Held, therefore, assuming three years to be the period of limitation, that the claim was not barred. The debt due from the defendant did not become recoverable until he was registered as shareholder. MALICHAND DHARAMCHAND v. DALSUKHRAM HARGOVINDAS, 17 B. 469 ... 305

Compensation.

(1) See CIV. PRO. CODE (ACT XIV OF 1882), 18 B. 717.

(2) See ENCROACHMENT, 17 B. 771.

(3) See LANDLORD AND TENANT, 18 B. 66.

(4) See MUNICIPALITY, 18 B. 184.

Compromise.

(1) Compromise of a *bona fide* claim a good consideration—Agreement to lend money on mortgage—Delay in completion of agreement—Subsequent agreement to pay interest from a certain date—Consideration for such agreement—Right to rescind—Time of essence of contract—Suit by lender against borrower—Contract—Consideration—See CONTRACT, 17 B. 457.

(2) *Set-of—Equitable defence—Suit by trustees to eject a trespasser from trust property—Civ. Pro. Code (Act* XIV *of* 1882), *s.* 539.—Dharnidhar was the manager of a religious endowment called the Chinchvad Sansthan.

Compromise—(*Concluded*). PAGE

On his death in 1852, disputes arose between Chinto and Ganesh regarding the management of the *sansthan*, each claiming to be the heir and successor of Dharnidhar. After a long litigation they entered into a compromise in 1881, by which a portion of the *sansthan* property, consisting of certain *inam* villages, lands, and *varshasans*, were assigned to Ganesh, and Chinto was left in charge of the rest of the *sansthan* property, together with all the rights, privileges, and *manpans* enjoyed by the hereditary trustee of the endowment. In 1886 by a decree made in a suit called the "Charity suit," Chinto was removed from his office, and the plaintiffs were appointed trustees in his place. In 1889 the plaintiffs filed the present suit to set aside the compromise of 1881, and recover back the *sansthan* property assigned to Ganesh under that compromise. Ganesh pleaded, by way of set-off or equitable defence, that if the plaintiffs were at liberty to set aside the compromise, they were bound to restore to him in lieu of the trust property assigned to him under the compromise certain private property belonging to his adoptive father which he had given up.

Held, that Ganesh could not claim as a set-off or as an equitable defence to recover from the plaintiffs the private property, in question there being nothing in the compromise to show that there was any exchange of private property for trust property.

Held, also, that the suit did not fall under s. 539 of the Code of Civil Procedure (Act XIV of 1882). SHRI DHUNDIRAJ GANESH DEV v. GANESH, 18 B. 721 ... 990

(3) See ADMINISTRATOR, 17 B. 637.

Concurrent Decrees.

See EXECUTION OF DECREE, 18 B. 158.

Confession.

See EVIDENCE ACT (I OF 1872), 17 B. 485.

Confiscation.

See ACT V OF 1878 (BOMBAY ABKARI), 17 B. 154.

Consequential Relief.

See COURT FEES ACT (VII OF 1870), 18 B. 100.

Consideration.

See CONTRACT, 17 B. 457.

Consignment.

Consignment for sale—Advance by factor on consignment—Right of factor to sell goods consigned to him for sale below the limit of price prescribed by consignor—Principal and Agent—Principal and factor—See PRINCIPAL AND AGENT, 17 B. 520.

Construction.

(1) See ACT V OF 1878 (BOMBAY ABKARI), 17 B. 154.
(2) See ACT VII OF 1878 (INDIAN FOREST), 18 B. 670.
(3) See ACT I OF 1880 (BOMBAY KHOTI SETTLEMENT), 18 B. 133.
(4) See ACT VI OF 1888 (BOMBAY, GUJRAT TALUKDARS), 17 B. 289.
(5) See ACT VIII OF 1890 (GUARDIAN AND WARDS), 18 B. 375.
(6) See BHAG, 18 B. 283.
(7) See CHARITY, 17 B. 351.
(8) See CIV. PRO. CODE (ACT XIV OF 1882), 18 B. 429.
(9) See COMPANY 17 B. 197.
(10) See CONTRACT, 17 B. 129.
(11) See MATH, 18 B. 507.
(12) See MORTGAGE (SIMPLE MORTGAGE USUFRUCTUARY), 17 B. 425
(13) See PENAL CODE (ACT XLV OF 1860), 18 B. 758.
(14) See REGISTRATION, 18 B. 396.
(15) See WILL, 18 B. 1, 7.

Contract.

PAGE

(1) *Consideration—Compromise of a* bona fide *claim a good consideration—Agreement to lend money on mortgage—Delay in completion of agreement—Subsequent agreement to pay interest from a certain date—Consideration for such agreement—Right to rescind—Time of essence of contract—Suit by lender against borrower.*—On 31st August, 1891, the plaintiff agreed to lend the defendant Rs. 30,000 on a mortgagee. By the agreement the mortgagor (defendant) was to clear the title, and the time fixed for completion of the agreement was 8 days from its date. The mortgage was not completed within the stipulated time, in consequence of the non-production of the title-deeds by prior mortgagees, who were to be paid off out of the money to be advanced by the plaintiff. On the 9th September, 1891, the plaintiff's solicitors wrote to the defendant reminding him that the time for completion had expired, and stating that the plaintiff would require interest to be paid on the money which he had with him lying idle on the defendant's account. On the 24th September, 1891, the plaintiff formally tendered the Rs. 30,000 to the defendant, but as no mortgage-deed was then ready for execution, the money was not then paid. The plaintiff was always ready and willing to advance the money, but in consequence of the defendant's delay he insisted on interest being paid from the 24th September, 1891. The title-deeds were ultimately produced at the end of November or the beginning of December, and on 7th December, 1891, the draft mortgage was sent to the defendant for approval. It contained a clause stipulating for payment of interest from 24th September, 1891. On the 9th December, 1891, the plaintiff had an interview with the defendant. The two points then discussed were (1) what time after due date should be allowed to the defendant (mortgagor) for payment of interest; (2) whether interest on the principal sum should run from the 24th September, 1891. On the first point the plaintiff gave way, allowing defendant fifteen days instead of eight as originally provided. As to the second point, he declined to advance the money unless interest was paid from the 24th September, 1891. The defendant ultimately agreed to this. The mortgage-deed was duly engrossed with a stipulation for payment of interest from the 24th September, 1891, and the 26th January, 1892, was fixed as the day for execution. On that day, however, one of the defendant's daughters who had to execute the deed was absent, and the plaintiff refused to advance the money until her signature was obtained. Subsequently the defendant refused to sign the deed on the ground that it contained the clause for payment of interest from 24th September, 1891. He contended that he was not liable to pay interest from that date. The plaintiff brought this suit claiming Rs. 1,865-12 as damages for the defendant's breach of agreement. The lower Court held that although the original agreement of 31st August, 1891, mentioned no date from which interest should run, the defendant on the 9th December, 1891, had agreed to pay it from 24th September, 1891, and had made no objection on the point until February, 1892. The defendant contended that, if such an agreement was made on the 9th December, 1891, it was without consideration, but the Court held that the plaintiff was at that date at liberty to rescind the agreement altogether, and that he had consented not to rescind in consideration of being paid interest from the 24th December, 1891. The lower Court accordingly passed a decree for the plaintiff.

Semble that time was not of the essense of the contract, but

Held that, in any case, under the circumstances there was consideration for the agreement made by the defendant to pay interest from the 24th September. The plaintiff clearly regarded himself as entitled to rescind, and at the defendant's request agreed to forbear to do so if the defendant would consent to pay interest from 24th September, 1891. The claim of the right to rescind was undoubtedly a real one and made in good faith, and the forbearance to enforce it might well be an inducement to the defendant to agree to the plaintiff's terms, and the principle laid down in *Miles* v. *New Zealand Alford Estate Co.*, (32 Ch. D., 266) applied. DADABHOY DAJIBHOY v. PESTONJI MERWANJI BARUCHA, 17 B. 457 = Chitty's S.C.C.R. 367 ... 297

(2) *Construction—Coustom or usage qualifying contract—Evidence—Evidence Act I of 1872, s 92, proviso 5—Shipment, meaning of—Arbitration—Appointment of umpire by arbitrators—Mode of appointment prescribed by contract—Delegation by arbitrators of their right to appoint umpire.*—On 18th

Contract—(*Continued*). PAGE

April, 1890, the defendant signed a contract (No. 3053) to buy from the plaintiffs 25 bales grey dhoties "June shipment, in four lots, with an interval of four weeks." These goods were not supplied, as they could not be obtained at the price limited. On 24th September, 1890, the defendant gave the plaintiffs an order at an increased limit of price in the following terms:—"Please telegraph your Manchester friends to purchase on my account 25 bales grey dhoties relating to No. 3053 at an all-round advance of 1*d*. per pair on original limits for November, December, January shipments, in three monthly lots, about 8 bales to be shipped in each month." This order was accepted and the goods were shipped as follows:—6 bales were handed to the carriers (the S. & N. W. Railway Co.) in Manchester on the 28th November, 1890, and were shipped at Birkenhead on the 9th December, 1890; 6 bales were handed to the same carriers on the 4th December, 1890, and were shipped on the 13th December, 1890; 10 bales were handed to the same carriers on the 23rd December and 1 bale on the 24th December, and these 11 bales were shipped on the 6th January, 1891. The defendant refused to accept the goods. He contended that the documents of 18th April and 24th September should be read together, and that the final contract was for November, December, January shipments, in three monthly lots at intervals of four weeks. He also contended that the shipment on the 9th December, 1890, was a late shipment, and that he was not, therefore, bound to accept the goods under the contract. As to this last contention the plaintiffs alleged that by the custom of Bombay in the case of contracts made with members of the Native Piece-goods Association, the date of the carrier's weight note was to be regarded as the date of shipment, and that, under such a contract as the one in question, delivery to the Railway Company or other inland carrier was equivalent to shipment. This custom, it was alleged, originated in consequence of the above Association having agreed, that all piece-goods ordered out by its members should be conveyed to Bombay by certain lines of steamers only and by no others. It was stated that, unless some such custom existed, it would in many instances be impossible for Bombay merchants to carry out their contracts, as no steamers of the selected lines might be available. The Judge of the Court of Small Causes at the hearing found that the alleged custom existed, and was generally accepted and understood by merchants and dealers in Bombay.

On reference to the High Court,

Held, (1) that the contract finally agreed on was that 25 bales relating to No. 3053 (*i e.*, the document of the 18th April) should be purchased on defendant's account at an all-round advance of 1*d*. per pair on the original limits. Such bales to be shipped in the manner and at the times mentioned in the document of the 24th September, 1890;

(2) that evidence of the alleged custom or usage of trade was not admissible under s. 92, proviso (5), of the Evidence Act (I of 1872) to explain or vary the natural and ordinary meaning of the words in the contract. The parties contracted for a shipment on board of a ship or steamer, and to allow evidence of a usage that delivery to a Railway Company at an inland town should be regarded as equivalent to shipment on board a vessel at a seaport town would be to allow evidence of a usage repugnant to, or inconsistent with, the express terms of the contract.

The contract in question provided that disputes between the parties were to be referred to the arbitration of two merchants, and that should the arbitrators be unable to agree, they should appoint an umpire. The plaintiffs and defendant referred their dispute to two arbitrators. These arbitrators disagreed in their report, and referred the case to the Bombay Chamber of Commerce for the appointment of an umpire. The Chamber of Commerce appointed an umpire, who made his award.

Held, that the appointment of the umpire was invalid. The arbitrators could not delegate the power of appointment conferred on them by the contract. SMITH (J. C.) v. LUDHA GHELLA DAMODAR, 17 B. 129 = Chitty's S.C.C.R. 320 ... 84

(3) *Contract Act* (IX *of* 1872), s. 23—*Unlawful consideration—Agreement by plaintiff and defendant not to bid against each other at an auction—Specific Relief Act* (I *of* 1877), s. 35—*Void contract.*—There is nothing

Contract—(*Concluded*).

PAGE

necessarily unlawful in two or more persons agreeing not to bid against one another at an auction sale.

In order that a contract should be set aside under s. 35 (*b*) of the Specific Relief Act (I of 1877), the plaintiff should be shown to have been less to blame in the transaction than the defendant. HARI BALKRISHNA v. NARO MORESHVAR, 18 B. 342

(4) Contract to sell from 2,500 to 3,500 tons of coal—Breach of contract—Non-delivery of coal—Damages—Number of tons on which damages to be calculated—See ARBITRATION, 18 B. 299. ... 736

(5) Performance of contract—Making of contract—Goods to be shipped at Bombay to the plaintiff at Karwar—Contract entered into and intended to be performed at Bombay—Jurisdiction—See JURISDICTION, 18 B. 43.

(6) See HINDU LAW (JOINT FAMILY), 17 B. 718.

(7) See LANDLORD AND TENANT, 17 B. 475.

Contract Act (IX of 1872).

(1) Ss. 20 and 65—See LAND REVENUE, 17 B. 407.

(2) S. 23—See CONTRACT, 18 B. 342.

(3) S. 27—See SPECIFIC PERFORMANCE, 18 B. 702.

(4) S. 45—See PARTNERSHIP, 17 B. 6.

(5) S. 74—Interest—Enhanced rate in default of payment—Penalty—Liquidated damages—See INTEREST, 17 B. 106.

(6) S. 151—Bailment—See RAILWAY COMPANY, 17 B. 723.

Contractor.

See NEGLIGENCE, 17 B. 307.

Contributory.

See COMPANY, 17 B. 672; 18 B. 152.

Co-sharer.

(1) See ADVERSE POSSESSION, 18 B. 513.

(2) See HINDU LAW (JOINT FAMILY), 18 B. 505.

(3) See LANDLORD AND TENANT, 18 B. 141.

Costs.

(1) Costs where lower Court grants an injunction and appeal Court refuses injunction but awards damages—See EASEMENT, 18 B. 474.

(2) *Taxation—Attorney and client—Trustees—Bills of costs paid by majority of trustees—Right of dissenting trustee to have bills taxed even after payment.*—In a suit relating to a charitable trust the decree directed that the costs of all parties thereto, when taxed, should be paid out of the trust fund. Certain bills of costs were subsequently furnished to the trustees by the attorneys. Two of the trustees thought the bills reasonable, and agreed that they should be paid. The third trustee objected to the amount of the bills as exorbitant, and desired that they should be taxed. Notwithstanding his protest, however, the other trustees paid the bills without taxation. He, thereupon, took out a summons calling upon his co-trustees and the attorneys to show cause why the bills should not be taxed and why they should not refund any sum which had been overpaid.

Held, that the dissenting trustee was entitled to have the bills taxed, although they had been paid, and that the High Court had jurisdiction to order taxation to be made. JIJIBHOY MUNCHERJI JIJIBHOY v. BYRAMJI JIJIBHOY, 18 B. 189 ... 634

(3) See CIV. PRO. CODE (ACT XIV OF 1882), 17 B. 514; 18 B. 464.

(4) See INTERPLEADER, 18 B. 231.

(5) See MORTGAGE (REDEMPTION), 17 B. 32.

(6) See PAUPER, 18 B. 454.

(7) See PRACTICE, 18 B. 59.

Counterpart.

See STAMP, 18 B. 546.

Court-fees. PAGE

(1) See PAUPER, 18 B. 454.

(2) See STAMP, 18 B. 209, 696.

(3) See VALUATION, 18 B. 40.

Court Fees Act (VII of 1870).

(1) See STAMP, 18 B. 207.

(2) S. 7—Claim for interest from institution of suit until payment—Stamp—Future mesne profits—See STAMP, 17 B. 41.

(3) S. 7, cls. 1-9—See STAMP, 18 B. 696.

(4) *S.* 7, *cl.* 4 (*c*)—*Act* VII *of* 1887, *s.* 8—*Stamp—Consequential relief—Valuation of suit—Injunction—Talukdari Act, Bombay Act* VI *of* 1888, *s.* 11—*Jurisdiction.*—Where plaintiffs sued for a declaration that they were entitled to share in certain talukdari estates and for an injunction to restrain defendant from cutting and removing timber from certain forests, or, if the injunction was not granted, for an order to defendant to keep a correct account of the timber removed, the First Class Subordinate Judge rejected the claim for want of jurisdiction.

Held, that the suit was one for a declaration and consequential relief under s. 7, cl. 4 (*c*) of the Court Fees Act, and that as the claim was valued at Rs. 230 only, the appeal lay under Act VII of 1837, s. 8, to the District Court. An injunction is in the nature of consequential relief. GULABSINGJI v. LAKSHMANSINGJI, 18 B. 100 ... 575

(5) *S.* 7. *cl.* 4, *sub-cls.* (*c*) *and* (*d*)—*Valuation of suit - Valuation of a suit for injunction—Injunction—Appeal—Order rejecting plaint as insufficiently stamped.*—A suit for declaration of right and for an injunction falls under s. 7, cl. 4, sub-cls. (*c*) and (*d*) of the Court Fees Act VII of 1870. The valuation of the relief sought in such a suit rests with the plaintiff, and not with the Court.

A. sued B. and C. (1) for a declaration of his title to certain property, and (2) for an injunction restraining C. from paying, and B from receiving, an allowance of Rs. 2,400 a year out of the income of the property in dispute. A. valued each of the reliefs sought at Rs. 130, and affixed a Court-fee stamp of Rs. 20 to the plaint.

The Court of first instance rejected the plaint as insufficiently stamped, holding that the claim for the injunction sought should have been valued at ten times the annual allowance paid by C. to B., as provided by s. 7, cl. 2 of Act VII of 1870.

On appeal to the High Court,

Held, that the suit fell under s. 7, cl. 4, sub-cls. (*c*) and (*d*) of the Court Fees Act, and the plaintiff had a right to put his own valuation on the relief sought.

Held, also, that the order rejecting the plaint as insufficiently stamped was appealable. SARDARSINGJI v. GANPATSINGJI, 17 B. 56 ...

Court of Agent for Sirdars.

See SIRDAR, 17 B. 224.

Criminal Misappropriation.

See PENAL CODE (ACT XLV OF 1860), 18 B. 212.

Criminal Procedure.

Charge—Alternative charge—Contradictory statements—Statement made to a police officer during a police investigation—Contradictory statement made before a Magistrate holding a preliminary inquiry—Giving false evidence—Indian Penal Code (Act XLV of 1860), s. 193—Separate charges. See PENAL CODE (XLV OF 1860), 18 B. 377.

Crim. Pro. Code (Act XXV of 1861).

S. 76—See HABEAS CORPUS, 18 B. 636.

Crim. Pro. Code (Act X of 1872).

(1) Ss. 281 and 390—See INSOLVENCY, 17 B. 334.

(2) S. 454--See PENAL CODE (ACT XLV OF 1860), 17 B. 260.

Crim. Pro. Code (Act X of 1882).

PAGE

(1) Chap. IX—See PENAL CODE (ACT XLV OF 1860), 17 B. 626.

(2) *S.* 133—*Order for removal of an obstruction standing upon certain land—Ownership of such land—Effect of Magistrate's order under s.* 133—*Jurisdiction of Civil Court after order made—Declaratory decree—Declaration of title to land—Specific Relief Act* (I *of* 1877), *s.* 42.—A Magistrate made an order against the plaintiff, under s. 133 of the Crim. Pro. Code (Act X of 1882), for the removal of a certain *otta* standing in front of the plaintiff's shop as an obstruction to the public way. The plaintiff, thereupon, brought this suit against the Secretary of State for India in Council for a declaration that the land on which the *otta* stood was his property and not that of the Government.

Held, that the public roads being vested by s. 37 of the Land Revenue Code (Bombay Act V of 1879) in the Government of Bombay, they were "interested to deny" the plaintiff's title to the land, and, therefore, under s. 42 of the Specific Relief Act (I of 1877), the plaintiff (subject to the discretion of the Court) was entitled to a declaration as against the Government of his right to the land, and the plaintiff was not called upon to wait until the Government had taken possession of the land.

It was contended that the jurisdiction of the Court to make the declaration prayed for was taken away by the last clause of s. 133, which provides that "no order made by a Magistrate under this section shall be called in question in any Civil Court."

Held, that the Magistrate's order under this section is not a conclusive determination of the question of title. SECRETARY OF STATE FOR INDIA IN COUNCIL v. JETHABHAI KALIDAS, 17 B. 293. ... 191

(3) Chap. XIV—See PENAL CODE (ACT XLV OF 1860), 18 B. 377.

(4) *Ss.* 227 *and* 237—*Charge—Alteration of charge—Conviction for an offence different from that with which accused is charged—Extradition*—Lex fori.—The accused were subjects of His Highness the Gaekwar of Baroda. They are extradited for committing dacoity in British India. The Magistrate, who held a preliminary inquiry into the matter, committed the accused to the Sessions Court on a charge under s. 393 of the Indian Penal Code (XLV of 1860). The Sessions Judge amended the charge to one under s. 395, on the ground that, as the accused had been extradited on a charge under s. 395, they could be tried and convicted only under that section, and no other. At the end of the trial, the Sessions Judge finding that the accused were guilty of theft, but not of dacoity, acquitted them.

Held, reversing the order of acquittal, that it was competent to the Sessions Judge to alter the charge under s. 227 of the Code of Criminal Procedure (Act X of 1882) and under s. 238 to convict the accused of the minor offence, which the evidence established.

Held, also, that the Code of Criminal Procedure was applicable as *lex fori*. QUEEN-EMPRESS v. KHODA UMA, 17 B. 369 ... 240

(5) S. 235—See PENAL CODE (ACT XLV OF 1860), 17 B. 260.

(6) Chap. XXII—See ACT VI OF 1873 (BOMBAY DISTRICT MUNICIPAL), 17 B. 731.

(7) *S.* 263 (*h*)—*Summary trial—Magistrate's finding to contain a statement of the reasons for a conviction.*—Under s. 263 (*h*) of the Code of Criminal Procedure (Act X of 1882) a Magistrate, in recording his reasons for a conviction, must state them so that the High Court on revision may judge whether there were sufficient materials before him to support the conviction. QUEEN-EMPRESS v. SHIDGAUDA, 18 B. 97 ... 573

(8) Ss. 289-292—Practice--Procedure—Several persons tried jointly—Right of reply where one of several accused calls witnesses and the others do not. See PRACTICE, 18 B. 364.

(9) S. 386—See ACT IX OF 1890 (RAILWAYS), 18 B. 440.

(10) *S.* 423, *cl.* (*b*)—*Sentence—Alteration of sentence in appeal—Appellate Court's power to alter a sentence of fine into one of imprisonment.*—A Sessions Judge has no power to enhance a sentence in appeal, by altering a sentence of fine into one of imprisonment. QUEEN-EMPRESS v. DANSANG DADA, 18 B. 751 ... 1010

(11) S. 426—See INSOLVENCY, 17 B. 334.

Crim. Pro. Code (Act X of 1882)—(*Continued*). PAGE

(12) S. 432—See GAMBLING, 17 B. 184.

(13) *Ss.* 478 *and* 195—*Civ. Pro. Code* (XIV *of* 1882), *ss.* 278, 273—*Inquiry into claim to attached property—Civil Court's power to commit the party making such claim or his witness on a charge of forgery—Subsequent civil suit by claimant to establish his right to the property—Stay of criminal proceedings pending civil litigation.*—It is not an invariable rule that criminal proceedings should be stayed during the pendency of civil litigation regarding the same subject-matter.

Certain property was attached in execution of a decree. Thereupon accused No. 1 applied to have the attachment raised, on the ground that he had purchased the property from the judgment-debtor under a sale-deed executed long before the date of the attachment. In the summary inquiry, which was made under s. 278 of the Code of Civil Procedure (Act XIV of 1882), he produced the sale-deed, and accused No. 2 was called as his witness and supported his claim. The Subordinate Judge found that the deed was forgery, and rejected the claim. Proceeding then under s. 478 of the Code of Criminal Procedure (Act X of 1882), he held the inquiry directed by that section, and committed both the accused to the Sessions Court on charges of perjury and forgery. During the pendency of the inquiry under s. 478, the accused No. 1 filed a civil suit to establish the genuineness of the sale-deed and set aside the attachment. He also applied to the High Court to quash the commitment or stay the criminal proceedings pending the disposal of the civil suit.

Held, refusing the application, that the mere fact that a regular suit was filed to establish the genuineness of the sale-deed was not a sufficient ground for quashing the commitment, or for adjourning the trial pending the hearing of the civil suit.

Held, also, that the power given to a Civil Court under Chap. XXXV of the Code of Criminal Procedure (Act X of 1882) to take action regarding "any offence referred to in s. 195" is not ordinarily restricted, in regard to offences relating to documents, to such offences only when committed by a party to the proceeding in which the document was given in evidence. It extends also to such offences when committed by a witness of the party. *In re* DEVJI VALAD BHAVANI, 18 B. 581 ... 896

(14) *S.* 487—*Magistrate competent to try an accused person for disobedience of a summons issued by him as Mamlatdar.*—A Magistrate is not debarred by s. 487 of the Code of Criminal Procedure (Act X of 1882) from trying an accused person under s. 174 of the Indian Penal Code (XLV of 1860) for disobedience of a summons issued by him in his capacity of Mamlatdar.

In construing s. 487 of Act X of 1882, effect must be given to the words "as such Judge or Magistrate," and these words must be read in connection with all the three classes of offences previously referred to. QUEEN-EMPRESS v. RAIJI DAJI, 18 B. 380 (F.B.) ... 761

(15) *S.* 488—*Maintenance—Illegitimate children—Right of a married woman to claim maintenance for her illegitimate children—Evidence of wife to prove non-access — Evidence — Presumption of legitimacy — Evidence Act* (I *of* 1872), *s.* 112.—A married woman is entitled under s. 488 of the Code of Criminal Procedure (Act X of 1882) to claim maintenance for her illegitimate children from the putative father.

A wife can be examined as to non-access of her husband during her married life, without independent evidence being first offered to prove the illegitimacy of her children. ROZARIO v. INGLES, 18 B. 468 ... 822

(16) S. 491—Habeas Corpus—Foreigners—Act III of 1864, validity and application of—Powers of legislation of the Governor-General in Council—Indian Councils Act (Stat. 24 and 25 Vict., c. 67), s. 22—Warrant to arrest and imprison—Form of warrant—Service of warrant—Procedure—See HABEAS CORPUS, 18 B. 636.

(17) *Ss.* 517 *and* 523—*Property seized by the police pending an inquiry or trial under a search-warrant issued by the Court—Magistrate's power to deal with such property where no offence is committed.*—Section 523 of the Code of Criminal Procedure (Act X of 1882) does not apply to property which is produced before a Court in the course of an enquiry or trial under a search-warrant issued by itself under s. 96 of the Code. To such property s. 517

Crim. Pro. Code (Act X of 1882)—(*Concluded*). PAGE

alone would apply ; and if no offence is found in respect thereof, the Court can make no order. The property must be given back into the possession from which it came.

The scope of s. 523 must be confined to property seized by the police of their own motion in the exercise of the powers conferred on them by law, for instance under ss. 51, 54, 164 or 165 of the Code of Criminal Procedure.

Per TELANG, J.—Under s. 523 of the Code of Criminal Procedure a Magistrate is bound to institute an enquiry before making any order touching the right, not of property, but of possession to the property, seized by the police. *In re* RATANLAL RANGILDAS, 17 B. 748 ... 491

(18) S. 555—Judge—Disqualification of a Judge—Personal interest—Bombay District Municipal Act (VI of 1873), s. 84—Municipal offence—See JUDGE, 18 B. 442.

Criminal Proceedings.

Stay of criminal proceedings pending Civil litigation—See CRIM. PRO. CODE (ACT X OF 1882), 18 B. 581.

Cross claim.

See CIV. PRO. CODE (ACT XIV OF 1882), 18 B. 717.

Crown Grant.

See ACT VII OF 1878 (INDIAN FOREST), 18 B. 670.

Custom.

See CONTRACT, 17 B. 129.

Damages.

(1) Contract—Contract to sell from 2,500 to 3,500 tons of coal—Breach of contract—Non-delivery of coal—Number of tons on which damages to be calculated—See ARBITRATION, 18 B. 299.

(2) See ADMINISTRATOR, 17 B. 637.

(3) See EASEMENT, 18 B. 474.

(4) See ENCROACHMENT, 17 B. 771.

(5) See INAM, 18 B. 319.

(6) See MUNICIPALITY, 18 B. 547.

(7) See NEGLIGENCE, 17 B. 307.

Damdupat.

Hindu Law—Rule of damdupat when applicable—Interest—Amount of interest recoverable by a Hindu—Mortgage—Hindu creditor claiming interest from a debtor not a Hindu—Redemption suit—Supreme Court Charter, Clause 29—See HINDU LAW (GENERAL), 18 B. 227.

Debate in Legislative Council.

See ACT I OF 1880 (BOMBAY KHOTI SETTLEMENT), 18 B. 133.

Declaration.

(1) See COMPANY, 17 B. 197.

(2) See EXECUTION OF DECREE, 18 B. 260.

Declaratory Decree.

Declaration of title to land—Specific Relief Act (I of 1877), s. 42—Crim. Pro. Code (Act X of 1882), s. 133—Order for removal of an obstruction standing upon certain land—Ownership of such land—Effect of Magistrate's order under s. 133—Jurisdiction of Civil Court after order made—See CRIM. PRO. CODE (ACT X OF 1882), 17 B. 293.

Decree.

(1) Amendment of—Civ. Pro. Code (Act XIV of 1882), s. 206—Practice—Appeal—See PRACTICE, 18 B. 542.

(2) See HUSBAND AND WIFE, 17 B. 624.

Deed.

(1) Gift—Necessity of possession—Attestation of deed, effect of—See HINDU LAW (GIFT), 18 B. 688.

Deed—(*Concluded*). PAGE

(2) Property comprised in deed—Construction—General words—Particulars of property stated in deed—Leading description—Falsa demonstratio—Vendor and purchaser—Bhag—Bhagdari Act (Bombay) V of 1862, s. 3—Mortgage—Alienation of a portion of bhag—See BHAG, 18 B. 283.

Defamation.

(1) *Penal Code* (XLV *of* 1860), *s.* 499—*Statement by a witness—Privilege—Witness.*—A witness cannot be prosecuted for defamation on account of statements made when giving evidence in the witness.box. QUEEN-EMPRESS v. BALKRISHNA VITHAL,17 B. 573 ... 374

(2) *Penal Code* (*Act* XLV *of* 1860), *s.* 500—*Statement by witness—Privileged.*—A witness cannot be prosecuted for defamation in respect of statements made by him when giving evidence in a judicial proceeding. QUEEN EMPRESS v. BABAJI, 17 B. 127. ... 83

(3) Sending a notice containing defamatory matter to the complainant—Publication—Indian Penal Code (XLV of 1860), ss. 499, 500—See PENAL CODE (ACT XLV OF 1860), 18 B. 205.

Delay.

(1) See CONTRACT, 17 B. 457.

(2) See LIMITATION, 18 B. 84.

(3) See MORTGAGE (REDEMPTION), 17 B. 711.

(4) See PRACTICE, 17 B. 29.

Delegation.

See CONTRACT, 17 B. 129.

Denial.

See LANDLORD AND TENANT, 17 B. 631; 18 B. 110.

Desaigiri Sukhdi.

See REGISTRATION, 18 B. 92.

Dhara Lands.

See ACT I OF 1880 (BOMBAY KHOTI SETTLEMENT), 18 B. 244.

Dhurm.

See CHARITY, 17 B. 351.

Directors.

See COMPANY, 18 B. 119.

Discovery.

(1) Production—Documents of title—Refusal to produce—Ejectment—Practice—Inspection—See PRACTICE, 17 B. 581.

(2) See PRACTICE, 17 B. 384.

Discretion.

(1) See ACT III OF 1876 (BOMBAY MAMLATDARS' COURTS), 18 B. 449.

(2) See CHARITY, 18 B. 551.

(3) See SPECIFIC PERFORMANCE, 18 B. 702.

Distribution.

See EXECUTION OF DECREE, 18 B. 458.

Divankhana.

See EASEMENT, 18 B. 474.

Divorce.

(1) Husband and wife—Alimony—Parsi Matrimonial Court—Act XV of 1865—Suit by wife for judicial separation—Alimony after decree dismissing wife's suit and pending appeal—Alimony pending petition for review of judgment—Practice in allotment of alimony—See HUSBAND AND WIFE, 17 B. 146.

(2) Husband and wife—Decree based merely on admissions and without recording evidence—Adultery—Collusion— Practice—Procedure—The Indian Divorce Act (IV of 1869), ss. 3, cl. 3, 14 and 17—See HUSBAND AND WIFE, 17 B. 624.

Divorce—(*Concluded*).

PAGE

(3) Parsis—Parsi Marriage Act XV of 1865—Minority—Guardians—Practice—Procedure—Husband and wife—See HUSBAND AND WIFE, 18 B. 366.

Divorce Act (IV of 1869).

(1) Ss. 3, cl. 3, 14 and 17—See HUSBAND AND WIFE, 17 B. 624.

(2) S. 36—See HUSBAND AND WIFE, 17 B. 146.

Dock Authorities.

See SALE OF GOODS, 17 B. 62.

Doctrine of Marshalling.

See MORTGAGE (MARSHALLING), 18 B. 160.

Documents.

See PRACTICE, 17 B. 581; 18 B. 737.

Donatio Mortis Causa.

See HINDU LAW (GIFT), 17 B. 486.

Drainage.

Right of—See EASEMENT, 18 B. 382.

Drawee.

See HUNDI, 18 B. 570.

Drawing Toddy.

See ACT V OF 1878 (BOMBAY ABKARI), 18 B. 428.

Easement.

(1) *Easement of necessity—Light and air—Severance of tenements by grantor—Implied grant—Implied reservation of easement—Derogation of grant—Reservation of easements of necessity—Injunction—Easements Act V of 1882, s. 13.*—One Wallabh was the owner of a certain house behind which was a courtyard or *chok*, half of which belonged to him and the other half to one Mancharam, (the defendant's father), who owned a house close by. Two of the rear rooms of Wallabh's house abutted upon his portion of the *chok*, and had two doors opening out into the *chok*. In 1861, Wallabh sold (*inter alia*) his half of the *chok* to Mancharam. The conveyance contained no reservation of any rights over the *chok*. Wallabh having died in 1875-76, his widow Jamna sold his house to the plaintiff, and shortly afterwards the defendant (Mancharam's son) put up a hoarding on the *chok* which blocked up the above mentioned doors of the plaintiff's house, and obstructed the light and air passing through them into the said two rear rooms. The plaintiff sued for an injunction.

Held, that as Wallabh had made an absolute sale to Mancharam of his portion of the *chok*, expressly reciting that he had reserved no interest in the *chok*, it would in the circumstances of this case be contrary to equity and good conscience to hold that he impliedly reserved a right of light and air over the *chok*, so as to prevent B, from building on the *chok* and thus obstructing the windows and doors in Wallabh's house overlooking the *chok*.

Held, also, that the case was not governed by s. 13, clause (*c*) of the Easements Act (V of 1882), which was not extended to the Bombay Presidency till Act VIII of 1891 was passed. CHUNILAL MANCHARAM v. MANISHANKAR ATMARAM, 18 B. 616 ... 920

(2) *Light and air—Obstruction—Injunction or damages—Specific Relief Act I of 1877—Costs—Costs where lower Court grants an injunction and appeal Court refuses injunction, but awards damages.*—The plaintiff was the owner of a house in Jambulwadi Street in Bombay. The defendant owned a house to the east of it, and between the two houses was a gully three feet seven inches wide the part of which next the defendant's house was a gutter. On the ground floor of the plaintiff's house were four windows and on the first floor two windows all looking out into the gully and all of them ancient windows. The defendant's house originally was a little higher than the plaintiff's house and consisted of a ground floor, a first floor and a loft. Shortly before suit, the defendant pulled down this house and on the same site began to build a new four-storied house with a loft.

Easement—(*Continued*). PAGE

The plaintiff sued for an injunction, alleging that this new house, which would be of much greater height than the old one, would completely block up his ancient windows and cause him material damage, there being no other windows in his house on the side next the defendant. The defendant in his written statement denied that his new house would cause material damage to the plaintiff. He alleged that his old house, which was higher than the plaintiff's, had a projecting cornice, so that hardly any direct light came to the plaintiff's windows, which were almost, if not entirely, lighted by the light that came from each end of the gully. He further stated that his new house would have no cornice and that he had widened the gully, so that light to the plaintiff's windows would not be appreciably diminished, but that even if the passage had not been widened there would have been little diminution of light. He also alleged that the plaintiff had other windows and sources of light than the said six windows. While denying all damage, the defendant, however, to avoid litigation and without prejudice paid into Court Rs. 200, which he said was more than sufficient to compensate the plaintiff.

After filing the suit the plaintiff obtained a rule for an injunction at the date of which the walls of the defendant's house had been built up as far as the second floor. The rule was subsequently discharged, the defendant consenting that the case should be argued at the hearing as if the new house was then in the same condition. The defendant, however, subsequently continued to build, and at the date of hearing it was practically complete.

The lower Court (STARLING, J.) found that prior to the building of the new house direct light came to the plaintiff's windows to the extent at all events of 5°, and in addition to this a considerable amount of lateral light came to the windows over the defendant's roof. The Court held that, as the plaintiff had a right to this light by prescription, he was absolutely entitled to the whole of it: that the defendant had by his new building cut off all the direct light, and that practically all the light left to the plaintiff was reflected light, the amount of which depended on the condition in which the defendant might choose to keep the walls of his house. Under these circumstances the lower Court, looking at the house as if it was still in the condition in which it was at the time the injunction was discharged, held that the plaintiff was entitled to a mandatory injunction, and directed the defendant to remove the upper portion of the house which had been built since that time. On appeal:—

Held, that although the plaintiff's light had been sensibly diminished by the defendant's new building, there had not been such a large, material and substantial damage as to require interference by injunction, or that the plaintiff's room had been rendered unfit for the purpose for which it might reasonably be expected to be used.

The appeal Court, therefore, varied the decree of Starling, J., and refused an injunction, but ordered the defendant to pay the plaintiff Rs. 500 as damages.

On the question of costs it was argued for the defendant (appellant) that he should be given his costs of appeal, as he had succeeded in setting aside the injunction granted by the lower Court and should also get his costs of hearing in the lower Court, as the whole contest there had been as to the right to an injunction, which in appeal had been refused. The defendant had paid Rs. 200 into Court when he filed his written statement, and would have paid more if he could have obtained any indication from the plaintiff of the amount that would satisfy him. Nothing, however, would satisfy the plaintiff but an injunction, and he had failed to get it.

Held, that the plaintiff should have his costs of hearing in the lower Court and that each party should pay his costs of the appeal and of the proceedings on the rule for an injunction before the trial. The ordinary rule should be observed, and the costs should follow the event. The event in this case was that the plaintiff had proved his case against the defendant, although he had not got the precise form of relief which he wanted. If a party substantially succeeds, he is entitled to his costs. GHANASHAM N. NADKARNI v. MOROBA RAMCHANDRA PAI, 18 B. 474 ... 825

Easement—*(Continued).*

PAGE

(3) Right of way—Landlord and Tenant—Variance between pleading and evidence —Practice—Procedure—Encroachment—Injunction—High way—Place dedicated by owner of land for convenience of adjoining houses—User of such open space—Covenant or grant presumed—See ENCROACHMENT, 17 B. 648.

(4) *Right of way—Prescription—Prescriptive right of the defendant to have branches of his trees overhanging the plaintiff's land—Right of the defendant to go on to the plaintiff's land to collect the fruit of the trees distinct from and not necessary to the right to have the branches overhanging.* —The defendant having acquired a prescriptive right to have the branches of his trees overhanging the plaintiff's land, the lower Courts held that he had a right to go on to the plaintiff's land for the purpose of gathering the fruit of trees, on the ground that the prescriptive right to have the branches of his trees overhanging the plaintiff's land carried with it an "accessory" right to enjoy the profits of the branches in the best way possible.

Held, (reversing the lower Court's decree), that the right to go on the plaintiff's land to pick the fruit off the branches was perfectly distinct from the prescriptive right to have the branches overhanging the land, and could not be said to be accessory to the latter right in the sense of being within the limits of that right. NAIK PARSOTAM GHELA v. GANDRAP FATELAL GOCULDAS, 17 B. 745

(5) *Right of way—Right of drainage—Mortgage—Mortgage of part of a house—Easement over the other part granted to the mortgage by the mortgage-deed —Subsequent sale of parts of the house to different owners—Sale of mortgaged part subject to the mortgage—Mortgage paid off by purchaser—Purchaser's right to easement—License—Grant of right of way in a mortgage of part of property of mortgagor—Reservation by mortgagor of similar right in respect of other property not mortgaged by him—Vendor and purchaser —Sale of land subject to a mortgage giving a right of way—Mortgage paid off by purchaser—Mortgagee not a party to conveyance—Receipt for mortgage money endorsed on conveyance.*—V., the owner of a house, mortgaged the east portion of it to M. in 1878. The mortgage-deed gave to the mortgagee the use of a certain privy situated in another part of the house and the right of way to it through a certain *bol* or passage. V, subsequently sold the whole house to C., and C., in 1880, mortgaged the western part of it to R., who got a decree, and in execution the part mortgaged to him (*i.e.*, the west) was sold in 1885, and the defendant became the purchaser. In 1887 C. sold the east part to the plaintiff, who paid off the mortgage to M., and obtained M.'s endorsement of payment on his deed of conveyance. The plaintiff subsequently sued to restrain the defendant from interfering with his use of the passage and of the privy. The defendant alleged that both were comprised in the property purchased by him at the Court sale in 1885, and that the right given by the mortgage of 1878 was merely a license to the mortgagee and not an easement. ... 489

Held, that the use of the passage and of the privy was a privilege granted by the very instrument which created the mortgage, and should be regarded as a privilege ancillary to the use of the part of the house mortgaged to M. in 1879. The defendant's purchase in 1885 was subject to the easement acquired by M. (the mortgagee), and the plaintiff had purchased the mortgagee's interest in the house, which included her right by way of easement. The plaintiff was, therefore, entitled to the use of the privy and the passage.

In the mortgage-deed of 1880, by which the west part of the house was mortgaged by C. to R., the following clause was contained:—"You are to have the use of the drain for passing water as it has continued from old times."

Held, that these words should be understood as intended to reserve to C. (the mortgagor), in respect of the part of the house not included in the mortgage, a right to use the drain similar to the right given to the mortgagee. The right so reserved by C. was afterwards sold by C. to the plaintiff along with the east part of the house in 1887, and the plaintiff was, therefore, entitled to the use of the drain.

The plaintfff purchased a part of the house which the vendor had previously mortgaged to M. The mortgage-deed gave to the mortgagee the use of a

Easement—(*Concluded*). PAGE

certain privy and the right of going to it through a passage situated at the rear of the mortgaged part of the house. M. was not a party to the conveyance to the plaintiff, but at the time of the purchase the plaintiff paid off M.'s mortgage, and M. signed a receipt for the mortgage money endorsed on the conveyance.

Held, that the plaintiff must be taken to have purchased the mortgagee's interest in the house including the right by way of easement over the passage. VISHNU v. RANGO GANESH, 18 B. 382 ... 763

(6) See NEGLIGENCE, 17 B. 307.

Easements Act (V of 1882).

S. 13—See EASEMENT, 18 B. 616.

Easements Act (VIII of 1891).

See EASEMENT, 18 B. 616.

Ejectment.

(1) See LANDLORD AND TENANT, 17 B. 475, 736.

(2) See LIMITATION ACT (XV OF 1877), 18 B. 51.

(3) See MUNICIPALITY, 18 B. 19.

(4) See PRACTICE, 17 B. 591.

Encroachment.

(1) *Injunction—Highway—Place dedicated by owner of land for convenience of occupiers of adjoining houses—User of such open space—Covenant or grant presumed—Easement—Right of way—Landlord and tenant—Variance between pleading and evidence—Practice—Procedure.*—The plaintiff and defendant occupied houses situated in the same lane and opposite each other. Close to both houses was an open space in which a cross had stood. The plaintiff alleged that the said vacant space was originally intended for and had always been used by the occupants of his house and the residents in the lane in common for the purposes of recreation, save where the cross stood. The cross had been for many years visited by Christian worshippers who prayed and worshipped there. The plaintiff also alleged that, in addition to the general use of the open space, he and his predecessors in title and the occupants of his said house had for more than twenty years used the open space as a footway and a way for carriages and other vehicles to approach the said house and to stand and be able to turn there. He complained that the defendant had wrongfully removed the cross, and enclosed the greater portion of the said open space, and he prayed for a declaration that he and the occupants of his house were entitled to the use of the said space for purposes of recreation and as a footway and carriage way and for an injunction. The defendant pleaded that the whole of the open space formerly belonged to a Portuguese religious confraternity who were the *fazendars* of both of his property and the plaintiff's; that this confraternity had permitted the cross to be erected on the land, at which the residents of the houses of the plaintiff and defendant and other adjacent houses who were then Portuguese used to assemble and worship; that the Portuguese having left the locality the cross was removed, and the part of the open space which had been enclosed by the defendant had been sold to him by the confraternity in 1887. He denied the use of the space alleged by the plaintiff.

Held, that the evidence was not sufficient to establish that the land in dispute had been dedicated to the public, but that, on the evidence, the Court was justified in presuming and ought to presume a covenant on the part of the *fazendari* owners of the oart to keep the lane, including the upper end of it, open for the use of the owners of the houses abutting upon it. Such a covenant should be presumed equally in the case of a landowner giving land for building purposes to *fazendari* tenants on a perpetual tenure at a fixed rent and in the case of a owner selling land out and out for building purposes.

Where the plaintiff suing to prevent an encroachment on certain land alleged that the land was set apart for recreation, but the evidence established that it was set apart generally for the more convenient occupation of the houses surrounding it (which would include recreation puoposes).

Encroachment—(*Concluded*).

PAGE

Held that the plaintiff ought not on that account to fail altogether and be left to a fresh action. The defendant had not been misled or induced to refrain from calling evidence to rebut the plaintiff's case. RANCHORDASS AMTHABAI v. MANEKLAL GORDHANDASS, 17 B. 648 ... 425

(2) *On land—Injunction—Damages—Legal rights of owner of land—Owner not compellable to accept compensation instead of removal of encroachment.*—In a suit to recover land adjacent to a temple belonging to the defendants, on which land the defendants had encroached by building verandahs, the lower Courts found that the land sued for was the property of the plaintiff subject to the defendants' right of access to the temple, and directed the defendants to pay compensation to the plaintiff for the encroachment. The plaintiff appealed to the High Court.

Held, that the land being found to be the plaintiff's, the Courts could not compel him to part with his legal rights, and accept compensation against his will however reasonable it might appear to be. The defendants were accordingly ordered to remove the verandahs complained of. GOVIND VENKAJI v. SADASHIV BHARMA SHET, 17 B. 771 ... 506

(3) See CIV. PRO. CODE (ACT XIV OF 1882), 18 B. 699.

Endorsement.

(1) See HUNDI, 18 B. 570.

(2) See STAMP, 17 B. 687.

Enhancement.

(1) See LANDLORD AND TENANT, 17 B. 475.

(2) See PRACTICE, 17 B. 547.

Estoppel.

(1) Right of tenant on eviction to be recouped the money so expended—Buildings erected on land held under lease—Removal of such buildings—Landlord and tenant—Tenant expending money on land with landlord's knowledge and consent—Standing by—See LANDLORD AND TENANT, 17 B. 736.

(2) Suit on a document executed by defendant in which he was described as a trader—Plea in suit that he was an agriculturist—Dekkhan Agriculturists' Relief Act (XVII of 1879)—See ACT XVII OF 1879 (DEKKHAN AGRICULTURISTS' RELIEF), 17 B. 227.

(3) *Tax—Payment of a tax for one year without protest—Payment of the tax in a subsequent year under protest—Suit to recover money so paid—Cause of action.*—The plaintiff paid a house tax, at the rate of Rs.5, for the year 1890 without any protest. When the tax was sought to be levied from the plaintiff at the same rate for the year 1891, he objected to the levy as illegal and excessive, and paid the tax under protest. He then sued to recover what he alleged was an excess charge of Rs. 5 in respect of the tax for 1891. His claim was rejected on the ground that he was estopped from recovering the alleged excess by reason of his having paid the tax for 1890 without protest.

Held, that the suit was not barred. The levy of a tax in each year gives a new and distinct cause of action, and the payment of the tax without protest for one year does not bar a suit to recover a sum paid in a subsequent year under protest on account of a tax which was not legally chargeable for that year. PITAMBERDAS v. JAMBUSAR TOWN MUNICIPALITY, 17 B. 510 ... 331

(4) See LAND ACQUISITION ACT (X OF 1870), 17 B. 299.

(5) See LANDLORD AND TENANT, 18 B. 66.

Evidence.

(1) Document not sufficiently stamped admitted in evidence by lower Court—Appeal Court cannot exclude it—Stamp Act (I of 1879), s. 4, cl. 3—Practice—Procedure—Stamp—See PRACTICE, 18 B. 737.

(2) Evidence Act (I of 1872), s. 92, Proviso 5—Custom or usage qualifying contract—Shipment, meaning of—Arbitration—Appointment of umpire

Evidence—(*Concluded*). PAGE

by arbitrators—Mode of appointment prescribed by contract—Delegation by arbitrators of their right to appoint umpire—Contract—Construction —See CONTRACT, 17 B. 129.

(3) Hundis inadmissible under Stamp Act, but admitted by defendant—Admission—Stamp Act, I of 1879, s. 34—See STAMP ACT (I OF 1879), 18 B. 369.

(4) Landlord and tenant—Terms of tenancy proved orally although contained in a document—Compensation for buildings erected by tenant—Estoppel—Practice—Procedure—See LANDLORD AND TENANT, 18 B. 66.

(5) Lease—Agreement to indemnify contained in lease—Suit for indemnity—Registration—See REGISTRATION, 18 B. 745.

(6) Professional communication—Attorney and client—Privilege—Extent of the privilege—Solicitor bound to give the name of the client on whose behalf the privilege is claimed, but not nature of his employment—Evidence Act (I of 1872), s. 126—See ATTORNEY AND CLIENT, 18 B. 263.

(7) Registration of bonds given for purchase-money—Limitation—Limitation Act (XV of 1877), sch. II, art. 132—Vendor and purchaser—Unpaid purchase-money—Suit by vendor to recover—See VENDOR AND PURCHASER, 18 B. 48.

(8) Stamp Act (I of 1879), s. 34—Limitation—Acknowledgment—Stamp—Unstamped balance of account—See LIMITATION, 18 B. 614.

(9) See ADVERSE POSSESSION, 18 B. 513.

(10) See ARBITRATION, 18 B. 299.

(11) See CRIM. PRO. CODE (ACT X OF 1882), 18 B. 468.

(12) See EVIDENCE ACT (I OF 1872), 17 B. 485.

(13) See HINDU LAW (WIDOW), 18 B. 534.

(14) See LANDLORD AND TENANT, 17 B. 475.

(15) See LIMITATION ACT (XV OF 1877), 18 B. 51.

(16) See MORTGAGE (REDEMPTION), 17 B. 365.

(17) See PRACTICE, 18 B. 520, 606.

(18) See REGISTRATION, 17 B. 235; 18 B. 92.

Evidence Act (I of 1872).

(1) *Ss.* 25 *and* 26—*Confession—Confession made to a police patel, admissibility of—Evidence—Police officer.*—A police patel is a police officer within the meaning of ss. 25 and 26 of the Indian Evidence Act (I of 1872). A confession made to a police patel is inadmissible in evidence. QUEEN-EMPRESS v. BHIMA, 17 B. 485 ... 315

(2) S. 92, Prov. 5—See CONTRACT, 17 B. 129.

(3) S. 105—See PENAL CODE (ACT XLV OF 1860), 17 B. 260.

(4) S. 112—Evidence of wife to prove non-access—Presumption of non-access—See CRIM. PRO. CODE (ACT X OF 1882), 18 B 468.

(5) S. 126—Evidence—Attorney and client—Professional communication—Privilege—Extent of the privilege—Solicitor bound to give the name of the client on whose behalf the privilege is claimed, but not the nature of his employment—See ATTORNEY AND CLIENT, 18 B. 263.

Excess Charge.

See ACT IX OF 1890 (RAILWAYS), 18 B. 440.

Execution of Decree.

(1) *Agreement not to execute a decree—Suit to restrain execution—Civ. Pro. Code (Act* XIV *of* 1882), *s.* 244—Res judicata—*Agreement not to execute regarded as satisfaction of decree—Civ. Pro. Code (Act* XIV *of* 1882), *ss.* 257*a*, 258 373.—Mukund and Antaji were partners, and as such were indebted to Haridas. Antaji died, and subsequently the debt was settled between Haridas on one side and Mukund and Antaji's widow, as guardian of her minor sons, on the other. For a moiety of the debt a bond was passed by Mukund to Haridas, and for the other moiety by the widow Antaji. Haridas filed a suit against Mukund and got a decree, which was satisfied.

Execution of Decree—(*Continued*).

PAGE

Haridas then sued the widow on her bond. The Court allowed her objection that she was not competent to give a bond binding her sons personally, and of its own accord made Mukund a defendant, and passed a decree against Mukund and Antaji's estate. Haridas assigned this decree to Ramchandra, who applied for execution against Mukund, Mukund thereupon filed this suit against Haridas and Ramchandra praying for an injunction against the execution of the said decree and for damages against Haridas. He alleged that during the pendency of the suit in which the said decree had been passed, Haridas had agreed that he would not obtain a decree against him, and that, if such a decree were passed, he would not execute it. The lower appeal Court rejected the plaint, holding (1) that as between the plaintiff Mukund and the defendant Ramchandra the question in issue was *res judicata*, (2) that there was no cause of action against the defendant Haridas. On appeal to the High Court,

Held, that, as between Mukund and Ramchandra, the suit was not *res judicata*. The alleged agreement by its very terms provided for the event of the decree being passed, and was only intended to prevent its being executed.

It having been urged that the question was one which could be decided in execution, and that under s. 244 of the Civ. Pro. Code (Act XIV of 1882), the present suit would not lie,

Held, that the words "relation to execution" in s. 244 must be restricted to "the contents of the order made, or to how far it has been carried out," and do not, therefore, include an agreement not to execute the decree.

It being further contended that the agreement raised a question as to the "satisfaction" of the decree, and was, therefore, void without the sanction of the Court,

Held, that the satisfaction contemplated by s. 244 must have arisen out of some transaction between the parties subsequent to the decree. MUKUND HARSHET v. HARIDAS KHEMJI, 17 B. 23 ... 15

(2) *Alteration of decree—Decree in terms of an award ordering (inter alia) delivery of moveable property—Loss of part of such moveable property and consequent failure to deliver—Application to insert in decree an order to pay value of such moveable property in event of failure to deliver—Civ. Pro. Code* (XIV *of* 1882), *ss.* 206-8—*Practice.*—A partition suit brought by a son against his father was referred to arbitration. On the 9th January, 1890, the award was published, and on the 27th March, 1890, the defendant moved for and obtained a decree in terms of the award. By this decree it was ordered that in satisfaction of the plaintiff's claim the defendant should pay to him Rs. 1,05,000 in the manner therein stated, *viz.*, Rs. 40,000 to be paid forthwith and the balance of Rs. 65,000 to be paid "upon the plaintiff's delivering to the defendant certain specified property, which included two vessels or buglows, called respectively the 'Nasri' and 'Sambuk'." In no event was defendant to be required to pay the Rs. 65,000 before the 15th November, 1890. At the date of the decree the vessel 'Sambuk' was at sea on a voyage, and on the 18th June, 1890, while still on the voyage, she was lost. On the 15th November, 1890, the plaintiff's attorneys demanded payment of the balance of Rs. 65,000. They offered to deliver the other properties specified in the decree, but stated that the vessel 'Sambuk' had been lost. They offered to pay its value, which they estimated at Rs. 1,000. The defendant, however, demanded the delivery of the buglow, which they stated to be worth a very large sum. The defendant having, under the circumstances, refused to pay the Rs. 65,000, the plaintiff applied for execution of the decree, which was refused. He then obtained a rule calling on the defendant to show cause why the decree of the 27th March should not be amended or rectified by stating therein the amount of money to be paid to the defendant as an alternative if delivery of the vessel 'Sambuk' could not be made, such delivery having become impossible.

Held, that the rule must be discharged. The objection was an objection to an award, not to a decree. Possibly it might have been open to the parties to object to the award before it was filed, on the ground that it ought to have stated a sum to be paid to the defendant in case some of the property could not be delivered to him. If such an objection had

Execution of Decree—*(Continued)*. PAGE

been made, the Court might possibly had remitted the award, or refused to file it. No such objection, however, was taken, and the award was filed, and a decree obtained, in accordance with the award. The award could not be modified by the Court, nor could the decree, which must be in accordance with the award. AHMED BIN SHAIK ESSA KHALIFFA v. SHAIK ESSA BIN KHALIFFA, 17 B. 657 ... 431

(3) Appeal—Death of judgment-debter after appellate decree—Representatives of judgment-debtor—Civ. Pro. Code (Act XIV of 1882), ss. 234, 248, 361 to 372, 563--Practice—Procedure—See PRACTICE, 18 B. 224.

(4) Attachment—Application by third party for removal of attachment—Order refusing to remove attachment--Omission by third party to bring subsequent suit to establish right to attached property—Subsequent withdrawal of attachment by attaching party—Effect of such withdrawal—Subsequent claim to property by the party who had failed to remove attachment—Civ. Pro. Code (XIV of 1882), ss. 278 and 283—See CIV. PRO. CODE (ACT XIV OF 1882), 18 B. 241.

(5) *Attachment—Order for removal of attachment—Suit for a declaration that the property was liable to attachment and sale—Suit to set aside an order removing attachment—Defendant's adverse possession—S. 246 of the Civ. Pro. Code (Act VIII of 1859), s. 283 of the Civ Pro. Code (Act XIV of 1882)—Art. 15, sch. II of the Limitation Act (IX of 1871)—Art. 11, sch. II of the Limitation Act (XV of 1877)* —The plaintiff obtained a decree against one Ishvar, and in execution attached the property in dispute. The defendants intervened, and obtained an order for the removal of the attachment on the 11th August, 1888. On the 13th August, 1889, the plaintiff instituted this suit for a declaration that the property belonged to his judgment-debtor (Ishvar) and as such was liable to attachment and sale. The defendants pleaded that they had been in possession of the property for more than twelve years prior to the institution of the suit, and that the suit was, therefore, barred. The Judge rejected the plaintiff's claim.

Held, reversing the decree, that the suit being brought under s. 283 of the Civ. Pro. Code (Act XIV of 1882) it was a suit to set aside the order of 11th August, 1888, directing the removal of the attachment, and should be determined by ascertaining the rights of the parties at the date of that order. As the defendants had not at that date acquired a title to the property by adverse possession for twelve years, the plaintiff was entitled to a decree.

A suit brought under s. 283 of the Civ. Pro. Code (Act XIV of 1882) is a suit to set aside an order within the meaning of art. 11 of sch. II of the Limitation Act (XV of 1877). HARISHANKAR JEBHAI v. NARAN KARSAN, 18 B. 260 ... 681

(6) *Auction purchaser—Symbolical possession—Judgment-debtors remaining in actual possession—Subsequent attempt by purchaser to take possession—Obstruction—Application to remove obstruction—Application converted into a suit under s. 331 of Civ. Pro. Code (XIV of 1882)—Limitation—Adverse possession—Limitation Act (XV of 1877), s. 3, and sch. II, arts. 138, 144, 167—Civ. Pro. Code (XIV of 1882), ss. 328, 329, 331.*—The plaintiff purchased the property in dispute at an auction sale in execution of a decree, and on the 14th August, 1877, he took formal possession, but the judgment-debtors remained in actual possession. On 18th September, 1889, the plaintiff proceeded to take possession, but was obstructed by the defendant, who alleged that he had purchased the property from the judgment-debtors in 1888. The plaintiff then applied for the removal of the defendant's obstruction, and his application was registered as a suit under s. 331 of the Civ. Pro. Code (XIV of 1882).

Held, that the plaintiff's claim was barred by limitation. When his application was converted into a suit under s. 331, the rights of the parties had to be determined as if an ordinary suit for possession had been instituted against the defendant, and either art. 138 or art. 144 of the Limitation Act (XV of 1877) applied. In either case the defendant could avail himself of the judgment-debtors' possession, which was adverse to the plaintiff. NAMDEV v. RAMCHANDRA GOMAJI MARWADI, 18 B. 37 ... 533

Execution of Decree—(*Continued*). PAGE

(7) *Civ. Pro. Code* (XIV *of* 1882), *ss.* 285, 295—*Concurrent decrees—Distribution of assets among several decree-holders—Sale in execution by inferior Court of property while under an attachment issued by superior Court—Practice—Procedure.*—On the 9th October, 1891, A. obtained a decree against B. in the Court of the first Class Subordinate Judge of Surat. On the 13th October, 1891, C. also obtained a decree against B. in the Court of the Second Class Subordinate Judge at Surat and immediately, *viz.*, on the 16th October, 1891, applied for execution. B's property was consequently attached on the 18th October, 1891. On the 7th July, 1892, an order for sale was made, and the proclamation of sale was issued on the 9th July, 1892. The 17th August was fixed as the date of the auction sale.

On the 23rd July, 1892, A. applied to the First Class Subordinate Judge for execution of his decree of the 9th October, 1891, and B's property (with respect to which the proclamation of sale had been already issued by the Second Class Subordinate Judge) was attached on the 14th August, 1892. Three days later, however, *viz.*, on the 17th August, 1892, the property was sold under the decree of the Second Class Subordinate Judge.

A. then applied to the Second Class Subordinate Judge to set aside the sale on the ground that it was invalid under s. 285 of the Civ. Pro. Code (Act XIV of 1882), having been made while the attachment levied by the first Class Subordinate Judge was pending, and on the Second Class Subordinate Judge's refusal to do so, A. applied to the High Court under its extraordinary jurisdiction.

Held, that the sale was good. PATEL NARANJI MORARJI v. HARIDAS NAVALRAM, 18 B. 458 ... 815

(8) Civ. Pro. Code (XIV of 1882), s. 647 as amended by Act VI of 1892, s. 4—Application for execution dismissed for default—Power of the Court to restore such application to the file—Construction of Statutes—See CIV. PRO. CODE (ACT XIV OF 1882), 18 B. 429.

(9) Decree against father—Execution—Liability of family property—Purchaser—Civ. Pro. Code (XIV of 1882), ss. 318, 332, 333—Hindu law—Joint Family—Ancestral property—Father's debt—See HINDU LAW (JOINT FAMILY), 17 B. 718.

(10) *Decree—Mesne profits, ascertainment of—Duty of the Court—Deduction claimed*—Res judicata.—Where a decree awarded mesne profits of the lands claimed in the suit, and the Court declined, in execution of the decree, to investigate questions relating to the deductions claimed by the defendant, on the ground that to do so would be "to go behind the decree," and that it was not competent to the Court to do that in executing the decree.

Held, that the mesne profits could only be ascertained after making deductions from the gross earnings for all such payments made by the defendant as the plaintiff would have been bound to make if he had been in possession. It was, therefore, the duty of the Court executing the decree to enquire into the payments which the defendant alleged he had made, and also to determine the question whether, as alleged by the plaintiff, the lands forming the subject-matter of the suit were rent-free.

The Court having awarded a particular sum as annual mesne profits without setting forth in the judgment the details thereof, and it having, therefore, become impossible to say that the right to a particular deduction therefrom claimed by the defendant was adjudicated on by the Court.

Held, that the rule of *res judicata* did not apply to the question as to the payment by the defendant. KACHAR ALA CHELA v. SHA OGHADBHAI THAKERSHI 17 B. 35 ... 23

(11) Execution pending appeal—Landlord and tenant—Enhancement of rent—Decree for enhanced rent and in default possession to be given—Appeal by defendants—Execution of decree by plaintiffs—Possession taken pending appeal—Decree confirmed on appeal—Time for complying with decree not enlarged by filing appeal—Application by defendants to be restored to possession on payment of amount ordered by appellate decree—Practice—Procedure—See PRACTICE, 17 B. 547.

(12) Execution sale—Auction-purchaser—Return of purchase-money when judgment-debtor found to have no saleable interest in property sold—Fact how

Execution of Decree—(*Continued*). PAGE

found—Judgment-creditor to have notice—Party—Procedure—Civ. Pro. Code (XIV of 1882), ss. 313, 315 and 622—See CIV. PRO. CODE (ACT XIV OF 1882), 18 B. 594.

(13) Execution sale—Decree—Purchasers at successive execution sales—Title obtained by first purchaser—Certificate of sale obtained by second purchaser before certificate obtained by first purchaser—Priority—Civ. Pro. Code (Act XIV of 1882), s. 316—What is the title which vests under the section—Limitation in application of provisions of section—Confirmation of sale—Certificate of sale—See CIV. PRO. CODE (ACT XIV OF 1882), 17 B. 375.

(14) Hindu law—Joint ownership—Decree against joint owner—Execution sale—Right of purchaser—Co-sharers made parties after period of limitation—Limitation—See HINDU LAW (JOINT FAMILY), 18 B. 505.

(15) *Limitation—Appeal—Appeal against part of decree—Decree affirmed in appeal—Decree to be executed in the appellate decree and limitation runs from date of that decree.*—In a suit for the value of goods and damages, the Court allowed the claim with respect only to a portion of the plaintiffs' claim, and rejected the rest. The plaintiffs appealed against the latter part of the decree. The decree was confirmed in appeal. The plaintiffs applied for execution of the decree after the expiration of three years from the date of the original decree, but within three years from the date of the appellate decree. The lower Court rejected the application as time-barred, being of opinion that the original decree still existed, there having been no appeal against that part of the decree which allowed the claim.

Held, discharging the order of rejection, that when the appellate Court confirms the decree of the Court below, the latter becomes incorporated in the decree of the Appellate Court, which is thenceforth the only decree to be executed. SAKHALCHAND RIKHAWDAS v. VELCHAND GUJAR, 18 B. 203 ... 643

(16) Possessory suit—Mamlatdars' Act (Bombay Act III of 1876), s. 15, cl. (*a*), sub-cl. (1), sub-cl. (2), s. 18—Execution of decree—Actual possession—Execution of decree against a third party—Want of jurisdiction—Exercise of the extraordinary jurisdiction discretionary—See ACT III OF 1876 (BOMBAY MAMLATDARS' COURTS), 18 B. 449.

(17) Questions arising in execution between the parties—Decree incapable of execution by reason of events subsequent to decree—Decree giving an option to the parties—Practice—Procedure—Civ. Pro. Code (XIV of 1882), s. 244—See CIV. PRO. CODE (ACT XIV OF 1882), 18 B. 495.

(18) *Rateable distribution of assets realized in execution—Civ. Pro. Code* (XIV *of* 1882), *s.* 295.—R. obtained a decree against A and another in the High Court under its original civil jurisdiction. In execution of that decree A's property was attached by the Second Class Subordinate Judge of Bijapur, and an order for sale was made. D. obtained a decree against A. alone in the Court of the First Class Subordinate Judge of Sholapur and obtained from that Court an order for the attachment and sale of A.'s property which was already attached by the Second Class Subordinate Judge of Bijapur. He then applied to the Second Class Subordinate Judge of Bijapur for rateable distribution of the assets realized under s. 295 of the Civ. Pro. Code (Act XIV of 1882). The Second Class Subordinate Judge of Bijapur rejected the application, and, D. thereupon applied to the High Court.

Held, following 4 B. 472 and 5 B. 198, that D. was not entitled to share in the assets. DATTATRAYA v. RAHIMTULLA NURMAHOMED KHOJA, 18 B. 456 ... 813

(19) Sale of property subject to mortgage—Valuation of property sold—Computation of purchase-money—Certificate of sale—Proclamation of sale—Mortgages noted in proclamation of sale—Civ. Pro. Code (XIV of 1882), ss. 282, 287—Stamp—Stamp Act (I of 1876), sch. I, arts. 16, 21—See STAMP, 18 B. 175.

(20) See ACT III OF 1874 (BOMBAY, HEREDITARY OFFICES), 17 B. 363.

(21) See ACT XVII OF 1879 (DEKKHAN AGRICULTURISTS' RELIEF), 18 B. 739.

(22) See CIV. PRO. CODE (ACT XIV OF 1882), 17 B. 94, 162, 514, 735; 18. B. 61, 98, 522.

(23) See HINDU LAW (JOINT FAMILY), 18 B. 147.

Execution of Decree—(*Concluded*). PAGE

(24) See HINDU LAW (WIDOW), 17 B. 398.
(25) See HUSBAND AND WIFE, 18 B. 327.
(26) See INSTALMENTS, 17 B. 555.
(27) See LIMITATION, 18 B. 734.
(28) See MORTGAGE (GENERAL), 18 B. 86.
(29) See PARTIES, 17 B. 49.
(30) See PRACTICE, 17 B. 772.
(31) See REGISTRATION, 18 B. 13.
(32) See SUCCESSION CERTIFICATE ACT (VII OF 1889), 18 B. 315.

Executor.

(1) Executor de son tort—Suit by one executor *de son tort* against another—Letters of administration—Administration suit—See SUCCESSION ACT (X OF 1865), 18 B. 337.

(2) Of shareholder—Rights of executor or administrator of a shareholder—"Holding a share," meaning of—Agreement—Construction—Company—Shareholder—Declaratory decree—Specific Relief Act (I of 1877), s. 42—Objection taken for first time in appeal—Practice—Procedure—See COMPANY, 17 B. 197.

(3) Probate—Application by executor for probate in *forma pauperis*—Civ. Pro. Code (XIV of 1882), Ch. 26, s. 647—Practice—Procedure—Will—See WILL, 18 B. 237.

Executor de son tort.

See SUCCESSION ACT (X OF 1865), 18 B. 337.

Ex parte Decree.

(1) Co-defendants—Small Cause suit—Ex-parte decree against one of several defendants—Application by co-defendant to set aside decree—Case re-opened with respect to the applicant only—Civ. Pro. Code (XIV of 1882), ss. 106 and 103—Practice—Procedure—See PRACTICE, 18 B. 142.

(2) See ACT XV OF 1882 (PRESIDENCY SMALL CAUSE COURTS), 17 B. 507.

Extradition.

Lex fori—Crim. Pro. Code (Act X of 1882), ss. 227 and 237—Charge—Alteration of charge—Conviction for an offence different from that with which accused is charged—See CRIM. PRO. CODE (ACT X OF 1882), 17 B. 369.

Extraordinary Jurisdiction.

See CIV. PRO. CODE (ACT XIV OF 1882), 18 B. 61.

Factor.

Right of factor to sell goods consigned to him for sale below the limit of price prescribed by consignor—Consignment for sale—Advance by factor on consignment—Principal and factor—Principal and Agent—See PRINCIPAL AND AGENT, 17 B. 520.

False Evidence.

See PENAL CODE (ACT XLV OF 1860), 18 B. 377.

Family Idol.

See HINDU LAW (PARTITION), 17 B. 271.

Family Necessity.

See HINDU LAW (WIDOW), 18 B. 631.

Family Purpose.

Joint family—Manager—Loan to manager—Presumption—Evidence—Burden of proof—Hindu Law—See PRACTICE, 18 B. 520.

Fieri Facias.

See ACT VI OF 1888 (BOMBAY GUJARAT TALUQDARS), 17 B. 289

Finding of Facts.

See ACT XVII OF 1879 (DEKKHAN AGRICULTURISTS' RELIEF), 18 B. 347.

PAGE

Firm.

(1) See MORTGAGE (REDEMPTION), 18 B. 591.

(2) See PARTIES, 17 B. 413.

(3) See REGISTRATION, 17 B. 235.

Foreign Court.

See ACT OF STATE, 17 B. 620-N.

Foreigner.

(1) See ACT XV OF 1882 (THE PRESIDENCY SMALL CAUSE COURTS), 17 B. 662.

(2) See HABEAS CORPUS, 18 B. 636.

Foreign Power.

See ACT OF STATE, 17 B. 600, 620-N.

Forgery.

See CRIM. PRO. CODE (ACT X OF 1882), 18 B. 581.

Fraud.

(1) *Plaint—Form of plaint—Charges of fraud—Amendment of plaint—Practice—Procedure.*—Where a plaintiff seeks relief on the ground of fraud, and the plaint contains general allegations, but no specific instances, of the alleged fraud, it ought to be immediately, on presentation, rejected or returned for amendment, as it does not disclose a cause of action.

The plaintiff sued to recover damages caused by the defendant's fraud during his management of the plaintiff's estate from 1870 to 1884. The plaint disclosed no specific instances of the fraud imputed to the defendant. The Court of first instance, without going into evidence, rejected the plaintiff's claim on the preliminary ground that the plaintiff had no right to sue during the lifetime of his adoptive mother. In second appeal, the respondent objected that the plaint was defective. The plaintiff's pleader asked for leave to amend it by specifying certain instances of the alleged fraud.

Held, that the amendment could not then be allowed, and the suit must fail. When fraud is charged, the evidence must be confined to the allegations. KRISHNAJI v. WAMNAJI, 18 B. 144 ... 604

(2) *Sham transaction—Fraudulent conveyance—Suit for possession by purchaser of land—Defence that the sale to plaintiff was a sham transaction to defraud creditors.*—The plaintiff sued for possession of certain land, which he alleged he had purchased from the defendant under a registered sale-deed, dated 10th November, 1876. The defendant pleaded that the deed was a sham deed and without consideration and had been executed by him merely to save the land from his creditors.

Held, that the plea was good, and that it was open to the defendant to defend his possession by showing that the real transaction between himself and the plaintiff was to defraud, whether a third party or his creditors generally. BABAJI v. KRISHNA, 18 B. 372 ... 756

(3) See CHARITY, 18 B. 551.

(4) See CIV. PRO. CODE (ACT XIV OF 1882), 17 B. 94.

(5) See LIMITATION ACT (XV OF 1877), 17 B. 341.

Fraudulent Conveyance.

See FRAUD, 18 B. 372.

Funeral Ceremonies.

See HINDU LAW (CASTE), 18 B. 115.

Gambling.

Gambling Acts (IV, *Bombay of* 1887 *and* I *of* 1890), s. 3—"*Common gaming house*"—"*Instrument of gaming*"—"*Used*,"—*Meaning of these words in s.* 3 *of the Act.*—The accused rented a place near a public road at Bombay, at Rs. 250 a month. There they erected a shed containing eleven *pedhis* or stalls. In the centre of the shed they put up, in a prominent position, a clock for keeping accurate time. The stalls were let out to certain persons, each at the rate of Rs. 100 a month.

The roofs of several adjoining houses surrounded this place. From one of these roofs rain fell into the place.

Gambling—(*Concluded*).

PAGE

Numbers of people resorted to this place for the purpose of rain-betting.

The rain-betters staked certain sums of money on the chance whether the rain would fall or would not fall within a certain time. After making the bets, the parties betting would go to one of the stall-keepers, and get him to register the particulars of the debt in a book kept for the purpose, and each deposited with the stall-keeper the amount staked.

The bets as to rain falling were determined by persons at the place seeing the rain falling in a stream from such of the roofs of the adjoining houses as had been chosen by the betters on making the bets, and seeing also the time, by the clock, if there was any doubt as to the time.

After the bet was determined, the winner received from the stalkeeper the amount of the stake.

Under these circumstances, the accused were charged before the Chief Presidency Magistrate with committing the offence of keeping a "common gaming house" under s. 4, cls. (*a*), (*b*) and (*c*), of the Bombay Gambling Act IV of 1887, as amended by Act I of 1890.

On a reference by the Magistrate under s. 432 of the Code of Criminal Procedure (Act X of 1882):

Held, that to bring the place in question within the definition of a "common gaming house" in s. 3 of the Bombay Gambling Act (IV of 1887) as amended by Bombay Act I of 1890, the instrument of gaming or wagering must be in the place itself, either kept there, or brought there and used there, for profit and gain. It is not sufficient that wagers are made in the place upon or by means of some article or other which is outside the place. The roofs of the houses surrounding the place in question could not, therefore, be regarded "as instruments of gaming" either kept or used therein, within the meaning of s. 3 of the Act.

Held, also, that the word "used" in s. 3 of the Act, as amended by Act I of 1890, must be taken in its ordinary sense, as meaning *actually* used. Any article which is *in fact* used as a means of wagering, comes within the definition of "an instrument of gaming," even though it may not have been specially devised or intended for that purpose.

Held, per TELANG, J., that neither the stalls, nor the books in which the bets were registered, nor the money staked and deposited with the stall keeper, were instruments of gaming or wagering. QUEEN-EMPRESS v. KANJI BHIMJI, 17 B. 184 ... 120

Gaming.

Bombay Gambling Acts IV of 1887 and I of 1890—"Instruments of Gaming"—"Common Gaming House"—"Used," meaning of these words in s. 3 of the Act—See GAMBLING, 17 B. 184.

Gift.

See WILL, 18 B. 1, 7.

Goods.

(1) See JURISDICTION, 18 B. 43.

(2) See SALE OF GOODS, 17 B. 62.

Gordon Settlement.

See WATAN, 18 B. 22.

Gotraj Sapindas.

See HINDU LAW (INHERITANCE), 17 B. 303.

Government

See CIV. PRO. CODE (ACT XIV OF 1882), 18 B. 464.

Grantor.

See EASEMENT, 18 B. 616.

Guardian.

(1) Appointment of guardian by will—Application for certificate of guardianship—Practice—Procedure—Guardian and Wards Act (VIII of 1890), ss. 7 (cl. 3) and 48—Minor—See ACT VIII OF 1890 (GUARDIAN AND WARDS), 17 B. 560.

Guardian—(*Concluded*). PAGE

(2) Guardian and Wards Act (VIII of 1890), s. 39—Guardian and ward—Minor—Removal of guardian—"Instrument," construction—See ACT VIII OF 1890 (GUARDIAN AND WARDS), 18 B. 375.

(3) See ACT VIII OF 1890 (GUARDIAN AND WARDS), 17 B. 566.

(4) See HUSBAND AND WIFE, 18 B. 366.

Habeas Corpus.

Foreigners—Act III of 1864, *validity and application of—Powers of legislation of the Governor General in Council—Indian Councils Act* (*Stat* 24 *and* 25 *Vict.*, *c.* 67), *s.* 22—*Crim. Pro. Code* (*X of* 1882), *s.* 491—*Warrant to arrest and imprison—Form of warrant—Service of warrant—Procedure.*—On the 3rd July 1894, certain foreigners resident in Bombay having been arrested by the police and sent to jail under warrants issued under ss. 3 and 4 of Act III of 1864, they applied to the High Court and obtained a rule *nisi* under s. 491 of the Crim. Pro. Code (X of 1882) and under Stat. 31, Car. II, c. 2 (Habeas Corpus Act) calling on the Superintendent of the Jail to show cause why they should not be set at liberty. In the affidavits filed in showing cause against the rule the only reason suggested for their arrest was that they were connected with loose women residing in a certain district of Bombay. It was contended for the prisoners that their arrest and imprisonment were illegal (1) inasmuch as Act III of 1864 was *ultra vires* of the Indian Legislature; (2) that the Act being intended only to secure the "peace and security" of British India was in this case improperly applied.

Held, (1) that Act III of 1864 was not *ultra vires* of the Governor-General of India in Council;

(2) that it was rightly applied in the case of the foreigners in question, although their residing in Bombay may not have been likely to have affected or endangered the peace and security of British India.

Per STARLING, J.—S. 3 of Act III of 1864 gives the fullest power to the Government to order any foreigner to remove himself from British India. The Government is the sole judge of what is necessary for the peace and security of British India, and, if it acted in accordance with the letter of the Act, the Court could not inquire into the sufficiency of its reasons for so acting.

A separate warrant was issued in the case of each of the foreigners in question; and all were in the same form. The warrant directed the person whose name appeared in it forthwith to "remove himself from British India by sea," and it further contained the following words:—"All officers to whom this order may be communicated are required to see that it is duly obeyed, and, in the event of its being infringed, to apprehend and detain the said ( ) in safe custody in the jail of Bombay under s. 4 of the said Act, until he shall be lawfully discharged therefrom." Each warrant was signed by the Secretary to Government and was directed to the Commissioner of Police and to the Superintendent of the Jail.

Held, that the warrants were not valid warrants for the following reasons:—

(1) They were irregular in that they contained an order to the person named in them to do a certain thing with a further conditional order for his imprisonment in the event of his not doing it. There ought to have been a separate order to each prisoner to remove himself from British India, which order should have been duly served upon him. Then, in case of his refusal or neglect to comply with its terms, there ought to have been a further order by the Governor in Council authorising his arrest and detention in jail.

(2) The persons named in them were not indicated with sufficient certainty and particularity. The warrants contained no description of the persons against whom they purported to be directed, and did not give their place of residence.

(3 By reason of the direction contained in them that the persons named in them were to remove themselves from British India by sea to the places mentioned in the warrant. The particular route to be specified under s. 3 of Act III of 1864 is intended to be a route in British India, and not

Habeas Corpus--(*Concluded*).

PAGE

a route beyond the high seas. The Government has no jurisdiction to direct a person's movements at sea beyond the limits of three miles from the shore.

(4) (Per STARLING, J.)--The warrants were also defective inasmuch as they bore no seal. ALTER CAUFMAN v. THE GOVERNMENT OF BOMBAY, 18 B. 636 ... 933.

Heirship.

(1) See APPEAL (GENERAL), 17 B. 748.

(2) See JURISDICTION, 17 B. 230.

(3) See SUCCESSION CERTIFICATE ACT (VII OF 1889), 18 B. 608.

Hereditary Allowance.

See REGISTRATION, 18 B. 92.

Hereditary Office.

See KAZI, 18 B. 103.

Hereditary Officer.

See INAM, 18 B. 319.

High Court Rules.

No. 10, cl. (*r*)—See COMPANY, 18 B. 65.

High Priest.

See ACT OF STATE, 17 B. 620 (N).

Highway.

See ENCROACHMENT, 17 B. 648.

Hindu Law.

1.—GENERAL.
2.—ADOPTION.
3.—ALIENATION.
4.—CASTE.
5.—CUSTOM
6.—DEBTS
7.—GIFT.
8.—GUARDIANSHIP.
9.—INHERITANCE.
10.—JOINT FAMILY.
11.—MAINTENANCE.
12.—MINOR.
13.—PARTITION.
14.—RELIGIOUS ENDOWMENTS.
15.—REVERSIONER.
16.—STRIDHAN.
17.—SUCCESSION.
18.—WIDOW.
19.—WILL.
20.—WOMEN'S ESTATE.

——1.—General.

(1) Damdupat—*Rule of* damdupat *when applicable—Interest—Amount of interest recoverable by a Hindu—Mortgage—Hindu creditor claiming interest from a debtor not a Hindu—Redemption suit—Supreme Court Charter, cl.* 29.—In a redemption suit brought by a Mahomedan against a Hindu, it was found on taking the accounts that a sum of Rs. 17,519 were due by the plaintiff (mortgagor) to the defendant (mortgagee). Of this sum Rs. 6,500 were the principal and the remainder (Rs. 11,019) was for interest. The plaintiff contended that the defendant being a Hindu was bound by the rule of *damdupat*, and could not claim as interest more than the amount of the principal.

Held, that the rule of *damdupat* did not apply; and that the plaintiff was liable to the defendant for the whole amount. The rule of *damdupat* only applies when the debtor is a Hindu. DAWOOD DURVESH v. VULLUBHDAS PURSHOTAM, 18 B. 227 ... 659

(2) See REGISTRATION, 18 B. 332.

Hindu Law—2.—Adoption. PAGE

(1) *Adoption by a mother who has succeeded as heir to her son after the death of his widow.*—An adoption to herself and her deceased husband by a mother who has succeeded as heir to her son after his death and that of his widow is invalid according to Hindu law. KRISHNARAV TRIMBAK HASABNIS v. SHANKARRAV VINAYAK HASABNIS, 17 B. 164 ... 107

(2) Inheritance—Share of adopted son where a son is subsequently born—Western India—Mitaksbara—Vyavahar Mayukha—See HINDU LAW (INHERITANCE), 17 B. 100.

———3.—Alienation.

(1) Gift—Gift by manager of part of family property—Illegitimate daughters—Maintenance—Alienation of family property—Dasiputra—Hindu law—Joint family—Manager—See HINDU LAW (JOINT FAMILY), 18 B. 177.

(2) See HINDU LAW (INHERITANCE), 17 B. 690.

(3) See HINDU LAW (WIDOW), 18 B. 534, 631.

———4.—Caste.

Caste-matter—Custom of caste—Funeral ceremonies—Right to assistance of fellow-members of caste—Refusal to assist—Cause of action—Suit not maintainable.—The plaintiff, a Hindu and *kharva* by caste, alleged in his plaint that, pursuant to a usage of his caste, he, on the occasion of his child's death, called upon the defendants, who were his caste-fellows, to assist him in removing the dead body and performing caste ceremonies incidental thereto; that the defendants refused to do so, and induced other members of the caste to refuse also; that, in consequence thereof, the plaintiff was injured in his caste *status*, and he prayed for a declaration that the defendants' acts were unlawful, and that he was lawfully entitled to exercise and enjoy all his customary caste-rights and privileges; and also for damages and for an injunction restraining the defendants from preventing other members of the caste from recognising him and treating him as a member of the caste.

Held, that the plaint disclosed no cause of action, and must be rejected. KANJI BAVLA v. ARJUN SHAMJI, 18 B. 115 ... 585

———5.—Custom.

(1) See HINDU LAW (CASTE), 18 B. 115.

(2) See HUSBAND AND WIFE, 17 B. 400.

———6.—Debts.

(1) Joint family—Ancestral property—Father's debt—Decree against father—Execution—Liability of family property—Purchaser—Civ. Pro. Code (XIV of 1882), ss. 318, 332, 333—See HINDU LAW (JOINT FAMILY), 17 B. 718.

(2) Joint family—Family debt—Liability of family property—Manager—Decree against manager—Execution sale—Questions for Court to decide in determining the quantum of interest which passes to the auction-purchaser—See HINDU LAW (JOINT FAMILY), 18 B. 147.

(3) See HINDU LAW (JOINT FAMILY), 17 B, 512.

(4) See HINDU LAW (WIDOW), 18 B. 631.

(5) See PRACTICE, 18 B. 520.

———7.—Gift.

(1) Gift to a woman gives a life-interest—See CIV. PRO. CODE (ACT XIV OF 1882), 17 B. 503.

(2) *Necessity of possession—Attestation of deed, effect of.*—In 1873, Ramji, a Hindu, executed a deed of gift of his immoveable property to his daughter Mukta (defendant No. 1). The deed was attested by the plaintiff. In 1878, Ramji mortgaged to the plaintiff some of the land comprised in the deed of gift. Ramji died in that year, and in 1882 his grandson conveyed the equity of redemption to the plaintiff, who was already in possession of the mortgaged land as mortgagee. In the year 1888 the plaintiff being dispossessed by Mukta (defendant No. 1) and the second defendant to whom she had sold the land, he brought the present suit to recover possession. The defendants relied upon the gift.

Hindu Law—7.—Gift—(*Concluded*).

Held, that the plaintiff was entitled tc possession. At the time of the mortgage to him in 1878 Ramji had not completed his gift to Mukta by giving possession. He was therefore in a position to give the plaintiff a good title. It had not been shown that Mukta had ever been treated as the owner of the equity of redemption.

Held, also, that the circumstance that the plaintiff attested the deed of gift in 1873 could not affect his title, as the gift had not been completed by delivery of possession. ABAJI GANGADHAR v. MUKTA, 18 B. 688 ... 968

(3) *Verbal gift of immoveable property—Death of the donor—Possession given to the donee by the son of the donor.*—One Ganesh Vithal, being possessed of certain lands which were his self-acquired property, died in 1878. On his death-bed he told his son, Purshotam Ganesh (the plaintiff's father), to give these lands to his (Ganesh Vithal's) daughter, the defendant. In the following year (1879) Purshotam by a registered deed of gift gave the lands to the defendant. The deed contained the following recital :—"Our vadil (father) Ganesh Vithal has made a gift to you of his self-acquired lands Nos. 101 and 102 of mauze Vadgaon for your own and your children's maintenance, and has directed me (Purshotam Ganesh) to execute an instrument according to law. I (Purshotam Ganesh) hereby execute a deed of gift to you." Shortly after the execution of this document, the defendant was put into possession of the lands, and she admittedly continued in possession down to the commencement of this suit in 1888. The plaintiffs, who were the minor children of Purshotam Ganesh, now sought to recover these lands from the defendant, alleging that on the death of their grandfather, Ganesh Vithal, the lands had devolved by inheritance upon his son, Purshotam (their father), and contending that the latter had no power to make a gift of these to the defendant. The lower Court found that the question of Purshotam's competency to give the lands did not arise, as they had already been given to the defendant by his father, Ganesh Vithal, and that Purshotam was simply an instrument in carrying out the wishes of his father, and in executing the deed of gift to the defendant. On appeal, the District Judge considered that the point for determination was whether the gift by Ganesh Vithal to the defendant was valid by Hindu law, not having been accompanied by possession. He held the gift to be valid. On special appeal to the High Court,

Held, dismissing the appeal, that whether the gift by Ganesh Vithal to the defendant was to be regarded as a gift, possession being afterwards given to the defendant, or whether Ganesh Vithal was to be regarded as having constituted himself a trustee and having made Purshotam a trustee to carry out his wishes, the defendant was in lawful possession of the lands, and that the plaintiffs have neither by Hindu law nor otherwise any legal or equitable claim to have the deed of gift to the defendant cancelled. BHASKAR PURSHOTAM v. SARASVATI BAI, 17 B. 486 ... 316

(4) See CHARITY, 17 B. 351.

(5) See REGISTRATION, 18 B. 92.

———8.—Guardianship.

See HINDU LAW (PARTITION), 17 B 271.

———9.—Inheritance.

(1) *Moveable property—Daughter-in-law inheriting moveable property from father-in-law—Estate taken by her in such property—Widow—Widow's estate in moveables—No power to dispose by will of moveables.*—Where a son predeceased his father and the son's widow subsequently succeeds to her father-in-law's property as his heir, she takes the same estate in it as she does in property inherited by her from her husband.

Under the law of Mitakshara a widow has no power to bequeath moveable property inherited by her from her husband.

In the Presidency of Bombay, moveable property inherited by a widow from her husband devolves on her death to her husband's heirs.

If the decision of 7 B. 155 is to be regarded as necessarily giving to the heir of a widow on her death such moveable property inherited from her husband as remains undisposed of by her, it must be treated as of no authority, GADADHARBHAT v. CHANDARBHAGABAI, 17 B. 690 (F.B.) ... 453

Hindu Law—9.—Inheritance—(*Continued*). PAGE

(2) *Share of adopted son where a son is subsequently born—Western India—Mitakshara—Vyavahar Mayukha—Point taken by appellant on second appeal not raised by him in his first appeal—Practice.*—In Western India, both in the districts governed by the Mitakshara, and those specially under the authority of the Vyavahar Mayukha, the right of the adopted son, where there is a "legitimate son" born after the adoption, extends only to a fifth share of the father's estate.

In a suit by an adopted son to recover his share in his adoptive father's estate, a son having been born to the adoptive father subsequently to the plaintiff's adoption, the Court of first instance awarded the plaintiff a fourth share of the property in dispute. The defendant appealed to the District Court, but in appeal raised no question as to the extent of the share awarded to the plaintiff. On second appeal to the High Court it was contended that, in any event, the plaintiff was only entitled to a fifth share.

Held that, under the circumstances and having regard to the nature of the question, the point might be taken in second appeal on behalf of the defendant, and the High Court varied the decree by awarding the plaintiff a fifth share instead of a fourth share, but ordered the appellant (defendant) to bear his own costs of the appeal. GIRIAPA v. NINGAPA, 17 B. 100 ... 66

(3) Stridhan—*Devolution of* stridhan *belonging to a childless widow—Grandson—Co-widow—Husband's nephew*—Sapindas.—A childless Hindu widow died possessed of *stridhan* consisting of ornaments given to her on her marriage and of a house purchased by her out of her own separate income. She left her surviving (1) a co-widow; (2) the plaintiff, who was grandson of another co-widow; and (3) a nephew (*i.e.*, brother's son) of her husband. She had been married in one of the approved forms.

Held, that the plaintiff was a nearer *sapinda* of the deceased than neither her co-widow or her husband's nephew, and, as such, excluded both from inheriting the deceased's *stridhan*. GOJABAI v. SHRIMANT SHAHAJIRAO MALOJI RAJE BHOSLE, 17 B. 114 ... 75

(4) Stridhan, *devolution of—Woman's estate apart from* stridhan—*Devolution of, according to Mayukha—Property inherited by a woman from a male owner—Property not of the class called "* stridhan *proper"—Reversion on her death to heir of last male owner—Theory of such revertor not to be extended to* stridhan—*Meaning of expression "sons and other heirs" used in Mayukha, ch. IV, s. 10. pl. 26—"Sons and the rest," meaning of—Decree for maintenance obtained by wife against her husband—Appeal by husband against decree—Death of wife pending appeal—Daughter to be legal representative of the deceased for the purpose of the appeal—Practice—Procedure.*—In cases to which the Vyavahar Mayukha is applicable, a woman's daughter and not her husband is the heir to her property, although not of the kind belonging to the class of '*stridhan*' proper.

The doctrine that property which has been inherited by a woman should revert on her death to the heirs of the last male owner is not to be extended to the devolution of *stridhan*. The heirs to succeed are the heirs to the woman herself, though her heirs in the husband's family.

The phrase "sons and the rest" in ch. IV. s. 10, pl. 26 of the Mayukha means merely "sons, grandsons and great-grandsons," and the phrase "daughters and the rest" in pl. 14, 23 and 24 means "daughters and their issue" as contrasted with "sons, graudsons and great-grandsons."

As regards property which does not class as woman's property in the technical sense, the "sons and the rest" take precedence over the "daughters and the rest." Failing both sons and daughters the heirs to "*stridhan* proper" and "*stridhan* improper" are identical, save that as between male and female offspring the latter have a preferential right as regards "*stridhan* proper," while the former have a similar right as "*stridhan* improper."

The author of the Mayukha, like the author of the Mitakshara, does not regard the enumeration of specific kinds of *stridhan* in the old Smriti texts as exhaustive. He includes under the name all that by law becomes the property of the woman, only (unlike the author of the Mitakshara) he distinguishes the specific kinds enumerated in the texts from those which are not so enumerated for purposes of inheritance. In doing this it seems

Hindu Law—9.—Inheritance—(*Concluded*). PAGE

quite reasonable to lay down that, as regards that class of property which is emphatically woman's property, being expressly so named by the old sages, the female offspring should take precedence over the male; while as regards that which is not such, the general preference given to male offspring over female by Hindu law should have effect. On the other hand, there is no obvious reason why in the case of collateral relations any similar distinction should be maintained between the two classes.

Under the rule of succession above stated, the woman is recognized as a fresh source of devolution. It is to be remembered that the property with which the rule in question deals, is not merely that which the woman obtains by inheritance, but may include that which has never belonged to her husband or any other relation, either on the husband's or the father's side, but is her own original acquisition. Such property is the woman's property; it is not the husband's property. Why, then, should it go on her death to any one except to those who are the woman's heirs, and how can the rule about the last male owner be made applicable to such property at all?

A Hindu wife obtained a decree against her husband for maintenance. He appealed, and while the appeal was pending the wife died, leaving two daughters. The question then arose whether her husband or his daughters should represent the deceased in the appeal.

Held, that the daughters of the deceased were the legal representatives for the purposes of the appeal. MANILAL REWADAT v. BAI REWA, 17 B 758... 498

(5) *Succession—Succession among the remoter* gotraj sapindas—Gotraj sapindas—*Succession* per capita—*Practice—Second appeal—New point raised in second appeal.*—Among the remoter *gotraj sapindas* the inheritance goes *per capita* and not *per stirpes*. The High Court will allow, on second appeal, a new point to be raised for the first time, provided it is purely a question of law, arising on the findings of the Courts below, and not affected by any facts outside those findings. NAGESH v. GURURAO, 17 B. 303 ... 193

(6) See HINDU LAW (GIFT), 17 B. 486.

———10.—Joint Family.

(1) *Ancestral property—Father's debt—Decree against father—Execution—Liability of family property—Purchaser—Civ. Pro. Code (XIV of* 1882), *ss.* 318, 332, 333.—In a suit for specific performance of a certain contract for the sale of land which the defendant had failed to complete, the plaintiff obtained a decree against the defendant for the repayment of the earnest-money and his costs of suit. In execution of this decree the plaintiff attached the whole of the property, which the defendant had agreed to sell. A warrant for sale was duly issued, and claims were advertised for. The sons of the defendant thereupon appeared before the Commissioner and claimed to be entitled to three-fourths of the property, which they alleged was ancestral. Their claim was not investigated, but to save time it was agreed that a note should be made in the proclamation of sale, that the sons claimed to be interested in the said lands and premises, on the ground that they were ancestral, and that the one-fourth share of the defendant only could be sold by the attaching creditor. Under this proclamation the right, title and interest of the defendant in the property were sold. At the sale the sons gave notice of their claim. The property was duly sold and the purchaser was put into possession, the claimants being dispossessed. The claimants then took out a summons under s 332 of the Civ. Pro. Code (XIV of 1882) calling upon the purchaser to show cause why they should not be restored to possession.

Held—(1) that the judgment-debt due by the defendant was one which the plaintiff could enforce, if necessary, against ancestral property in the hands of the defendant to the extent of the whole interest therein of the defendant and his sons, as it was not an immoral or illegal debt;

(2) that, assuming that the property in question was ancestral, what the purchaser bought was the whole property, and not merely the right which the defendant might have as the father of the family to a share of it on partition. The plaintiff evidently did not acknowledge any right in the claimants, but intended to sell the very largest right the defendant might have

Hindu Law—10.—Joint Family—(*Continued*). PAGE

in the property, which, as the judgment-debt was one for which the family property was liable, was the whole estate of the joint family ;

(3) that the purchaser who had bought the whole of the rights of the family in the property, was entitled to the possession of what he bought, and was not required to file a suit for partition, because the shares of all the co-parceners had passed to him ;

(4) assuming that the property was ancestral, the claimants were not in possession on their own account, and were, therefore, not entitled to be restored under s. 332 of the Civ Pro. Code (XIV of 1882). A member of a joint Hindu family cannot say that he is in possession of any particular portion of the joint property on his own account. His possession is the possession of the family ;

(5) what all the sons were entitled to, was to try the fact or nature of the debt due to the plaintiff in a suit of their own. In such suit they would have to prove that the debt was not such as to justify the sale. COOVERJI HIRJI v. DEWSEY BHOJA, 17 B. 718 ... 471

(2) *Gift by manager of part of family property—Illegitimate daughters—Maintenance—Gift—Alienation of family property—"Dasiputra" (son of a slave) —Hindu law—Joint family.*—Ramchandra, the manager of an undivided Hindu family, gave certain shares in a spinning and weaving company, which had been purchased out of family funds, to Ganesh for and on behalf of the plaintiffs, who were Ramchandra's illegitimate daughters. After the death of Ramchandra and Ganesh, Ramchandra's illegitimate daughters sued the surviving members of the family for a declaration that the shares belonged to them, and that they had right to have them transferred to their names in the company's books.

Held, without deciding whether illegitimate daughters are entitled to simple maintenance from the family property, in any case, Ramchandra, as manager, could not alienate the shares for that purpose, as there were no emergent circumstances requiring it. PARVATI v. GANPATRAO BALAL, 18 B. 177 ... 626

(3) *Joint ownership—Decree against joint owner—Execution sale—Right of purchaser—Co-sharers made parties after period of limitation—Limitation.*—The interest of Vithu, as co-sharer in certain land, was sold in execution of a decree against him. It was purchased by one Sakharam, who sold it to the plaintiff. The plaintiff sued for possession, and the other co-sharers were made party defendants to the suit, which, however, was held, as against them, to be barred by limitation.

Held, that the plaintiff was entitled to be put into joint possession of the land with them, although the suit as against them was barred. KRISHNAJI BIN MALJI v. VITHU, 18 B. 505 ... 845

(4) Loan to manager—Family purpose—Presumption--Evidence—Burden of proof—See PRACTICE, 18 B. 520.

(5) *Manager—Family debt—Liability of family property—Decree against manager —Execution sale—Questions for Court to decide in determining the* quantum *of interest which passes to the auction-purchaser—Hindu law.*—Where the manager of a joint Hindu family is sued for the recovery of a debt, and his right, title and interest in the family property are sold in execution, the questions which the Court has to decide in determining the *quantum* of interest which has passed to the auction-purchaser are : (1) whether the debt was one for which the entirety might, by proper procedure, have been brought to sale, and (2) whether, as a matter of fact, the purchaser bargained and paid for the entirety.

A. and his three younger brothers B., C. and D. were members of a joint Hindu family. A. was the manager of the family. After A.'s death, B., C. and D. were sued as his legal representatives in respect of a debt which A. had contracted for the benefit of the family. A decree was passed against them as A.'s representatives, directing the recovery of the debt by sale of A.'s estate. In execution of this decree, A.'s right, title and interest in certain family property was put up to sale.

Held, that the sale affected the rights of all the members of the joint family. Under the circumstance what was meant to be brought to sale was the

Hindu Law—10.—Joint Family—(*Concluded*). PAGE

right, title and interest of the family of which Sakbaram had been the manager, and for the benefit of which the debt had been incurred. JANKIBAI v. MAHADEV, 18 B. 147 ... 607

(6) Manager—Lease granted by manager—Right to sue for rent under such lease—Co-sharers—Parties—Practice—Landlord and tenant—See LANDLORD AND TENANT, 18 B. 141.

(7) *Manager—Limitation Act* (XV *of* 1877), *s.* 19—*Acknowledgment—Manager of a joint Hindu family—His authority to acknowledge a family debt.*—The Manager of a joint Hindu family has authority to acknowledge the liability of the family for the debts which he has properly contracted, so as to give a new period of limitation against the family from the time the acknowledgment is made. He is an agent duly authorized in this behalf within the meaning of s. 19 of the Limitation Act XV of 1877. BHASKAR TATYA SHET v. VIJALAL NATHU, 17 B. 512 ... 333

(8) Partition—Minor—Partition effected without taking into account a minor co-parcener — Such partition invalid—Limitation—See HINDU LAW (PARTITION), 18 B. 197.

(9) Partition—Partition of joint property situate in British India without taking into account other joint property situate outside British India—See HINDU LAW (PARTITION), 18 B. 389.

(10) Partition—Property left undivided at the time of partition—Suit to recover share of the produce—Amendment of suit—Changing character of the suit—Hindu Law—See HINDU LAW (PARTITION), 18 B. 611.

(11) Widow—Minor sons—Sale by widow of immoveable property left by husband—Family necessity—Minor sons bound by sale—Deed of sale—Effect of conveyance how ascertained. See HINDU LAW (WIDOW), 18 B. 631.

(12) Widow—Widow's right of residence in her husband's house after his death—House mortgaged by plaintiff's husband in his lifetime and sold in execution—Auction-purchaser—Notice of widow's claim to reside—See HINDU LAW (WIDOW), 17 B. 398.

(13) See HINDU LAW (MAINTENANCE), 17 B. 45.

(14) See HINDU LAW (PARTITION), 17 B. 271.

(15) See HINDU LAW (WIDOW), 18 B. 452.

11.—Maintenance.

(1) Joint family—Manager—Gift by manager of part of family property—Illegitimate daughters—Maintenance—Gift—Alienation of family property—"Dasiputra" (son of a slave)—See HINDU LAW (JOINT FAMILY), 18 B. 177.

(2) *Mother's right to—Right to possession in virtue of claim to maintenance—Mortgagee's right to possession subject to mother's claim to maintenance—Practice—Procedure—Point of law raised for first time in second appeal.*—After the death of S.. who had mortgaged certain land belonging to him, his widow (defendant No. 2) mortgaged it again in consideration of the existing mortgage-debt and a further advance. The mortgage was afterwards assigned to the plaintiff, who sued the widow (defendant No. 2) and the mother (defendant No. 1) of S. for possession. The mother (defendant No. 1) contended that any right the widow (defendant No. 2) had to mortgage the property was subject to her (the first defendant's) right to maintenance out of it, and, as her maintenance, she claimed to remain in possession. The lower Court held that the property should not be given to the plaintiff until a proper arrangement had been made by him for the maintenance of defendant No. 1, but stated that it imposed that condition on the supposition that there was no other family property out of which she could be maintained.

Held, that the decree was wrong in making the right of the first defendant to remain in possession dependent on there being no other property. Further, that as the mortgagees lent their money with full knowledge of the first defendant's possession in virtue of her claim to maintenance, the first defendant ought not to be compelled to accept from the plaintiff maintenance in some other form.

In suit by a mortgagee for possession of mortgaged land, the mother of the deceased owner claimed to ramain in possession of it in virtue of her right to maintenance. At the hearing of the second appeal a claim was made,

Hindu Law—11.—Maintenance—(*Concluded*). PAGE

on her behalf, not merely to maintenance, but to a share in the property as mother of the last owner. The point had not been taken in the lower Courts, nor was it one of the grounds of appeal.

Held, that it could not be taken for the first time in second appeal. It set up a new right differing in kind from that asserted throughout the trial, and not differing merely in degree, as was the case in 17 B. 303 RACHAWA v. SHIVAYOGAPA, 18 B. 679 ... 962

(3) *Widow's maintenance—Withholding of maintenance—Demand and refusal—Arrears of maintenance—Limitation Decree providing for reduction of tenance in event of altered circumstances of persons paying it—Hindu law.* —K., a Hindu widow, sued the undivided brothers of her deceased husband for maintenance. She also claimed arrears of maintenance for six years prior to the institution of the suit. The Court of first instance passed a decree in her favour awarding her maintenance at the rate of Rs. 52 a year during her lifetime, but "subject to variation according to the change in defendants' circumstances for the worse." The Court also awarded her arrears of maintenance for three years only (not six as claimed) on the ground she was only twenty years old, and had always lived with her father and been maintained by him, and that a formal demand had only been made on the defendants three years previously. On appeal the District Court increased the rate of maintenance to Rs. 65 per annum, and awarded the plaintiff arrears for six years, holding that the fact of the demand having been made only three years before suit did not prevent her from recovering arrears for six years.

Held by the High Court that although the withholding of maintenance, which constituted the cause of action, might be proved otherwise than by a demand and refusal, yet in this case it had not been shown that there were any circumstances which would amount to a refusal of maintenance. The decree of the lower appeal Court was, therefore, confirmed, except so far as it gave the plaintiff arrears of maintenance for six years, which period was altered to three years. The clause as to the reduction of maintenance in the event of altered circumstances was also struck out. MOTILAL v. BAI KASHI, 17 B. 45 ... 30

(4) Widow—Suit by heir to recover family property from widow—Provision for widow—See HINDU LAW (WIDOW), 18 B. 452.

(5) See HINDU LAW (INHERITANCE), 17 B. 758.

——12.—Minor.

(1) See HINDU LAW (PARTITION), 17 B. 271.

(2) See HINDU LAW (WIDOW), 18 B. 197, 631.

——13.—Partition.

(1) *Manager—Liability of manager to accounts on occasion of partition—Right of members who were minors at the time of management to an account from manager—Manager also guardian of minors—Nature of account to be rendered by a manager on partition—Family idol and property appertaining thereto goes on partition to senior member of family—Right of mother to a share of estate on partition—Hindu law* —A manager of a Hindu family cannot refuse to render any account whatever of his management on the occasion of a partition, or require the other members of the family to accept his *ipse dixit* as to the property subject to partition. What that account should be so as to discharge him from his liability to account as manager, and what objections the other members of the family can take to it, must depend on the conduct of the manager and the other members of the family, the nature of the property, and the circumstances of the family, and cannot be stated in definite terms. Members who were minors during the management cannot be taken to have consented to the management, and are entitled, when they attain their majority, to hold the manager liable, not only for acts amounting to fraud, but also where the management has been grossly negligent and prejudicial to their interests; the presumption, however, being that, in the absence of evidence, the property for partition is such as it exists at the time of the suit for partition.

Hindu Law—13.—Partition—(*Continued*). PAGE.

A brother sued his three brothers for partition of their father's estate, which consisted of moveables and immoveables and a banking business. As senior member of the family he also claimed the *rajseva* (family idol) and the property appertaining to it. The mother (Kashi) of the first three defendants and Manchha, the widow of a deceased brother of the plaintiff, and Nandkore, his aunt, the widow of his father's brother, were also defendants to the suit. The three brothers (defendants Nos. 1, 2 and 3) alleged that their father, Maneklal, had died in 1864 at which time they were minors; that the plaintiff had managed the estate ever since, and had, in 1865, obtained a certificate of guardianship and administration to their estate under Act XX of 1864; that the plaintiff's management had been fraudulent, improper and wasteful and prejudicial to their interests as minors, and they contended that they were entitled to an account from him of the property at the date of their father's death and of the proceeds, income and profits from that date to the date of suit. They contended that as the plaintiff had been appointed administrator of their estate under Act XX of 1864, he was liable to account to them as a trustee, and was bound to show that all sales, purchases and other transactions entered into by him were necessary and for their benefit. The lower Court held that the family being united, the Minors Act did not apply, and that the fact that the plaintiff had obtained a certificate of guardianship did not enlarge his liability to account, and that, on the authorities, the manager of a Hindu family was not bound to account for past transactions, nor for mesne profits, unless in cases of fraud or gross extravagance, and that the estate of the family property as it existed at the time of partition was to be the basis of the distribution.

On appeal to the High Court,

Held, that the defendants were entitled to an account from the plaintiff, and that it was open to them to raise objections with regard to the plaintiff's management.

Held, also, as to the nature of the account which the plaintiff should render of past transactions, that, having regard to the circumstances of the family and the nature of the family property, the plaintiff, in producing the books of the firm since the father's death, which contained an account of all transactions relating to the firm's property and of the moveable and immoveable property, had done all that he could be expected to do, whether as the family manager or as certificated administrator of the defendants' interests in the family property.

Held, also, that the circumstance that the plaintiff had obtained a certificate of administration of the estate of the minors, and sold their interests in certain houses, without the consent of the Court, could not give them a counter claim against the plaintiff unless they proved that they had been prejudiced by the sale. As to ornaments purchased since the death of the father, it was directed that they should be brought into hotchpot by all the parties in making the partition. As to remission of tenant's rent and compromises of suits, although a considerable loss was shown to have resulted from them, it was held that the defendants had failed to show that they were improper or uncalled for, and there was no evidence to make the plaintiff himself liable for them, or to forbid their being transferred to the general account. The losses in trade also were properly debited to the general business of the firm, and the plaintiff was not personally liable for them.

Held, also, that the plaintiff was entitled to take the *rajseva* (family idol) and keep it with the property appertaining thereto as the family idol and the property thereof, with liberty to such members of the family as are or shall become *marjadas* to have access to it for the purpose of worship.

Held, also, that Kashi, the mother of the first three defendants (step-mother of the plaintiff), was entitled on this partition to a one-fifth share in the estate. DAMODARDAS MANEKLAL v. UTTAMRAM MANEKLAL, 17 B. 271 ... 177

(2) *Minor—Partition effected without taking into account a minor co-parcener—Such partition invalid—Limitation—Hindu Law.*—A partition effected without reserving any share for a minor member of the family, and without the consent of some one authorized to act on his behalf, is invalid as against the minor.

Hindu Law—13.—Partition—(*Concluded*). PAGE

Three brothers, S., L. and K., were members of a joint Hindu family. In 1862, S and L. divided the whole of the family property between them without reserving any share for their brother K., who was then a minor. K. lived with L. as a member of his family. L. died in 1867, leaving a childless widow, with whom K. continued to live till his death in 1876. K. left an infant son (the plaintiff), only a year old. Subsequently S. died in 1887, leaving two widows without issue. In 1889, the plaintiff, being still a minor, sued by his next friend to recover either the whole or one-third of the family property in the possession of the widows of L. and S. The principal defences to this suit were (1) that it was time-barred, and (2) that the plaintiff was not entitled to claim more than one-third of the property in suit.

Held, that the partition made by S. and L. in 1862 was invalid, as it was made without reserving any share for their minor brother K. and without taking him into account. K.'s son was, therefore, entitled to recover the whole of the ancestral property as the sole surviving male member of the family.

Held, also, that the suit was not barred by limitation either under Act IX of 1871 or Act XV of 1877 in the absence of any evidence showing that K. ever demanded partition and was refused, or that he was excluded to his knowledge from all participation in the family property. KRISHNABAI v. KHANGOWDA, 18 B. 197 ... 630

(3) *Partition of joint property situate in British India without taking into account other joint property situate outside British India.*—A Court can grant partition of property belonging to a joint Hindu family situated in British India without taking into account other property belonging to the family situated outside British India. RAMACHARYA v. ANANTACHARYA, 18 B. 389 ... 768

(4) *Property left undivided at the time of partition—Suit to recover share of the produce—Amendment of suit—Changing character of the suit.*—The circumstance that there has been a partition between the members of a joint Hindu family does not, in the absence of any special agreement between them, alter their rights as to the property still undivided. As to this they continue to stand to one another in the relation of members of an undivided Hindu family.

A claim to a share of the produce of the property left undivided at a partition does not lie, because such a claim is based on the right to a particular share in the property itself which has no existence in the case of an undivided family.

A suit for a share of the produce of the property left undivided at a partition cannot be amended by making it a suit for partition without entirely changing its character. GAVRISHANKAR v. ATMARAM RAJARAM, 18 B. 611 ... 916

(5) See ADVERSE POSSESSION, 18 B. 513.

(6) See STAMP, 18 B. 209.

——14.—Religious Endowments.

(1) See ACT OF STATE, 17 B. 600, 620-N.

(2) See COMPROMISE, 18 B. 721.

——15.—Reversioner.

(1) Adverse possession—Limitation Act (XV of 1877), sch. II, art. 141—See ADVERSE POSSESSION, 18 B. 216.

(2) Widow—Right of widow to sell property inherited from her husband—Reversioner—Suit by reversioner to set aside sale by widow—Burden of proof—Evidence—See HINDU LAW (WIDOW), 18 B. 534.

(3) See HINDU LAW (INHERITANCE), 17 B. 759.

——16.—Stridhan.

(1) Devolution of—Woman's estate apart from stridhan, devolution of, according to Mayukha—Property inherited by a woman from a male owner—Property not of the class called "stridhan proper"—Reversion on her death to heir of last male owner—Theory of such reverter not to be extended to stridhan—Meaning of expression "sons and other heirs" used

Hindu Law—16.—Stridhan—(*Concluded*). PAGE

in Mayukha, Ch. IV, s. 10, pl. 26—"Sons and the rest," meaning of—Decree for maintenance obtained by wife against her husband—Appeal by husband against decree—Death of wife pending appeal—Daughter to be legal representative of the deceased for the purpose of the appeal—Practice—Procedure—Hindu law—See HINDU LAW (INHERITANCE), 17 B. 758.

(2) Inheritance—Devolution of stridhan belonging to a childless widow—Grandson—Co-widow—Husband's nephew—Sapindas—See HINDU LAW (INHERITANCE), 17 B. 114.

(3) See HINDU LAW (GIFT), 17 B. 486.

——17.—Succession.

(1) Gift—Gift of immoveable property—Verbal gift of immoveable property—Death of the donor—Possession given to the donee by the son of the donor—See HINDU LAW (GIFT), 17 B. 486.

(2) Inheritance — Succession among the remoter *gotraj sapindas*—*Gotraj sapindas*—Succession *per capita*—Hindu law—Practice—Second appeal—New point raised in second appeal—See HINDU LAW (INHERITANCE), 17 B. 303.

(3) See HINDU LAW (INHERITANCE), 17 B. 690.

(4) See WATAN, 18 B. 22.

——18.—Widow.

(1) Adoption—Adoption by a mother who has succeeded as heir to her son after the death of his widow—See HINDU LAW (ADOPTION), 17 B. 164.

(2) Inheritance—Moveable property—Daughter-in-law inheriting moveable property from father-in-law—Estate taken by her in such property—Widow—Widow's estate in moveable—No power to dispose by will of moveables—See HINDU LAW (INHERITANCE), 17 B. 690.

(3) *Maintenance—Suit by heir to recover family property from widow—Provision for widow—Hindu law—Widow* —The Court will not allow the heir to recover family property from a widow entitled to be maintained out of it without first securing a proper maintenance for her. YELLAWA v. BHIMANGAVADA, 18 B. 452 ... 810

(4) Maintenance—Widow's maintenance—Withholding of maintenance—Demand and refusal—Arrears of maintenance—Limitation—Decree providing for reduction of maintenance in event of altered circumstances of persons paying it—See HINDU LAW (MAINTENANCE), 17 B. 45.

(5) *Minor sons—Sale by widow of immoveable property left by husband—Family necessity—Minor sons bound by sale—Deed of sale—Effect of conveyance how ascertained—Hindu law—Joint Family—Manager.*—Ramji Shiva, a Hindu, died in debt leaving two minor sons. His widow, who after his death was the manager of the family, borrowed money for family purposes, and as security mortgaged some of the immoveable property left by her husband. She subsequently sold it, and the Court held that the evidence showed that it was sold to pay off the family debts.

Held, that the minor sons were bound by the sale.

Held, also, that the effect of a conveyance of property sold by the manager of a family depends on the intention of the parties as gathered from the terms of the instrument and from the surrounding circumstances. SUCCARAM MORARJI SHETAY v. KALIDAS KALIANJI, 18 B. 631 ... 929

(6) *Right of widow to sell property inherited from her husband—Reversioner—Suit by reversioner to set aside sale by widow—Burden of proof—Evidence—Hindu law*—B. having during his lifetime mortgaged certain property the income of which was sufficient only to pay interest on a portion of the mortgage-debt, his widow after his death sold it before the mortgage-debt fell due. The reversioners sued to set aside the sale.

Held, that although there might have been no absolute necessity for the widow to sell the property to provide herself with maintenance, still as there was no other family property, the property in question must necessarily have been sold at the expiration of the time fixed by the mortgage, and the sale by the widow ought to be supported.

Hindu Law - 18.—Widow —(*Concluded*). PAGE

A widow like a manager of the family must be allowed a reasonable latitude in the exercise of her powers, provided "she acts fairly to her expectant heirs." VENKAJI SHRIDHAR v. VISHNU BABAJI BERI, 18 B. 534 ... 865

(7) *Widow's right of residence in her husband's house after his death—House mortgaged by plaintiff's husband in his lifetime and sold in execution—Auction-purchaser—Notice of widow's claim to reside.*—In execution of a decree upon a mortgage effected by the plaintiff's husband in his lifetime, the house in dispute was put up to auction, and purchased by the defendant. The defendant was aware that the plaintiff (the mortgagor's widow) was residing in the house at the time of the Court sale. In a suit brought by the plaintiff to establish her right to reside in the house in question.

Held, that in the absence of any allegation that the mortgage effected by the plaintiff's husband was not for the benefit of the family, or was in any way in fraud of the plaintiff's rights, the defendant as auction-purchaser took the house free from her right of residence as a Hindu widow, notwithstanding the fact that he had notice of her claim. MANILAL v. BAI TARA, 17 B. 398 ... 259

(8) See HINDU LAW (INHERITANCE), 17 B. 114.

(9) See PROBATE, 18 B. 749.

——19.—Will.

(1) *Bequest to* dharmada—Dharmada—Dharma.—A bequest in favour of *dharmada* is void by reason of uncertainty. The law on this point is the same in the Mofussil as in the Presidency town. DEVSHANKAR NARANBHAI v. MOTIRAM JAGESAVAR, 18 B. 136 ... 599

(2) Construction—Charity—Bequest to charity—Sadavarat—Bequest to a definite sadavarat—Bequest to two charitable objects, one of such bequests being invalid—Bequest of interest of a fund to A with invalid gift over of interest after A's death—A takes corpus of fund—See CHARITY, 17 B. 351.

(3) Idol—Property bequeathed to an idol—Owner of skrine—Act of state—Deposition of owner from his position by an act of State of foreign power—Effect of deposition or right to property in Bombay—Trustee—Power of appointment. See ACT OF STATE, 17 B. 600.

(4) *Probate—Application for probate refused by District Court on ground that will not proved—On appeal, finding by High Court that the will was proved—Subsequent application for probate to be made to District Court and not to High Court—Practice—Procedure.*—Where on appeal from the District Court it was found by the High Court that a will was proved.

Held, that a subsequent application for probate should be made to the District Court. BAYABAI v. SARASVATIBAI, 17 B. 686 ... 450

(5) Will by a Hindu widow in respect of property inherited from her deceased husband—Invalid will—Probate—See PROBATE, 18 B. 749.

(6) See HINDU LAW (INHERITANCE), 17 B. 690.

——20.—Woman's estate.

See HINDU LAW (INHERITANCE), 17 B. 758.

Hundi.

(1) Shah jog hundi—Shah jog hundi *endorsed to a particular person—Stolen* hundi—*Payment by drawee without inquiry to wrong person—Liability of drawee to lawful owner of* hundi.—On the 8th December, 1893, the plaintiff at Sholapur having bought a *shah jog hundi* there drawn upon the defendants in Bombay endorsed it to Ramrukh Ramkisson and sent it by post to him for collection. In course of its transmission it was stolen, and the name of Ramrukh Ramkisson was expunged, another name *viz.*, that of Dwarkadas Lalji, was substituted. On the 9th December, 1893, the *hundi* was presented for payment to the defendants in Bombay by a person giving his name as Dwarkadas Lalji, and the defendants paid it without inquiry as to the responsibility or position of the person to whom they paid it. The plaintiff sued the defendants for value of the *hundi*.

Held, (1) that the defendants were guilty of conversion of the *hundi* and were liable to the plaintiff, the lawful owner thereof, in trover;

Hundi—(*Concluded*).

PAGE

(2) that the *hundi* continued to be *shah jog* after being endorsed to a particular person. GANESDAS RAMNARAYAN v. LACHMINARYAN, 18 B. 570 =Chitty's S.C.C.R. 409 ... 889

(2) Stamp Act (I of 1879), s. 34—Evidence—Hundis inadmissible under Stamp Act, but admitted by defendant—Admission—See STAMP ACT (I OF 1879), 18 B. 369.

Husband and Wife.

(1) *Decree based merely on admissions and without recording evidence—Adultery—Collusion—Practice—Procedure—Indian Divorce Act (IV of 1869), ss. 3, cl. 3, 14 and 17—Divorce.*—A decree for dissolution of marriage cannot be made merely on admissions and without recording any evidence. BAI KANKU v. SHIVA TOYA, 17 B. 624 (**F.B.**) ... 409

(2) *Divorce—Parsis—Parsi Marriage Act XV of 1865—Minority—Guardians—Practice—Procedure.*—In a suit by a husband for divorce under s 30 of the Parsi Marriage Act, XV of 1865, the defendant, if under the age of 21 years, although more than 18, must be deemed to be a minor, and a guardian for the suit of the defendant must be appointed. SORABJI CAWASJI POLISHVALA v. BUCHOOBAI, 18 B. 366 ... 751

(3) Evidence of wife to prove non-access—Crim. Pro. Code (Act X of 1882), s. 488—Maintenance—Illegitimate children—Right of a married woman to claim maintenance for her illegitimate children—Evidence—Presumption of legitimacy—Evidence Act (I of 1872), s. 112—See CRIM. PRO. CODE (ACT X OF 1882), 18 B. 468.

(4) *Marriage—Restitution of conjugal rights—Conditional marriage—Kudwa Kunbi caste—Custom—Public policy.*—The plaintiff, a member of the Kudwa Kunbi caste, sued in 1890 for restitution of conjugal rights, alleging that he had been married to the first defendant in 1927. The defendant alleged that at the date of the marriage the parties were only a month old; that the marriage was a *sata* (exchange) marriage, and that by the contract the plaintiff's father was bound, as a condition of his obtaining the second defendant's daughter for his son, to provide a girl to be married to the second defendant's son. They alleged that such conditional marriages were a custom of the caste, and they denied that the condition had been performed by the plaintiff's father. They further alleged that in 1936 the plaintiff's father, finding that he could not perform the condition, had passed a release (the plaintiff himself then being a minor) to defendant No. 2 (the father of defendant No. 1) giving up all claims to defendant No. 1; that a dispute having subsequently arisen after the plaintiff had attained his majority the matter was referred to the members of the caste, who decided that within a certain fixed time the plaintiff should provide a girl for the son of defendant No. 2, and that on the plaintiff failing to do so the marriage was dissolved. The Court found that by the custom of the caste the marriage in 1927 between the plaintiff and defendant No. 1 was only a conditional marriage; that the release of 1936 operated to cancel the marriage, and that in any case the plaintiff's failure to find a girl for the second defendant's son, in accordance with the decision of the caste, dissolved the marriage.

Held, that the plaintiff had not established his right to the restitution of defendant No. 1 as his wife. The alleged custom was not contrary to public policy. According to the custom relied on, there was no complete and binding marriage within the intention of the parents of the parties, although the ordinary religious ceremonies were performed. Such a transaction could not be regarded as immoral from any point of view.

The Hindu law leaves it entirely to the parents to marry their daughters, and although, according to the strict Brahmanical law, a marriage is complete when the religious ceremony has been performed, there would seem to be no sufficient reason for refusing to recognise a custom, at any rate, among the lower caste, by which such transactions, rendered necessary by the paucity of women in the caste, although performed with religious ceremonies, are still regarded by the parents on both sides as incomplete and conditional marriages. BAI UGRI v. PATEL PURSHOTAM, 17 B 400 ... 260

Husband and Wife —(*Concluded*). PAGE

(5) *Parsi Matrimonial Court—Act XV of* 1865—*Suit by wife for judicial separation—Alimony—Alimony after decree dismissing wife's suit and pending appeal—Alimony pending petition for review of judgment—Practice in allotment of alimony.*—A wife sued her husband for judicial separation in the Parsi Matrimonial Court. Alimony was granted to be by an order dated 11th July, 1891, which directed the defendant to pay alimony to her from the 15th April, 1891, "until the final decree herein be passed." On the 18th July, 1891, the suit was dismissed, and after that date the defendant ceased to pay alimony. The plaintiff obtained a rule for review of judgment, which was discharged on the 27th January, 1892, and on the 18th March, 1892, she filed an appeal against the decree dismissing the suit and against the order refusing a review. She now applied for an order directing the defendant to pay her all the arrears of alimony "*pendente lite*" from the date of filing the suit, or so much as had not been paid, and that he should pay her further alimony until the final disposal of the appeal.

Held, dismissing the application, that the words "final decree herein," contained in the order of the 11th July, 1891, by which alimony was granted, meant the decree in the suit and not in the appeal.

(2) That the Parsi Matrimonial Court, constituted under Act XV of 1865, had no power to award alimony "*pendente lite*" after decree and pending appeal,

(3) An unsuccessful wife is not entitled to claim alimony after final decree and pending appeal, nor for the period during which she is seeking review of judgment.

Quære.—Whether the Court where a petition for review is pending before it, has a discretion to allot or continue alimony "*pendente lite*"

The words, "during the suit," in s. 33 of Act XV of 1865 include the period up to the making of a final or absolute decree.

Ellis v. *Ellis* (8 P.D. 188) and *Dunn* v. *Dunn* (13 P.D. 91) should guide the practice of the Parsi Matrimonial Court in allotment of alimony for the time following a decree *nisi*. HIRABAI v. DHUNJIBHOY ROMANJI, 17 B. 146 ... 95

(6) *Restitution of conjugal rights—Decree — Decree not executed—Subsequent voluntary cohabitation followed again by desertion—Satisfaction of decree —Second suit for restitution of conjugal rights*—Res judicata—*Cause of action -Civ. Pro. Code* (*Act XIV of* 1882), *ss.* 13 *and* 244.—Plaintiff obtained a decree against his wife for restitution of conjugal rights in 1885 which was never executed. In 1887, however, she returned to his house, and stayed with him for two months. She afterwards deserted him again. Thereupon the plaintiff filed a second suit for restitution of conjugal rights.

Held, that the suit was not barred either under s. 13 or 244 of the Code of Civil Procedure (Act XIV of 1882). A second withdrawal from cohabitation constitutes a fresh cause of action. KESHAVLAL GIRDHARLAL v. BAI PARVAT, 18 B. 327 ... 726

(7) *Suit for restitution of conjugal rights—Cause of action—Jurisdiction.*—The plaintiff sued his wife for restitution of conjugal rights in the Court of the Subordinate Judge of Borsad, within whose local jurisdiction the plaintiff resided. The defendant contended (*inter alia*) that the Subordinate Judge of Borsad had no jurisdiction to entertain the suit, on the ground that she was living outside his jurisdiction. The Subordinate Judge dismissed the suit for want of jurisdiction. On appeal by the plaintiff, the decree was confirmed. On second appeal,

Held, reversing the decree, that the Court of Borsad had jurisdiction. The cause of action, in a suit by a husband for restitution of conjugal rights, consists in the wife's absenting herself from her husband's house without his consent, and it must, therefore, be deemed to arise at his house. LALITAGAR v. BAI SURAJ, 18 B. 316 ... 719

Idol. PAGE

(1) Property bequeathed to an idol—Owner of shrine—Act of State—Deposition of owner from his position by an act of State of foreign power—Effect of deposition on right to property in Bombay—Trustee—Will—Power of appointment—See ACT OF STATE, 17 B. 600.

(2) Property of idol—High-priest and manager of shrine—Deposition of high-priest by act of State—Appointment of new high-priest—Suit by latter for property belonging to shrine—Act of State of foreign power—Effect of such act on title to property outside foreign State—See ACT OF STATE, 17 B. 620 (N).

Illegitimate Children.

Crim. Pro. Code (Act X of 1882), s. 488—Maintenance—Right of a married woman to claim maintenance for her illegitimate children—Evidence of wife to prove non-access—Evidence—Presumption of legitimacy—Evidence Act (I of 1872), s. 112—See CRIM. PRO. CODE (ACT X OF 1882), 18 B. 468.

Immoveable Property.

See REGISTRATION, 18 B. 92.

Inam.

(1) *Service inam land—Suit for a declaration of title to trees thereon and for damages—Jurisdiction of Civil Courts—S. 4, cl. (a) of the Bombay Revenue Jurisdiction Act (Bombay Act X of 1876)—Hereditary Offices Act (Bombay Act III of 1874)—Hereditary office—Hereditary officer—Officiator.*—Section 4, cl. (*a*) of the Bombay Revenue Jurisdiction Act (Bombay Act X of 1876) is not intended to apply only to the property appropriated to the payment of the officiating member of a vatandar family, the expression used being "hereditary officer" and not the person performing the duties of the "hereditary office" to which by the Hereditary Office Act (Bombay Act III of 1874) the distinct denomination of "Officiator" is given.

The plaintiff complained that he was prevented from cutting the trees growing on land situate in the village of Tungarli, belonging to certain persons who had sold the trees to him. He claimed damages and an injunction restraining the Collector from interfering with him. The defendant pleaded that the trees did not belong to the plaintiff's vendors, being on service inam land. The lower Court dismissed the plaintiff's claim, holding that the land, on which the trees were growing, was service inam land, and that the plaintiff's vendors had no title to them. On appeal, the High Court, on the evidence, upheld the lower Court's decision that the land was inam service land, but held that it did not necessarily follow that the trees upon it were the property of Government and not of the vatandars. The latter might be the owners of the trees subject to a condition. The case was, therefore, remanded to the District Court for a finding on an issue as to whether the holders of service inam lands had a title to the trees on the lands, and if so, whether they had the right to cut down trees without the permission of the Collector. On this finding the District Judge found in the affirmative. The case then came again before the High Court, when a preliminary objection was taken that under s. 4 of Act X of 1876 the Court had no jurisdiction.

Held, that it having been decided that the land in question was service inam land, the Court under s. 4, cl. (*a*) of Bombay Act X of 1876, ceased to have jurisdiction over the plaintiff's claim against Government in respect of the trees growing thereon, as such claims related to property appertaining to the office of a village officer. S. J. DESOUZA v. THE SECRETARY OF STATE FOR INDIA, 18 B. 319 ... 721

(2) See RESUMPTION, 17 B. 431.

Inamdar.

(1) *Inam village—Suit by an inamdar against a khot to recover balance of land revenue—Assessment—Survey made by the British Government—Collector's certificate—Change in rate of assessment—Pensions Act (XXIII of 1871), s. 4—Jurisdiction of Civil Courts—Revenue Jurisdiction Act (Bombay Act X of 1876), s. 4, sub-cl. (b)—Land Revenue Code (Bombay Act V of 1879), s. 216, cls. (a), (b) and (c)—Village partially alienated.*—In a suit by an inamdar of a village against a khot to recover rent in kind (according to the market rate at the time of payment), the defendant (khot) contended

Inamdar—(*Concluded*). PAGE

(1) that he was only liable to pay cash assessment as fixed by the survey made by the British Government, which was at a lower rate than he had previously paid; (2) that the suit was barred for want of Collector's certificate under s. 4 of the Pensions Act (XXIII of 1871); and (3) that the Civil Court had no jurisdiction to entertain the suit under the Revenue Jurisdiction Act (Bom. Act X of 1876), s. 4, sub-cl. (*b*), and the Land Revenue Code (Bom. Act V of 1879), s. 216, sub-cl. (*b*).

Held, that as there was no objection by either party to the amount or incidence of assessment of land revenue fixed by Government, and the question being whether the khot was liable to pay to the inamdar *maktas* or assessment, the suit was not taken away from the cognizance of Civil Courts by the Revenue Jurisdiction Act (Bom. Act X of 1876), s. 4, sub-cl. (*b*).

Held, further, that the Court was not precluded from entertaining the suit for want of Collector's certificate under the Pensions Act (XXIII of 1871), s. 4, because the original grant passed the lands, and because it is the original grant which determines whether the Pensions Act is applicable, and not the actual rights which the grantee, as a matter of fact, may have enjoyed by it.

Held, further, that the payment which the khot had been making to the inamdar before the time of the British survey was in the nature of assessment or rating by Government, but *held* also that the plaintiffs were entitled to the old assessment as claimed by them. It was plain that in cases falling within sub-cls (*a*) and (*e*) of s. 216 of the Land Revenue Code, Bombay Act V of 1879, the inamdar's interest in the assessment would not be affected by the application of Chapters VIII to X of that Act. He would still get the old assessment in the alienated lands in the village in the former case and the same amount of assessment in the latter, and the same must have been the intention in cases contemplated by sub-cl. (*b*).

The "holder of the village" in the concluding para. of s. 216 must be read as meaning the "holder of the assessment or any part thereof of an alienated village." GANGADHAR HARI KARKARE v. MORHAT PUROHIT, 18 B. 525 ... 859

(2) Superior holder—Liability of inamdar to pay the cess—Local Funds Act, III (Bom.) of 1869, s. 8—Local Fund cess.—See ACT III of 1869 (BOMBAY LOCAL FUNDS), 17 B. 422.

(3) See LANDLORD AND TENANT, 17 B. 475.

(4) See LAND REVENUE, 17 B. 407.

Increase of Capital.

See COMPANY, 18 B. 152.

Indemnity.

See REGISTRATION, 18 B. 745.

In Forma Pauperis.

(1) See CIV. PRO. CODE (ACT XIV OF 1882), 18 B. 464.

(2) See PAUPER, 18 B. 454.

(3) See WILL, 18 B. 237.

Infringement.

See TRADE MARK, 17 B. 584.

Injunction.

(1) Damages—Encroachment on land—Legal rights of owner of land—Owner not compellable to accept compensation instead of removal of encroachment—See ENCROACHMENT, 17 B. 771.

(2) Negative agreement—Discretion of Court—Agreement not to work for a rival tradesman—Specific Relief Act (I of 1877), ss. 21, 56 and 57—Specific performance—See SPECIFIC PERFORMANCE, 18 B. 702.

(3) See CAUSE OF ACTION, 18 B. 693.

(4) See COURT FEES ACT (VII OF 1870), 17 B. 56; 18 B. 100.

(5) See EASEMENT, 18 B. 474, 616.

Injunction—*(Concluded).* PAGE

(6) See ENCROACHMENT, 17 B. 648.

(7) See TRADE MARK, 17 B. 584.

Insolvency.

(1) *Indian Insolvent Act (Stat. 11 and 12 Vic., c. 21), ss. 50 and 51—Conduct of insolvent amounting to offences within those sections—Conduct of insolvent considered with reference to the following charges filed against him by opposing creditors, viz., reckless speculation; contracting debts without reasonable expectation of paying them; misconduct in contracting debts; concealment of property; obtaining forbearance by false representations; contracting debts by false pretences; undue preference.*—The insolvent had for many years carried on business in Bombay as a merchant. His firm (Messrs. B. and A. Hormarji) had been established in 1830 by his uncle and father. On the death of the latter in 1882 the insolvent was left the sole surviving partner, and from that time until his failure he carried on the business alone. The failure took place in April, 1891, and on the 1st May, 1891, he was adjudicated an insolvent. His liabilities were stated to be Rs. 47,98,591; his good assets Rs 5,13,903 and his doubtful assets Rs. 60 014. His discharge was opposed by six banks in Bombay with which he had had dealings. The grounds of opposition were as follows:—

(1) Reckless speculation; (2) contracting debts without any reasonable expectation, at the time when the same was contracted, of paying the same; (3) gross misconduct in contracting debts; (4) concealment of property; (5) obtaining forbearances from the opposing creditors by making false representations to them; (6) contracting debts by means of false pretences; (7) fraudulently and with intent of diminishing the sum to be divided among his creditors, or of giving an undue preference to creditors, having discharged a debt due by the insolvent.

It appeared that down to the end of 1889 there was nothing in the dealings of the firm to which objection could be taken. In the first half of the year 1890 he must have sustained heavy loss, as his mercantile assets over liabilities, which on 31st December, 1889, were Rs. 5,50,794, were on the 30th June, 1890, reduced to Rs. 2,29,612. The charges, however, against the insolvent were based upon his conduct subsequently to the latter date. On that day (30th June, 1890,) the insolvent nominally possessed four lakhs of rupees, the saleable value of which was about 2½ lakhs. With his finances in this state the insolvent speculated in exchange, and in six months *viz.*, before the 31st December, 1890) he had lost his four lakhs of nominal capital, and 19 or 23 lakhs of rupees besides. The Court *held*

(1) As to the first ground of opposition, that the insolvent was guilty of rash and reckless speculation. This, however, was not an offence within the meaning of s. 51 of the Indian Insolvent Act (11 and 12 Vic., c. 21). When the insolvent entered into the contracts which had resulted in the loss, he had a fair capital, and though his speculations were excessive in amount he had a fairly reasonable expectation that there would not be such a fall in exchange as would more than absorb his assets.

(2) As to the second and third grounds of opposition, that they were proved in respect of the insolvent's transaction subsequently to December, 1890, and that the insolvent was guilty of gross misconduct in contracting debts having no reasonable or probable expectation, at the time when they were contracted, of paying them, and that this conduct fell within the purview of s. 51 of the Indian Insolvent Act. In December, 1890, the insolvent was bankrupt to the extent (at all events) of over 16 lakhs, and had on hand large forward contracts which then showed a further probable loss. In that position he entered into further large speculative sales of exchange. He had then no assets with which to meet any loss.

(3) As to the fourth ground of opposition, that it was proved.

(4) As to the fifth ground of opposition, that it was not established. On 18th April, 1891, the insolvent called a meeting of creditors and laid a not very candid or truthful statement of his affairs before them. Nothing was then arranged, and the meeting was adjourned for a week, in order that a committee should examine the insolvent's position, &c. It was understood and arranged that in the meantime no step should be taken

against the insolvent and that he should keep his affairs in *statu quo*. The insolvent, however, swore that he understood he was to make no large payments, but that he was to keep the firm going. During that week the insolvent paid Rs. 3,193 due on a bill to one of the banks and Rs. 472 on re-draft account, a few insignificant current expenses and Rs. 1,000 to his solicitors, who were preparing a trust-deed to be carried before the creditors. The Court was of opinion that the conduct of the insolvent in making these payments did not amount to the offences charged in the fifth ground of oppostion, *viz.*, obtaining forbearance from the opposing creditors by making false representations to them.

(5) As to the sixth ground, that it was not established. On the 14th March the insolvent in answers to enquiries had assured the manager of the Chartered Bank that his firm was quite sound and solvent, it being then to his knowledge hopelessly insolvent. On that day the manager accepted the insolvent's bills for £20,000 for which security was given, and subsequently the insolvent sold one of his own bills for £10,000 to the Bank. This, however, was in pursuance of a previous contract. The evidence of the manager showed that it was because of this contract, and not because of the false representation of the insolvent, that he purchased the draft for £10,000. The Court was of opinion that the transaction did not come within s. 50.

(6) As to the seventh ground (undue preference), that it was not proved. On the 16th April, 1891, the day but one before the insolvent held a meeting of his creditors, he sent £5,000 to Messrs. Elliott & Sons in England. That firm had accepted bills of the insolvent which he was bound to take up, but the earliest did not fall due untill the 20th May, 1891. His practice had been to remit money a day or two before bills became due. The Court was of opinion that the transaction was not an undue preference within s. 50. It was no doubt a voluntary payment, but it was not shown to be a fraudulent discharge of a debt within the section. A mere voluntary payment of a debt is not within the purview of the section. Such a payment must be fraudulent and must be made with the intent of diminishing the sum to be divided amongst creditors, or of giving an undue preference to any of the creditors. From the mere fact of a voluntary payment, fraud of a penal nature cannot be inferred. Here nothing more was proved than a voluntary payment by a man in insolvent circumstances. The insolvent knew he was in difficulties, but was of so sanguine a nature that he believed he could surmount them, and so £ 5,000 were sent rather with a view to keep up his English connection than with the fraudulent intent of giving an undue preference. Where an undue preference is made penal the Court must be satisfied that the guilty intention necessary to constitute the offence existed in the mind of the insolvent, and ought not to assume it unless the circumstances point to no other probable conclusion.

The release by an insolvent of a debt due to him without receiving payment would undoubtedly fall within the scope of s. 50 of the Indian Insolvent Act (Stat. 11 and 12 Vic., 21). *In the matter of* HORMASJI A. HORMASJI, 17 B. 313 ... 204

(2) *Insolvent convicted and sentenced to imprisonment under* s. 50 *of the Indian Insolvent Act* (*Stat.* 11 *and* 12 *Vic.*, c. 21)—*Appeal by insolvent under* s. 73—*Bail—No power in High Court to admit insolvent to bail pending appeal*—An insolvent was convicted by the Insolvent Court of an offence under s. 50 of the Indian Insolvent Act (Stat. 11 and 12 Vic., c. 21) and sentenced to imprisonment. Under s. 73 of the Act he appealed against the decision and sentence of the Insolvent Court and applied to be admitted to bail pending the hearing of his appeal.

Held, refusing the application, that the High Court had no power to admit him to bail. *In the matter of* HORMASJI ARDESIR HORMASJI, 17 B. 334 ... 217

Insolvent Act (11 and 12 Vic., C. 21).

(1) Ss. 50 and 51—See INSOLVENCY, 17 B. 313.

(2) Ss. 50 and 73—See INSOLVENCY, 17 B. 334.

Inspection.

PAGE

(1) Defendant's right to inspection of documents referred to in plaint before written statement filed—Practice—See PRACTICE, 18 B. 368.

(2) Discovery—Production—Documents of title—Refusal to produce—Ejectment—Practice—See PRACTICE, 17 B. 581.

(3) Production—Discovery — Co-defendants — Inspection granted to defendant against co-defendant—Civ. Pro. Code (XIV of 1882), ss. 129 and 131—Practice—See PRACTICE, 17 B. 384.

Instalments.

Decree on mortgage for payment of Rs. 1,800 *by instalments, and in default execution for whole amount to issue—Default in payment for instalments—Waiver by plaintiff of right to execute decree—Receipt by plaintiff of overdue instalments is no waiver—Practice—Procedure - Different rulings of different High Courts—Judge to follow the ruling of the High Court to which he is subordinate.*—By a consent decree passed in a mortgage suit the defendant was ordered to pay to the plaintiff the sum of Rs. 1,800 by yearly instalments of Rs. 50 payable on the 30th April in each year, and in case of default in payment of any instalment the plaintiff was to be at liberty to execute the decree by sale of the mortgage property. The defendants failed to pay the first instalment, which fell due on the 30th April, 1888, and the plaintiff applied for execution and obtained an order for the sale of the property. In order to prevent the sale the defendants on the 13th November, 1888, paid Rs. 60 out of Court, and the application for execution thereupon was allowed to drop The defendants subsequently made the following payments, *viz.*, Rs. 15 on the 5th June, 1889, Rs. 25 on the 12th June, 1889, Rs. 15 on the 1st January, 1890, and Rs. 50 in the Nazir's office on the 2nd June, 1890, which was the day on which the Court opened after the summer vacation, which had begun on the 30th April, 1890. On the 6th June, 1890, the plaintiff again applied for execution of the decree, which was granted by the Subordinate Judge. On appeal, the District Judge reversed the order, holding that the plaintiff by accepting the above payments had waived his right to execute the decree. On appeal to the High Court.

Held that the plaintiff was entitled to execution. The acceptance of the payments did not prove a waiver. They were not accepted on account of the specific instalments in arrears, but on account of the whole decree; and even if they were taken as payments of overdue instalments, they could not by themselves prove a waiver.

A Judge should follow the ruling of the High Court of his own Presidency. BALAJI GANESH v. SAKHARAM PARASHRAM, 17 B. 555 ... 363

Insurance.

See RAILWAY COMPANY, 17 B. 723.

Interest.

(1) *Enhanced rate in default of payment—Penalty—Liquidated damages—Contract Act (IX of* 1872), *s.* 74.—A proviso for retrospective enhancement of interest, in default of payment of the interest at a due date, is generally a penalty which should be relieved against, but a proviso for enhanced interest in the future cannot be considered as a penalty, unless the enhanced rate be such as to lead to the conclusion that it could not have been intended to be part of the primary contract between the parties. UMARKHAN MAHAMADKHAN DESHMUKH v. SALEKHAN, 17 B. 106 (F.B.) ... 70

(2) Hindu Law—Damdupat—Amount of interest recoverable by a Hindu—Mortgage—Redemption suit—Supreme Court Charter, cl. 29—Rule of damdupat when applicable—See HINDU LAW (GENERAL). 18 B. 227.

(3) See CONTRACT, 17 B. 457.

Interpleader.

Civ. Pro. Code. (XIV of 1882), *ss.* 470, 473—*Costs of plaintiff—Claims by plaintiff against goods in respect of which suit brought.*—In May, 1893, one Sadanand Ramsarmall (defendant No. 4), a resident at Hissar in the Punjab, consigned 600 bags of rapeseed to one Khimji Kanji of Bombay and delivered them to the plaintiffs for carriage to Bombay. While the

Interpleader—(*Concluded*). PAGE

goods were in transit to Bombay, Sadanand, the consignor, ordered the plaintiffs to deliver them to his agent Ramgopal Fulchand, instead of to the consignee, and on the 18th May, Ramgopal requested delivery from the plaintiffs. Before the goods could be delivered, however, the firm of E. D. Sassoon & Co., (defendants Nos. 1, 2 and 3) claimed them, alleging that they had been assigned to them by Khimji Kanji for valuable consideration. The plaintiffs thereupon filed this suit praying that the defendants should be required to interplead, and that they should be restrained from suing them (the plaintiffs) in respect of the said goods. The plaintiffs claimed to charge the goods with payment of freight, wharfage and demurrage and their costs of suit.

Held:—

(1) that the suit was properly instituted by the plaintiffs as an interpleader suit so as to entitle them to their costs;

(2) that the fourth defendant was entitled to the goods, subject to the plaintiff's charge for freight and costs;

(3) that the plaintiffs' charge for wharfage and demurrage could not be allowed. The goods remained in the plaintiffs' possession not by reason of any neglect or default of the owner to take delivery of them, but by the act of the plaintiffs themselves, who kept and refused to deliver them for their own protection and benefit. All that they could presumably be entitled to, was a reasonable warehouse rent, which, however, they had not claimed. BOMBAY, BARODA AND CENTRAL INDIA RAILWAY COMPANY v. JACOB ELLAS SASSOON, 18 B. 231 ... 662

Issue.

See RES JUDICATA, 18 B. 597.

Jains.

See CHARITY, 18 B. 551.

Joint Ownership.

Decree against joint owner—Execution sale—Right of purchaser—Co-sharers made parties after period of limitation—Limitation—Hindu Law—See HINDU LAW (JOINT FAMILY), 18 B. 505.

Joint Possession.

See HINDU LAW (JOINT FAMILY), 18 B. 505.

Joint Trial.

See PRACTICE, 18 B. 364.

Judge.

Disqualification of a Judge—Persona interest—Crim. Pro. Code (Act X of 1882), *s.* 555—*Bombay District Municipal Act* (VI *of* 1873), *s.* 84—*Municipal offence.*—The mere fact that a Magistrate is the vice-president of a district municipality and chairman of the managing committee does not disqualify him from trying a charge of an offence brought by the municipality under Bombay Act VI of 1873. But if he has taken any part in promoting the prosecution, as, for instance, by concurring in sanctioning it at a meeting of the managing committee or otherwise, he will be disqualified by reason of the existence of a personal interest over and above what may be supposed to be felt by every municipal commissioner in the affairs of the municipality. QUEEN-EMPRESS v. PHEROZSHA PESTONJI, 18 B. 442. 803

Judicial Proceeding.

See DEFAMATION, 17 B. 127.

Judicial Separation.

See HUSBAND AND WIFE, 17 B. 146.

Jurisdiction.

(1) *Carrying on business*—"*Dwell*"—*Letters Patent*, 1865, *cl* 12—The expression "carry on business" in cl 12 of the Letters Patent, 1865, is intended to relate to business in which a man may contract debts, and ought to be liable to be sued by persons having business transactions with him.

Jurisdiction—(*Continued*).

PAGE

The defendant, who was an Acharya of the Vaishnav community, and was head of their institution at Nathdwara in Udepur where he usually resided, was, when this suit was brought, in Bombay for a time. He had in the latter place a treasurer and other servants employed in an establishment for the collection and entry of gifts made by devotees; and there, also, donations, made in like establishments elsewhere, were received for transmission to Nathdwara. The defendant, also, while in Bombay, accepted offerings on ceremonial visits made, or received, by him personally; but no bargain for the amount was made beforehand. *Held*, that in the above transactions there was no "carrying on business" within cl. 12 of the Letters Patent, 1865. GOSWAMI SHRI 108 SHRI GIRDHARAJI v. SHRI GOVARDHANLALJI GIRDHARIJI, 18 B. 294 (P.C.)=21 I.A. 13=6 Sar. P.C.J. 396 ... 704

(2) Caste—Caste-matter—Custom of caste—Funeral ceremonies—Right to assistance of fellow members of caste—Refusal to assist—Cause of action—Suit not maintainable—See HINDU LAW (CASTE), 18 B. 115.

(3) Civ. Pro. Code (XIV of 1982), s. 16—Suit to recover mortgage-debt by sale of mortgaged property out of jurisdiction—See CIV. PRO. CODE (ACT XIV OF 1882). 17 B. 570.

(4) *Contract—Performance of contract—Making of contract—Goods to be shipped at Bombay to the plaintiff at Karwar—Contract entered into and intended to be performed at Bombay.*—The plaintiff residing at Karwar sent a sum of money to Kemp & Co. (defendant No. 1). a firm at Bombay, asking them to send him certain goods. Kemp & Co. informed the plaintiff that they had not the goods required by him. The plaintiff thereupon telegraphed to them to pay the amount to defendant No. 2, a resident of Bombay, provided he shipped the goods. On the failure of defendant No. 2 to ship the goods, the plaintiff brought a suit against the defendants in the Court at Karwar to recover the amount. He claimed against Kemp & Co. (defendant No. 1) because they had paid the money to the second defendant before the goods were shipped, and against the second defendant because he had not shipped the goooods, although he had received the money. The Court at Karwar was of opinion that Karwar was the place where the contract was to be performed, and that, therefore, it had jurisdiction to entertain the suit, and it passed a decree against defendant No. 2. The claim as against defendant No. 1 was dismissed.

Held, reversing the decree, that the understanding on which the money was paid to defendant No. 2 by Kemp & Co., and which was the agreement on which the plaintiff sued, was that the second defendant would ship the goods at Bombay to the plaintiff at Karwar. The contract, therefore, as between defendant No. 2 and Kemp & Co. acting on behalf of the plaintiff, was both entered into and intended to be performed at Bombay. The cause of action arose, therefore, in Bombay, and the Court at Karwar had no jurisdiction. DADABHAI DAJIBHAI v. DIOGO SALDANHA, 18 B. 43 ... 537

(5) Court of Agent for Sirdars in the Deccan—Suit in that Court—Pensions Act (XXIII of 1871), s. 4, applies to such suit—Collector's certificate—Reg. XXIX of 1827, ss. 4, and 6—Ordinary rules—Reg. II of 1827—See SIRDAR, 17 B. 224.

(6) Decree in possessory suit in Mamlatdar's Court—Execution of decree stayed by proceedings in Subordinate Judge's Court—Suit in Subordinate Judge's Court ultimately dismissed—Subsequent application to Mamlatdar to grant order for execution—Limitation—Deduction of time spent on proceedings in second suit—Limitation Act (XV of 1877), s. 14—Mamlatdar. See LIMITATION, 18 B. 734.

(7) Foreigner—Non-resident foreigner carrying on business by his munim in Bombay—Small Cause Court—Small Cause Court Act (XV of 1882), s. 18—See ACT XV OF 1882 (THE PRESIDENCY SMALL CAUSE COURTS), 17 B. 662.

(8) *Heirship—Application for declaration of heirship—Bombay Reg.* VIII *of* 1827, *s.* 2—*Subordinate Judge invested with function of District Court under Act* VII *of* 1889—*Jurisdiction of such Judge to hear such application.*—A Subordinate Judge who (under s. 26 of Act VII of 1889) has been invested by Government with the functions of a District Court under

Jurisdiction—(*Continued*). PAGE

Act VII of 1889 has jurisdiction to hear and determine an application made under s. 2 of Bombay Reg. VIII of 1827. PITAMBAR MANCHARAM v. ISHVAR JADURAM, 17 B. 230 ... 151

(9) *Letters Patent*, 1865, *cl.* 12—*Dwell—Carry on business—Personally work for gain.*—The word "dwell" must be construed with reference to the particular object of the enactment in which it occurs.

Residence in Bombay merely for a temporary purpose is not to "dwell" there so as to give jurisdiction to the High Court under cl. 12 of the Letters Patent, 1865.

Held, that the mere fact that the defendant had purchased the house which he occupied during a temporary visit to Bombay, afforded no inference of an intention to dwell there.

A defendant who was the *Acharya* or high priest of the Vaishnava community and the Maharaj Tikait of Shri Nathji at Nathdwara had a *pedhi*, or place of business, in Bombay, where devotees paid in any presents they intended to offer him.

Held, that this did not amount to "carrying on business" so as to give the High Court jurisdiction under cl. 12 of the Letters Patent, 1865.

The defendant when in Bombay was invited by his devotees and pupils to their houses, where he was treated as an incarnation of the deity, with certain forms and ceremonies, and received presents, and gave his blessing.

Held, that this did not amount to "personally working for gain" within the meaning of cl. 12 of the Letters Patent, 1865. GOSWAMI SHRI 108 SHRI GIRDHARIJI v. SHRI GOVARDHANLALJI GIRDHARIJI, 18 B. 290 701

(10) *Revenue Jurisdiction Act* (X *of* 1876), *s.* 4 (*c*)—*Mortgage—Suit for redemption—Sale of mortgaged land by Native Chief for arrears of assessment—Purchaser at sale—Claim by purchaser against mortgagor and mortgagee.*—The plaintiff sued to redeem certain land mortgaged by him to the first defendant. The second defendant claimed the land as owner, alleging that the mortgagor and mortgagee had failed to pay the assessment on the land to the Native Chief to whom it was due. The latter had accordingly sold it by public auction to realize the assessment, and he (defendant No. 2) had bought it. The Court of first instance rejected the plaintiff's claim on the ground that the suit could not be entertained by a Civil Court under the provisions of the Revenue Jurisdiction Act (X of 1876) and the Land Revenue Code (Bombay Act V of 1879).

On appeal the District Court reversed the decree and remanded the case for trial on the merits.

Held, confirming the order of the District Court, that Government having rendered no assistance in the proceedings for the realization of the revenue by the Native Chief on which the defendant relied, the jurisdiction of the Civil Court was not taken away by s. 4 (*c*) of the Revenue Jurisdiction Act X of 1876. MAHADU v. LAKSHMAN, 17 B. 681 ... 447

(11) Service inam land—Suit for declaration of title to trees thereon and for damages—S. 4, cl. (*a*) of the Bombay Revenue Jurisdiction Act (Bombay Act X of 1876)—Hereditary Offices Act (Bombay Act III of 1874)—Hereditary office—Hereditary officer—Officiator—See INAM, 18 B. 319.

(12) Valuation for purposes of jurisdiction—Appeal—Stamp—Suits Valuation Act (VII of 1887), s. 8—Court Fees Act (VII of 1870)—Valuation of suits—Appellate Courts—See STAMP, 18 B. 207.

(13) Valuation—Valuation of suit—Suit Valuation Act (VII of 1887), s. 8—Valuation for purposes of Court fees and for purposes of jurisdiction—Appeal—See VALUATION, 18 B. 40.

(14) See ACT III OF 1876 (BOMBAY MAMLATDAR'S COURTS), 18 B. 46, 449.

(15) See CHARITY, 18 B. 551.

(16) See CIV. PRO. CODE (ACT XIV OF 1882), 17 B. 162, 18 B. 98.

(17) See COSTS, 18 B. 189.

(18) See COURT FEES ACT (VII OF 1870), 18 B. 100.

(19) See CRIM. PRO. CODE (ACT X OF 1882), 17 B. 293.

(20) See HUSBAND AND WIFE, 18 B. 316.

Jurisdiction—(*Concluded*). PAGE

(21) See INAMDAR, 18 B. 525.
(22) See PAUPER, 18 B. 454.
(23) See RES JUDICATA, 17 B. 562.
(24) See RESUMPTION, 17 B. 431.
(25) See SMALL CAUSE COURT, 17 B. 42.
(26) See STAMP ACT (I OF 1879), 18 B. 369.
(27) See SUCCESSION ACT (X OF 1865), 17 B. 689.

Kazi.

(1) *Office of—Hereditary office—Vatan—Vatandars Act* (*Bombay Act* III *of* 1874), *s.* 9—*Mortgage.*—The office of kazi is not an hereditary office, unless perhaps by special custom of the locality. Where such a custom is not established, property attached to the office is not vatan property, and the Collector has no power to make an order with respect to it under s. 9 of the Vatan Act (Bombay Act III of 1874).

A Resolution of Government empowering a Collector to levy full assessment from the person other than the grantee in possession of land granted for public service does not authorise him to order the delivery of possession of the land to the grantee. BABA KAKAJI SHET v. NASSARUDDIN, 18 B. 103 ... 577

(2) See MAHOMEDAN LAW (WAKF), 18 B. 401.

Kharva Caste.

See HINDU LAW (CASTE), 18 B. 115.

Khata Tenants.

See LANDLORD AND TENANT, 17 B. 475.

Khot.

(1) See ACT VII OF 1878 (INDIAN FOREST), 18 B. 670.
(2) See KHOTI LANDS, 17 B. 677.

Khoti Khasgi Land.

See ACT VII OF 1878 (INDIAN FOREST), 18 B. 670.

Khoti Lands.

(1) *Mortgage—Sale in execution of decree on mortgage—Suit for possession by assignee of purchaser at such sale—Consent of* khot *to alienation.*—One Babsha, the registered occupant of certain lands situate in a *khoti* village, mortgaged the lands to one Velji, who got a decree on the mortgage. In execution of the decree the lands were sold to Panachand, who assigned them to the plaintiff. In January, 1878, the defendant as *khot*, took possession of the lands, alleging that Babsha had no right to mortgage ; that he had left the village and forfeited his occupancy ; that he (the defendant) had thereupon rightfully taken possession of the land in 1878, and that the occupancy had been declared forfeited by the revenue authorities in August, 1887, under ss. 86 and 153 of the Bombay Land Revenue Code, Bombay Act V of 1879. In 1888 the plaintiff brought this suit to recover the lands. The lower Court held that the defendant by accepting rent from the mortgagee was proved to have "consented to the mortgage and its necessary consequences."

On appeal to the High Court,

Held, reversing the decree of lower Court, that the plaintiff on the strength of his purchase from Panachand in 1887 had no right to eject the defendant. PURUSHOTTAM VAMAN SOMAN v. KASHIDAS JEYCHANDSHET, 17 B. 677 444

(2) See ACT I OF 1880 (BOMBAY KHOTI SETTLEMENT), 18 B 244.

Kudwa Kunbi Caste.

See HUSBAND AND WIFE, 17 B. 400.

Kulkarni Vatan.

Vatan—Suit for partition and declaration of right to a specific share in the vatan and to officiate—Power of Civil Courts to make the declaration—Vatandars

Kulkarni Vatan—(*Concluded*). PAGE

Act (*Bombay Act* III *of* 1874), s. 67—*Money grant—Vatan consisting exclusively of cash allowance—Collector's certificate—Pensions Act* (XXIII *of* 1871), *s.* 4.—In a suit for partition of a kulkarni vatan, for a declaration that the plaintiffs were entitled to officiate as kulkarnis and for a third share in the moiety of the vatan belonging to the parties, it was contended that under the Vatandars Act (Bombay Act III of 1874) the suit was not maintainable in the Civil Court.

Held, that the Vatandars Act does not preclude the Civil Court from declaring the plaintiffs' right to the status of vatandars when the share defined is in respect of a share in the vatan belonging to the branch of the parties, and the declaration does not interfere with the rights of the Collector in any way as given by the Act. In preparing the register, the Collector's duty as determined by s. 67 of the Act is confined to specifying the names of the heads of families and the proportionate part possessed by each head, and is in no way concerned with the rights of the members of a particular branch *inter se*.

A suit for a declaration that the plaintiffs are vatandars of a share of a moiety of a kulkarni vatan consisting exclusively of a cash allowance from Government is not a suit relating to a "money grant" within the contemplation of s. 4 of the Pension Act (XXIII of 1871). GOVIND SITARAM v. BAPUJI MAHADEO, 18 B. 516 ... 853

Label.

See TRADE MARK, 17 B. 584.

Land Acquisition.

(1) Compulsory acquisition—Set back—Compensation paid to owner for land with buildings thereon taken—Basis of valuation of land—Act XII of 1888, s. 3—Practice—Appeal—Municipality—Municipal Act III (Bombay) of 1888, ss. 298, 299 and 301—See MUNICIPALITY, 18 B. 184.

(2) See LAND ACQUISITION ACT (X OF 1870), 17 B. 299.

Land Acquisition Act (X of 1870).

S. 19—*Assessor—Disqualifications in an assessor—Bias—Objections to assessor's appointment not raised in time—Waiver—Estoppel—Minor—Assessor not competent to act as witness.*—Certain land belonging to the applicant, a minor, was taken by the Municipality of Hubli under the Land Acquisition Act (X of 1870). The Mamlatdar of Hubli, who was an *ex officio* member of the Municipal Committee, took part in the negotiations for the purchase of the land. He also gave evidence as to its value in the inquiry before the Collector. As the price offered by the Collector was not accepted by the applicant, the matter was referred to the District Judge, under s. 15 of the Act, for the purpose of determining the amount of compensation.

On this reference the Mamlatdar acted as an assessor appointed by the Collector, and was also examined as a witness as to the value of the land. But no objection was taken to his acting as an assessor. The District Judge eventually upheld the Collector's award. On an application under s. 622 of the Civ. Pro. Code (Act XIV of 1882).

Held, that the award was bad. The Mamlatdar had, under the circumstances, a substantial interest in the matter, sufficient to disqualify him from acting as an assessor.

Held, also, that the minor applicant was not estopped from objecting to the competency of the Mamlatdar by the fact that his guardian had not raised any such objection in the Court below, and might, therefore, be taken to have waived it.

Assuming that there was a waiver, it could not bind the minor, as it was not for his benefit.

Held, also, that a person who is appointed an assessor under s. 19 of the Land Acquisition Act (X of 1870) performs *quasi*-judicial functions, and is, therefore, incompetent to testify as a witness in the same proceedings. SWAMIRAO v. THE COLLECTOR OF DHARWAR, 17 B. 299 ... 195

Landlord and Tenant.

(1) Commencement and origin of tenancy—Tenancy forty years old—S. 83 of the Land Revenue Code (Bombay Act V of 1879), applicability of—See ACT V OF 1879 (BOMBAY LAND REVENUE CODE), 18 B. 221.

Landlord and Tenant—(*Continued*).

PAGE

(2) *Inamdar—Enhancement of rent—Landlord's right of enhancement—Ejectment for non-payment of enhanced rent—Plea of permanent tenancy—Decision of Judge not based on evidence given in the case—Practice—Second appeal—Finding of fact when binding in second appeal—Sheri and khata lands—Right of khata tenants not holding under express contract, how proved—Evidence as to similar tenants in similar villages admissible.*—In a suit for ejectment for non-payment of enhanced rent the defendants pleaded (1) that they were permanent tenants, (2) that the plaintiff had no power to enhance, (3) that the enhancement by the plaintiff was unreasonable. The lower Courts held that the defendants were permanent tenants, but were bound to pay a reasonable rent. Their decision was not based on evidence given in the case, but on what was termed a "well-known distinction between the *sheri* or private lands of an inamdar and the *khata* or *rayatwar* lands held by recognised tenants." The exercise of certain rights of transfer or inheritance, &c., were regarded as evidence of fixity of tenure at a reasonable rent. On second appeal by the plaintiff to the High Court it was argued that the District Court having found, as a fact, that the defendants were permanent tenants bound to pay a reasonable rent, the High Court in second appeal was bound by that finding.

Held, that the case should be remanded for proper enquiry. No doubt, if the appeal in the District Court were conducted as if all the facts recorded by the Subordinate Judge were admitted, the plaintiff could not in second appeal question these facts. But it did not appear that it was admitted that the distinction drawn between *sheri* and *khata* tenants was correct, or that every *khata* tenant, as such, exercised the rights described by the Subordinate Judge. Under the circumstances it was clear that the decision of the District Judge was based neither on evidence nor admissions, and was, therefore, not binding in second appeal.

In determining the rigts of *khata* tenants who held under no express contract, the best evidence no doubt, if possible, would be the evidence of custom in the particuiar village in question, but evidence of similar tenants in similar villages would not be excluded.

Mirasdars in an inam village cannot always claim to hold at a fixed rent. An inamdar can enhance their rents within the limits of custom. VISHVANATH BHIKAJI v. DHONDAPPA, 17 B. 475 ... 309

(3) *Joint family—Manager—Lease granted by monager—Right to sue for rent under such lease—Co-sharers—Parties—Practice.*—A manager of a joint Hindu family who, as such, has granted a lease, is during his life-time the only person to sue for rent due under the lease, but after his death his son, who has not succeeded his father in the management, cannot sue without joining the other members of the joint family as parties. DAYABHAI LALLUBHAI v. GOPALJI DAYABHAI, 18 B. 141 ... 602

(4) Land revenue—Bombay Summary Settlement Act (VII of 1863)—Settlement under that Act is an agreement and subject to the law of contracts—Settlement made and sanad issued under a mistake—Quit-rent paid by inamdars to Government under such settlement — Refund—Void agreement—Contract Act (IX of 1872), ss. 20 and 65—Sanad—Meaning and effect of —See LAND REVENUE, 17 B. 407.

(5) Miras tenure—Mirasdar on Inam estates, position of—Miras malki—Math —Manager—Land appertaining to math—Sale of "miras malki" (ownership of miras tenure)—Adverse possession—Limitation Act (XV of 1877), s. 28—Right to recover rent—Construction—See MATH, 18 B. 507.

(6) *Mirasi tenure—Mirasi tenure declared in a decree—Civ. Pro. Code* (XIV *of* 1882), *s.* 258—*Subsequent payment of rent by defendants not a payment under decree but under the tenure, and so need not be certified under s.* 258 *of the Civ. Pro. Code.*—The plaintiff sued the defendants to recover possession of certain land. The defendants pleaded they were *mirasi* tenants and entitled to possession as long as they paid the rent. The suit was compromised, and by a consent decree it was declared that the defendants held by *mirasi* tenure and they were directed to pay rent "as before" or in default the plaintiff should take possession. The plaintiff afterwards applied in execution for possession, alleging that the rent had not been paid.

Landlord and Tenant—(*Continued*).

The defendants pleaded that it had been paid, and the plaintiff rejoined that, even if it had been paid, the Court could not recognize the payment, as it had not been certified under s. 258 of the Civ. Pro. Code.

Held, that under the circumstances the rent when paid was to be deemed as paid under the *mirasi* tenure and not under the decree, and, therefore, s. 258 of the Civ. Pro. Code did not apply, and payment need not be certified. KEDARI v. GAJAI, 18 B. 690 ... 969

(7) *Mulgeni lease—Alienation by mulgenidar—Alienation contrary to the terms of the lease—Absence of any clause as to re-entry - Valid alienation—Suit by mulgar for possession.*—In the absence of any clause of re-entry in the event of alienation by the mulgenidar (permanent tenant) contrary to the terms of the lease, the mulgar (landlord) cannot treat the alienation as void and recover possession from the alienee. NARAYAN DASAPPA v. ALI SAIBA, 18 B. 603 ... 911

(8) *Non-payment of rent by tenant to landlord—Acquiescence of landlord—Effect of acquiescence—Subsequent suit by landlord for possession—Practice—Finding of fact not accepted in second appeal—Inam land—Sub alience—Wrongful surrender by the village inamdar to Government*—Khalsat.—The plaintiff, a sub-alienee from an inamdar of certsin inam, leased it to D. prior to the year 1858. In 1860 the land was wrongfully surrendered by the inamdars of the village to Government as lapsed old service inam and was made *khalsat*. In 1863, the plaintiff protested against this being done, and the Collector referred him to a Civil suit against the inamdars. From the year 1863 the plaintiff received no rent from D., or after D's death from his heirs, who paid the assessment to Government. In 1889, the plaintiff brought the present suit against the representatives of D. and the village inamdars to recover possession. The District Judge dismissed the suit on the ground that the plaintiff must be held to have acquiesced in the loss of the land, and by his conduct since 1863 must be taken to have designedly abandoned all his interest in the land, and that his suit was barred.

Held, that the plaintiff did not acquiesce in the surrender by the inamdar in 1860, to Government, as he distinctly protested against it in 1863, and that as to his conduct since 1863 nothing had taken place to deprive him of such legal rights as he possessed against the tenant D. in 1863, if they were not barred by the Statute of Limitation; and as to limitation.

Held, that as the District Judge had decided the point under the influence of the view taken by him as to the plaintiff's conduct, the case should be remanded for a fresh finding on that point.

Held, further, that the mere circumstance that D., after the land was treated as *khalsat*, paid assessment to Government, and had not paid rent to plaintiff, could not affect the relationship of landlord and tenant which admittedly existed between them in 1863. RAMBHAT v. BABABHAT, 18 B. 250 ... 675

(9) *Notice to quit—Plea of permanent tenancy.*—The plaintiff sued to eject the defendants from certain land. The defendants pleaded that they were permanent tenants under a lease granted to their ancestor by the plaintiff's grandfather in 1805. The Court of first instance awarded the plaintiff's claim. On appeal, the District Judge held that the lease on which the defendants relied was one determinable on the grantee's death, but as the grantee's heirs (the defendants) had continued in possession paying the stipulated rent, they were entitled to a reasonable notice to quit. The District Judge accordingly passed a decree, directing the defendants to vacate the land at the expiry of six months from the date of the decree.

Held, that the District Judge could not, in his judgment, give the notice which the plaintiff was bound to give to his tenants. Plaintiff's suit must fail for want of notice. ABU BAKAR SAIBA v. VENKATRAMANA VISHVESHVAR, 18 B. 107 ... 580

(10) *Permanent tenancy—Bombay Land Revenue Code (Bombay Act V of 1879), s. 83.*—The mere fact that a tenancy has commenced subsequently to the commencement of the landlord's tenure, does not prevent the application of s. 83 of the Bombay Land Revenue Code (Bombay Act V of 1879), in

Landlord and Tenant—*(Continued)*.

PAGE

cases where by reason of the antiquity of the tenancy no satisfactory evidence of its commencement is forthcoming.

G. held certain lands as a tenant under M., an inamdar. The lands continued in G.'s family for nearly 80 years. It was found that owing to this antiquity of the tenancy, its commencement or duration could not be satisfactorily established by evidence.

Held, that in the absence of any local usage to the contrary, G.'s tenancy must be presumed to be permanent. RAMCHANDRA NARAYAN MANTRI v. ANANT, 18 B. 433 ... 798

(11) *Possession—Adverse possession—Lease—Expiry of lease—Continued possession after expiration of lease—Permissive possession—Tenant's heirs continuing in possession after the expiry of tenancy—Limitation.*—In 1840 the land in dispute was leased to R. for life. R. died in or about 1871, and after R.'s death, his heirs (the defendants) continued in possession without obtaining a fresh lease or paying any rent to the landlord. In 1888 the landlord sued to eject the defendants. The defence was that the suit was barred by limitation.

Held, that the suit was not barred. After R.'s death the defendants, though not in possession as tenants, were not trespassers. Their possession was permissive, and not adverse until they expressly set up a title of ownership in the property. KRISHNAJI RAMCHANDRA v. ANTAJI PANDURANG, 18 B. 256 ... 679

(12) *Right of possession claimed by tenant against landlord—Mortgage by landlord—Possessory suit in the Mamlatdar's Court by the tenant against the mortgagor—Decree in favour of the tenant—Assignment of mortgage by mortgagee—Purchase of the equity of redemption by the assignee—Merger—Suit brought by the assignee to recover possession—Assignee bound by Mamlatdar's order against mortgagor—S. 15 of the Mamlatdar's Act (Bombay Act V of 1864)—S. 18 of the Mamlatdar's Act (Bombay Act III of 1876)—Art. 46, sch. II of the Limitation Act (IX of 1871).*—One Ramji Chikne, who was the owner of the land in dispute, mortgaged it to Baji in July, 1870. In October, 1876, Bapu, a tenant of the land, obtained an injunction against Ramji restraining him from interfering with his (Bapu's) possession, in a possessory suit which was filed in the Mamlatdar's Court in May, 1876. In July, 1877, Baji obtained a decree on his mortgage, and in execution he got possession of the property from Ramji (the mortgagor) in June, 1879. The plaintiff, who was the assignee of both Baji and Ramji (mortgagee and mortgagor), sued Bapu in ejectment in September, 1888. Both the lower Courts allowed the claim. On second appeal by Bapu, the plaintiff (*inter alia*) contended that having taken an assignment of the mortgage from the mortgagee, he was not bound by the proceedings in the Mamlatdar's Court in 1876 against the mortgagor. But

Held, that when the plaintiff, having previously taken an assignment of Baji's mortgage, purchased the equity of redemption from Ramji, the mortgage was extinguished, there being no circumstance from which an intention could be presumed to keep it alive. The plaintiff could not stand in a better position than Ramji, and was bound by the proceedings in the Mamlatdar's Court, notwithstanding that he had taken an assignment of Baji's mortgage. In those proceedings the defendant had claimed a right of permanent possession as against the Chikne family, and the effect of the Mamlatdar's order was to continue him in possession until ejected by the decree of a Civil Court. It was, therefore, incumbent upon Ramji to bring a suit within three years from the Mamlatdar's order, as provided by art. 46, sch. II of the Limitation Act (IX of 1871), and that not having been done, the plaintiff, who derived his title from Ramji, could not recover possession from the defendant.

Held, further, that ever since the proceedings in the Mamlatdar's Court commencing with the defendant's suit in May, 1876, the possession of the defendant, whatever may have been its nature originally, was distinctly adverse to Ramji and also to plaintiff, who as assignee might have taken possession at any time under the mortgage, and the present suit not having been brought until September, 1888, was barred by the Limitation Act (XV of 1877). BAPU MAHADAJI v. MAHADAJI VASUDEO, 18 B. 348 ... 740

Landlord and Tenant—(*Continued*). PAGE

(13) *Suit by tenant to recover possession claiming as full owner—Subsequent claim as yearly tenant unjustly dispossessed—Notice to quit—Denial of landlord's title*—A plaintiff sued to recover possession of certain fields, &c., alleging that he was a permanent tenant of the defendant, having purchased the right of occupancy from previous occupants of the land. The lower Court held that the plaintiff's vendors were mere yearly tenants and not permanent tenants, but that the sale of their right to the plaintiff was valid, and that the plaintiff had been wrongfully dispossessed by the defendant, no notice to quit having been given. But

Held, that the plaintiff could not recover. For his plaint and the conduct of his case amounted to a denial of his landlord's (defendant's) title. In his suit the plaintiff claimed to be full owner, and he could not afterwards claim to be restored to possession on the ground that he was a yearly tenant entitled to notice to quit, which was not given. LALU GAGAL v. BAI MOTAN BIBI, 17 B. 631 ... 414

(14) *Suit for possession—Denial of landlord's title—Plea of permanent tenancy—Notice to quit—Yearly tenant—Practice—Procedure—Second appeal—Point taken for first time on second appeal—Specific performance, suit for—Parties made defendants who were not parties to the agreement.*—The plaintiff sued the jaghirdars of a certain village (defendants Nos. 1 to 11) and certain of their tenants (defendants Nos. 12 to 18) for specific performance of an agreement made between the plaintiff and the jaghirdars, by which the jaghirdars agreed to give up to the plaintiff possession of certain lands, which were in possession of the tenants (defendants Nos. 12 to 18). The jaghirdars (defendants Nos. 1 to 11) pleaded that they were unable to give possession, as the tenants (defendants Nos. 12 to 18) were permanent tenants and refused to quit the land. The tenants (defendants Nos. 12 to 18) put in a separate defence, also alleging that they were permanent tenants of the jaghirdars. The lower appellate Court held that the tenants (defendants Nos. 12 to 18) were yearly tenants and did not hold in perpetuity, and that the jaghirdars (defendants Nos. 1 to 11) had power to eject them. That Court, therefore, passed a decree for the plaintiff for specific performance of the agreement as against the jaghirdars (defendants Nos. 1 to 11) and for possession as against the other defendants (Nos. 12 to 18). The latter defendants (the tenants) appealed to the High Court. They there contended that if they were yearly tenants, as held by the decree of the lower Court, they could not be dispossessed without notice to quit, and that no such notice had been given.

Held (1) that the objection was good, and that no decree against the tenants (defendants Nos. 12 to 18) could be made in favour of the plaintiff, and that he was only entitled to a declaration that the said defendants were mere yearly and not permanent tenants.

(2) That the tenants (defendants Nos. 12 to 18) had claimed to be permanent tenants before the suit was filed, and at that time they were not tenants of the plaintiff, but of the jaghirdars (defendants Nos. 1 to 11). Under the circumstances that claim could not be taken to have worked a forfeiture of their tenancy as a denial of their landlord's title, or in any case it must be deemed to have been waived by the jaghirdars (defendants Nos. 1 to 11). The plaintiff, therefore, could not rely upon it as an answer to the defendants' contention that a notice to quit was necessary.

(3) That the objection as to the necessity of notice to quit was one which might be taken in second appeal.

Held, also, that an objection that certain of the defendants should not have been made parties to a suit for specific performance, because they were not parties to the agreement, could not be taken for the first time in second appeal, as it only involved a question of practice. DODHU v. MADHAVRAO NARAYAN GADRE, 18 B. 110 ... 582

(15) Suit for rent—Succession Certificate Act (VII of 1889)—See SUCCESSION CERTIFICATE ACT (VII OF 1889), 18 B. 394.

(16) *Tenant expending money on land with landlord's knowledge and consent—Standing by—Estoppel—Right of tenant on eviction to be recouped the money so expended—Buildings erected on land held under lease—Removal of such buildings.*—The defendant entered into occupation of certain land

Landlord and Tenant—(*Concluded*).

PAGE

with the permission of the plaintiff, who was the owner, and erected buildings and otherwise expended money upon it. The plaintiff and the defendant were relations and lived near each other. The plaintiff constantly visited the land and knew what the defendant was doing, but made no objection. Subsequently the plaintiff being anxious to obtain from the defendant an acknowledgment of his (the plaintiff's) title, induced (but without misrepresentation or fraud) the defendant to sign a rent-note. The Court found that although this rent-note was, in terms, a lease for one year, yet the intention of the parties was not that the defendant should at the expiration of the year, or on any subsequent demand, hand over to the plaintiff the land with the buildings which had been erected by the defendant with the plaintiff's implied consent, without being recouped for the expenditure thus incurred; that subsequently to the execution of the rent-note the defendant had erected other buildings and that the plaintiff knew of this, and made no objection.

Held, that the plaintiff could not recover possession of the land or require the removal of the buildings, without recouping the defendant the money he had expended. The plaintiff was estopped from denying the claim of defendant. He had stood by in silence while his tenant had spent money on his land. DATTATRAYA RAYAJI PAI v. SHRIDHAR NARAYAN PAI, 17 B. 736 ... 483

(17) Tenant's liability to pay cess imposed by an Act subsequent to the lease—Bombay Act III of 1869, s. 8—Local-fund cess—See ACT III OF 1869 (BOMBAY, LOCAL FUNDS), 17 B. 54.

(18) *Terms of tenancy proved orally although contained in a document—Compensation for buildings erected by tenant—Estoppel—Evidence—Practice—Procedure.*—The plaintiffs alleged that in 1866 the defendant's father had let land to their predecessor in title in perpetuity on fazendari tenure for building purposes, subject to a certain rent. They complained that the defendant sought to eject them, and they prayed for a declaration that they were entitled to the land in perpetuity subject only to payment of the yearly rent. In the event of its being held that they were not perpetual tenants, they prayed that the defendant might be ordered to pay them Rs. 7,000, the value of the buildings on the land. The plaintiffs made out a *prima facie* case without showing, or its being shown, that there was any agreement or lease. Before the case had concluded, however, a document was produced which was said to be a counterpart of the agreement of letting made in 1866. It was not registered, and was, therefore, inadmissible in evidence. It was not tendered, but it was shown to the defendant in cross-examination, and he denied that it was a genuine document.

Held, that the plaintiffs, having made out a *prima facie* case without betraying the existence of a written contract relating to the subject-matter of the suit, were not precluded from obtaining a decree even though it afterwards appeared that a written contract had been made. If the defendant intended to rely upon a written contract it was for him to produce it as part of his evidence. In the present case, as the document was not referred to in the plaint, written statement or issues and was not before the Court, the evidence should be looked at to ascertain the terms of the tenancy by which the plaintiffs and their predecessors in title held the property.

Where a landlord had not objected to buildings erected by his tenant for a period of twenty-five years, and during that time had received rent from the tenant.

Held, that even if the Court were not justified in holding that the land had originally been granted for building purposes, the landlord would be precluded from ejecting the tenant without compensation. YESHWADABAI v. RAMCHANDRA TUKARAM, 18 B. 66 ... 553

(19) See ENCROACHMENT, 17 B. 648.

(20) See PRACTICE, 17 B. 547.

Land Revenue.

(1) *Bombay Summary Settlement Act* (VII *of* 1863)—*Settlement under that Act is an agreement and subject to the law of contracts—Settlement made*

Land Revenue—(*Concluded*). PAGE

and sanad *issued under a mistake—Quit-rent paid by* inamdars *to Government under such settlement—Refund—Void agreement—Contract Act* (IX *of* 1872), *ss.* 20 *and* 65—Sanad—*Meaning and effect of.*—Under the Bombay Summary Settlement Act, VII of 1863, a settlement in respect of the village of Mankol was effected, in 1864, between the Government and the plaintiffs, who were the *inamdars*, and a *sanad* was granted to the plaintiffs, under the terms of which a certain yearly quit-rent was payable by them to Government in respect of the said village. At the time of the settlement the plaintiffs believed that they were the superior holders of all the lands in the village, including certain *wanta* lands. It subsequently appeared, however, that the *wanta* lands were the property of certain *girasias*, who were in possession as owners, and that the plaintiffs were not the holders of these lands within the meaning of s. 32 of Act VII of 1863. The Government, however, required the plaintiffs to pay the entire quit-rent of the village for the *Samvat* years 1939-40, as fixed by the *sanad*. The plaintiffs paid under protest and brought this suit to recover the amount (Rs. 400-12-6) paid in respect of the *wanta* lands.

Held, that the plaintiffs were entitled to a refund of the quit-rent paid in respect of the *wanta* lands.

A settlement under Act VII of 1863 (Bombay) is an agreement effected by proposal and acceptance (*see* s. 2), and is subject to the ordinary rules applicable to contracts. Here both parties entered into the settlement in the belief that the plaintiffs were the superior holders of all the lands in the village. There was, therefore, a common mistake as to a matter of fact which both parties must have regarded at the time as essential to the agreement, it being made so by the Act itself under which they assumed to contract. Such a mistake under s. 20 of the Contract Act (IX of 1872) renders the agreement void. The settlement as to the *wanta* lands might be treated as distinct from that which applied to the remaining lands of the village, the former being void, and the plaintiffs being, therefore, entitled to a refund of the quit-rent paid in respect of such lands under s. 65 of the Contract Act.

A *sanad* issued under Act VII of 1863 merely declares what by s. 6 of the Act is stated to be the effect of the settlement to which both the Government and the holders of the land have consented; but it is by virtue of the settlement itself, as provided by the Act, that Government are entitled to demand payment of such rent. SECRETARY OF STATE FOR INDIA v. SHETH JESHINGBHAI, 17 B. 407 ... 265

(2) See INAMDAR, 18 B. 525.

Lease.

(1) See LANDLORD AND TENANT, 17 B. 736; 18 B. 141, 256.

(2) See REGISTRATION, 18 B. 109, 355, 745.

(3) See STAMP, 18 B. 546.

Legislation.

See HABEAS CORPUS, 18 B. 636.

Legitimacy.

See CRIM. PRO. CODE (ACT X OF 1882), 18 B. 468.

Letters of Administration.

See SUCCESSION ACT (X OF 1865), 17 B. 689; 18 B. 337.

Letters Patent, 1865.

(1) Cl. 12—Adding a defendant in a suit where leave to sue under cl. 12 of the Letters Patent, 1865, was necessary—Alternative liability—Order to add new defendant—Appeal against such order by original defendant—Practice—See PRACTICE, 17 B. 466.

(2) Cl. 12—Dwell—Carry on business—Personally work for gain—Jurisdiction—See JURISDICTION, 18 B. 290.

(3) Cl. 12—Jurisdiction—Carrying on business—"Dwell"—See JURISDICTION, 18 B. 294.

Lex Fori.

See CRIM. PRO. CODE (ACT X OF 1882), 17 B. 369.

License.

PAGE

See EASEMENT, 18 B. 382.

Light and Air.

(1) Obstruction—Injunction or damages—Specific Relief Act I of 1877—Costs—Costs where lower Court grants an injunction and appeal Court refuses injunction, but awards damages—Easement—See EASEMENT, 18 B. 474.

(2) Severance of tenements by grantor—Implied grant—Implied reservation of easement—Derogation of grant—Reservation of easements of necessity—Injunction—Easements—Easements of necessity—Easement Act V of 1882, s. 13—See EASEMENT, 18 B. 616.

Limitation.

(1) *Acknowledgment—Stamp—Unstamped balance of account—Evidence—Stamp Act* I *of* 1879, *s.* 34.—Though an unstamped acknowledgment cannot be "acted upon" as an acknowledgment of a particular sum being due, still it may be used for the collateral purpose of showing an acknowledgment of an existing liability in respect of goods sold. FATECHAND HARCHAND v. KISAN, 18 B. 614 ... 913

(2) Adverse possession—Decree—Execution—Auction-purchaser—Symbolical possession—Judgment-debtors remaining in actual possession—Subsequent attempt by purchaser to take possession—Obstruction—Application to remove obstruction—Application converted into a suit under s. 331 of Civ. Pro. Code (XIV of 1882)—Limitation Act (XV of 1877), s. 3 and sch. II, arts. 138, 144 and 167—Civ. Pro. Code (XIV of 1882), ss. 328, 329 and 331—See EXECUTION OF DECREE, 18 B. 37.

(3) Adverse possession—Mortgage—Mortgagee in possession—Dispossession of mortgagee by trespasser—Adverse possession as against mortgagee when effectual also as against the mortgagor—Evidence—Burden of proof—Limitation Act (XV of 1877), sch. II, art. 144—See LIMITATION ACT (XV OF 1877), 18 B. 51.

(4) Civ. Pro. Code (Act XIV of 1882), s. 318—Purchaser at Court sale—Certificate of confirmation of sale—Application for possession of purchased property—Date of accrual of right to apply for possession—See CIV. PRO. CODE (ACT XIV OF 1882), 17 B. 228.

(5) Decree—Execution—Appeal—Appeal against part of decree—Decree affirmed in appeal—Decree to be executed is the appellate decree, and limitation runs from the date of that decree—See EXECUTION OF DECREE, 18 B. 203.

(6) *Deduction of time spent on proceedings in second suit—Limitation Act* (XV *of* 1877), *s.* 14—*Mamlatdar—Juri diction—Decree in possessory suit in Mamlatdar's Court—Execution of decree stayed by proceedings in Subordinate Judge's Court—Suit in Subordinate Judge's Court ultimately dismissed—Subsequent application to Mamlatdar for execution of decree in possessory suit—Jurisdiction of Mamlatdar to grant order for execution.*—A Mamlatdar having in a possessory suit passed a decree awarding possession of certain land to the applicant, the opponents instituted a suit in the Court of the First Class Subordinate Judge for a declaration that the land in question was their property, and for an injunction to restrain the applicant from obstructing them in the enjoyment of their rights. Owing to this suit, the Subordinate Judge stayed execution of the Mamlatdar's decree. The opponents' suit was subsequently dismissed by the Subordinate Judge, whose decree was ultimately confirmed by the High Court in second appeal. The applicant then applied to the Mamlatdar for the execution of his decree in the possessory suit. The Mamlatdar rejected the application, on the ground that the decree of the High Court in the civil suit prevented him from executing his decree.

Held, that the applicant was entitled to obtain from the Mamlatdar an order for the execution of his decree, unless it was barred by limitation. It was not barred, inasmuch as in computing the period of limitation allowance was to be made for the time during which the decree remained in abeyance by reason of the proceedings in the other suit. Section 14 of the Limitation Act (XV of 1877) applies to proceedings in execution. NAVALCHAND NEMCHAND v. AMICHAND TALAKCHAND, 18 B. 734 ... 998

(7) *Limitation Act* (XV *of* 1877), *s.* 5—*Review of judgment—Application for review—Sufficient cause for delay in filing an appeal.*—Though under

Limitation—(*Concluded*). PAGE

certain circumstances the presentation of application for review may be considered as sufficient cause for delay in filing an appeal, the appellant is bound to satisfy the Court that such circumstances did exist in his case, and that he had sufficient cause for not presenting the appeal within the prescribed period.

The plaintiff obtained a decree for possession of certain land in the Court of first instance. This decree was reversed by the appellate Court on 29th October, 1890. The plaintiff applied for a review of judgment of the appellate Court on 27th January, 1891. The petition of review was rejected on 18th March, 1891. Thereupon the plaintiff preferred a second appeal to the High Court on 13th April, 1891.

Held, that the second appeal was time-barred. The time taken in prosecuting the application for review could not be deducted in calculating the period of limitation, as the plaintiff had not shown that he had reasonable grounds for asking for a review. PUNDLIK v. ACHUT, 18 B. 84 ... 564

(8) Limitation Act (XV of 1877), s. 19—Acknowledgment—Manager of a joint Hindu family—His authority to acknowledge a family debt—Hindu law—Manager—See HINDU LAW (JOINT FAMILY), 17 B. 512.

(9) Limitation Act (XV of 1877), sch. II, arts. 91 and 144—Adverse possession—Manager during minority—See ADVERSE POSSESSION, 17 B. 755.

(10) Limitation Act (XV of 1877), sch. II, arts. 127, 144—Suit for possession of land alleging a previous partition—Partition—Co sharers—Adverse possession—Burden of proof—Evidence—See ADVERSE POSSESSION, 18 B. 513.

(11) Limitation Act (XV of 1877), sch. II, art. 164—Presidency Small Cause Court Act (XV of 1882), s. 37—Decree—*Ex parte* decree—Application to set aside *ex parte* decree—See ACT XV OF 1882 (PRESIDENCY SMALL CAUSE COURTS), 17 B. 507.

(12) Stale demand—Limitation Act (XV of 1877), s. 10—Company—Directors of company—Liability of directors for funds of company applied in transactions *ultra vires*—Dealing in shares of other companies. See COMPANY, 18 B. 119.

(13) See ACT III OF 1874 (BOMBAY HEREDITARY OFFICES), 17 B. 362.

(14) See ACT I OF 1880 (BOMBAY KHOTI SETTLEMENT), 18 B. 244.

(15) See CHARITY, 18 B. 551.

(16) See CIV. PRO. CODE (ACT XIV OF 1882), 17 B. 375.

(17) See COMPANY, 17 B. 469, 472.

(18) See HINDU LAW (JOINT FAMILY), 18 B. 505.

(19) See HINDU LAW (MAINTENANCE), 17 B. 45.

(20) See HINDU LAW (PARTITION), 18 B. 197.

(21) See LANDLORD AND TENANT, 18 B. 256.

(22) See LIMITATION ACT (IX OF 1871), 17 B. 173.

(23) See LIMITATION ACT (XV OF 1877), 17 B. 341; 18 B. 387, 586.

(24) See MAHOMEDAN LAW (WAKF), 18 B. 401.

(25) See MORTGAGE (REDEMPTION), 18 B. 755.

(26) See PARTIES, 17 B. 413.

(27) See PRACTICE, 17 B. 29.

(28) See VENDOR AND PURCHASER, 18 B. 48.

(29) See WATAN, 18 B. 22.

Limitation Act (XIV of 1859).

(1) See HINDU LAW (PARTITION), 18 B. 197.

(2) S. 1, cl. 15—See LIMITATION ACT (IX OF 1871), 17 B. 173.

Limitation Act (IX of 1871).

(1) See HINDU LAW (PARTITION), 18 B. 197.

(2) Sch. II, art. 15—See EXECUTION OF DECREE, 18 B. 260.

(3) Sch. II, art. 46—See LANDLORD AND TENANT, 18 B. 348.

Limitation Act (IX of 1871)—(*Concluded*).

PAGE

(4) *Art.* 148—*Acknowledgment—Acknowledgment by one of several mortgagees as agent for the others—Acknowledgment by one of several heirs of the mortgagee, not sufficient—Mortgage—Redemption—Limitation.*—Under art. 148 of the Limitation Act (IX of 1871), an acknowledgment of the mortgagor's title by one of several mortgagees as agent for the others is wholly ineffectual, and does not bind the rest. So, too, is an acknowledgment by one of several heirs of the original mortgagee without effect. The expression "some person claiming under him" in art. 148 of the Act means some person claiming under him the *entirety* of the mortgagee's rights.

The property in dispute was mortgaged by Hari Bhagti to the firm of Kasandas Bechardas in 1816. In 1830 Jagjivandas, one of the sons and heirs of Kasandas, who was then manager of the firm, on behalf of the whole family, sub-mortgaged the property in dispute to a third party, under a bond which recited the original mortgage by Hari Bhagti to Kasandas. In 1885 the defendant, who was a descendant of Kasandas, redeemed the sub-mortgage effected by Jagjivandas. In 1887 the plaintiff, having purchased the equity of redemption from Hari Bhagti's descendants, filed the present suit for redemption of the mortgage of 1816. The plaintiff relied on the acknowledgment made by Jagjivandas in 1830 as giving a fresh starting point to limitation.

Held, that the suit was barred by limitation. The acknowledgment by Jagjivandas, whether as manager of the firm or as one of the heirs of the original mortgagee, was not sufficient under art. 148 of the Limitation Act (IX of 1871). BHOGILAL v. AMRITLAL, 17 B. 173 ... 113

Limitation Act (XV of 1877).

(1) See HINDU LAW (PARTITION), 18 B. 197.

(2) See LANDLORD AND TENANT, 18 B. 348.

(3) S. 3 and sch. II, arts. 138, 144 and 167—See EXECUTION OF DECREE, 18 B. 37.

(4) S. 4—See ACT XXIII OF 1871 (PENSIONS), 17 B. 169.

(5) S. 5—Review of judgment—See LIMITATION, 18 B. 84.

(6) S. 10—See COMPANY, 18 B. 119.

(7) S. 10 and art. 120—See CHARITY, 18 B. 551.

(8) S. 14—See LIMITATION, 18 B. 734.

(9) *S.* 18—*Limitation—Application of s.* 18, *Act* XV, *of* 1877—*Knowledge kept from the Official Assignee* (XI *and* XII *Vic.*, *c.* 21), *of his right to sue for an account of assets fraudulently transferred by an insolvent—Burden of proving when first the plaintiff had clear and definite knowledge—Party for purpose of discovery—Ss.* 13 *and* 43, *Civ Pro. Code* (XIV *of* 1882)—*Account.*—In order to make limitation operate when a fraud has been committed by one who has obtained property thereby, it is for him to show that the injured complainant has had clear and definite knowledge of the facts, constituting the fraud, at a time which is too remote for the suit to be brought. Suggestion of his having been defrauded does not amount to such knowledge as is required by s. 18 of the Indian Limitation Act (XV of 1877).

In a suit brought by the Official Assignee in 1887 it was established that the defendant receiving in 1859, upon a voluntary transfer, some of the insolvent's assets, joined and assisted him in defrauding his creditors; and that no disclosure of this fraud was made to the Official Assignee, while the defendant did what he could to prevent the latter from seeing the accounts of the assets transferred.

Held, that the burden of proof was on the defendant to show that the plaintiff had clear and definite knowledge of this fraud for more than the period of limitation. This burden had not been discharged by proof of the fact that some hints and clues had reached the Official Assignee which might have led to such knowledge: and *held*, that the Official Assignee had been kept from knowledge of his right to sue, within the meaning of s. 18 of the Limitation Act. ...

Also, this defendant having been "made a party," but only "for the purpose of discovery," to a prior suit brought by the plaintiff, according to an order in that suit, in which, however, there was no decree against him as a party, and no order as to his costs:

PAGE

Limitation Act (XV of 1877)—(*Continued*).

Held, that this irregular proceeding had not rendered him a party to that suit so as to make applicable either s 13 or 43 of the Civ. Pro. Code (Act XIV of 1882).

A decree that the defendant should account to the Official Assignee for the assets received by him from the insolvent, after the date of the insolvency, was affirmed. RAHIMBHOY HABIBBHOY v. C. A. TURNER, 17 B. 341 (P.C.) = 20 I.A. 1 = 6 Sar. P.C.J. 256 = 17 Ind. Jur. 40 ... 222

(10) S. 19—Acknowledgment—See HINDU LAW (JOINT FAMILY), 17 B. 512.

(11) *S.* 19—*Limitation—Acknowledgment—Signing, what amounts to.*—Certain letters admitting a debt were written by the authority of the debtor, who was a desai. The only words, however, of the letter which were actually in his own handwriting were the words "*guru samarth*" (the exalted preceptor is strong) at the beginning of each letter and the words "*kalave, bahut kay lihine, lobh karava hi vinanti*" (let this be known. What more need be written. Keep regard; this is the representation) at the end. It was proved by evidence that this was the usual mode of signing and authenticating letters and informal documents among the class to which the defendant belonged.

Held, that, by analogy, the writing of specified words by desais at the top and bottom of letters, which was shown to be the usual way, amongst persons of that class, of authenticating letters, was a "signing" within s. 19 of the Limitation Act (XV of 1877) and that the letter was a valid acknowledgment.

The ground upon which it is held that the mark of an illiterate debtor is a sufficient signature, is that the signing in such a manner as is usually adopted by the debtor with the view of showing that he intends to be bound by the document, renders the document effective as an acknowledgment under the section. Whether the circumstance of the debtor not signing his name, is the result of necessity as in the case of an illiterate debtor, or of custom as in the case of a class of debtors having a special status in the community can be of no importance. GANGADHARRAO VENKATESH v. SHIDRAMAPA BALAPA DESAI, 18 B. 586 ... 899

(12) S. 21—See LIMITATION ACT (IX OF 1871), 17 B. 173.

(13) S. 22—See PARTIES, 17 B. 413.

(14) S. 26—See EASEMENT, 18 B. 616.

(15) S. 28—See MATH, 18 B. 507.

(16) Sch. II, art. 11—See CIV. PRO. CODE (ACT XIV OF 1882), 17 B. 629.

(17) Sch. II, art. 11—See EXECUTION OF DECREE, 18 B. 260.

(18) Sch. II, art. 14—See ACT I OF 1880 (BOMBAY KHOTI SETTLEMENT), 18 B. 244.

(19) Sch. II, art. 30—See RAILWAY COMPANY, 17 B. 723.

(20) Sch. II, arts. 90 and 144—See ADVERSE POSSESSION, 17 B. 755.

(21) Sch. II, art. 120 - See MAHOMEDAN LAW (WAKF), 18 B. 401.

(22) Sch. II, arts. 127, 144—See ADVERSE POSSESSION, 18 B. 513.

(23) Sch. II, art. 132—See VENDOR AND PURCHASER, 18 B. 48.

(24) *Sch.* II, *art.* 134—*Mortgage—Sub-mortgage—Redemption—Limitation.*—In 1864 Ramji mortgaged the property in dispute with possession to Raghu. Raghu and his widow after his death sub-mortgaged various portions of it to Savalaram (defendant No. 3) in 1864, 1866 and 1870. After the death of the mortgagor, Ramji, his grandsons (plaintiffs Nos. 1, 2 and 3) sold their equity of redemption to plaintiffs Nos. 4 and 5, and in 1891 the five plaintiffs sued defendants Nos. 1 and 2, the heirs of Raghu (original mortgagee) and the sub-mortgagee (defendant No. 3) for redemption and possession. The defendants contended that the suit was barred by the Limitation Act (XV of 1877), sch. II, art. 134.

Held, that art. 134 did not apply as the language of the sub-mortgage-deed showed that the transaction was merely a mortgage of the mortgage interest of Raghu and not of the entire property in the land. SAVALARAM v. GENU, 18 B. 387 ... 766

(25) Sch. II, art. 141—Reversioner—Adverse possession—See ADVERSE POSSESSION, 18 B. 216.

Limitation Act (XV of 1877)—(*Concluded*).

PAGE

(26) *Sch.* II, *art.* 144—*Adverse possession—Mortgage—Mortgagee in possession—Dispossession of mortgagee by trespasser—Adverse possession as against mortgagee when effectual also as against the mortgagor—Evidence—Burden of proof.*—Land was mortgaged with possession to A, father-in-law of defendant No. 1, in 1828. In 1856 A was ousted from possession by B, a trespasser (defendant No. 2) who subsequently held the land and dealt with it as his own for forty years. The mortgagor sued both A and B for redemption. In appeal, it was contended by B that his possession had been adverse not merely to A (the mortgagee), but also to the plaintiff (the mortgagor), and that the suit was barred by limitation. The plaintiff contended that B's possession was not adverse to him, because he as mortgagor had no right to possession during the term of the mortgage.

Held, that the suit fell under art. 144 of sch. 2 of the Limitation Act (XV of 1877), and that it lay upon B to prove that his possession for twelve years prior to the suit was adverse to the plaintiff (the mortgagor). There may be a possession adverse to the interest of a mortgagee which nevertheless is not adverse to the interest of the mortgagor. In such a case a suit by the mortgagor, or those claiming under him, will not be barred, although one by the mortgagee may be. The case was remanded for a finding on the question of when B's possession became adverse to the plaintiff. CHINTO v. JANKI, 18 B. 51 ... 542

(27) Sch. II, art. 164—See ACT XV OF 1882 (PRESIDENCY SMALL CAUSE COURT), 17 B. 507.

(28) Sch. II, art. 178—Watandars Act (Bom. III of 1874), s. 10—Certificate issued by Collector more than twelve years after death of last holder—Court bound to act on certificate—Limitation—See ACT III OF 1874 (BOMBAY HEREDITARY OFFICES), 17 B. 362.

Liquidated Damages.

See INTEREST, 17 B. 166.

Liquidator.

See COMPANY, 17 B. 469, 472.

Local Fund Cess.

See ACT III OF 1869 (BOMBAY LOCAL FUNDS), 17 B. 422.

Local Funds.

See ACT III OF 1869 (BOMBAY LOCAL FUNDS), 17 B. 54.

Local Usage.

See LANDLORD AND TENANT, 18 B. 433.

Loss of Goods.

See RAILWAY COMPANY, 17 B. 723.

Mahomedan Law.

1.—GENERAL.
2.—CUSTOM.
3.—WAKF.
4.—WILL.

——1.—General.

See HINDU LAW (GENERAL), 18 B. 227.

——2.—Custom.

Kazi, Office of—Hereditary office—Watan—Watandars Act (Bombay Act III of 1874), s. 9—Mortgage—See KAZI, 18 B. 103.

——3.—Wakf.

(1) *Mosque—Charity—Suit against Directors or Mushavirs of a mosque—Liability of directors—Board of directors not properly constituted under the rules of the mosque—Liability of directors for acts done by Board not properly constituted—Appointment of officers—Management of property—Liability of provisional committee assuming authority to act—Trustees—Limitation—Kazi—Act* II *of* 1864 *and Bombay Act* IV *of* 1864—*Nazir of mosque, liability of—Parties to suit against trustees of mosque—Practice.*—A certain Mahomedan

Mahomedan Law—3.—Wakf—(*Continued*).

mosque in Bombay, known as the Juma Masjid, was possessed of considerable property. The administration of the mosque and its property was carried on under rules which had been drawn up and approved in the year 1834 at a special general meeting of the Jamat convened for the purpose in the course of a suit which had been filed in the Supreme Court against the then Mushavirs of the mosque. That suit was referred to the Master to make certain enquiries, and in his report these rules were set out in full. His report was confirmed by the Court. The rules provided that the mosque and its property should be managed by the Kazi of Bombay and ten Mushavirs, and that a Nazir should be appointed by them, and be subject to their control. The rules also prescribed the various duties of the Kazi, Mushavirs and Nazir and declared that the power of filling up vacancies should be exercised by the Kazi and Mushavirs collectively or by the Kazi and an absolute majority of the Mushavirs.

In 1834 and for many years subsequently there was, as there had always been, a "Kazi of Bombay" appointed under a *sanad* from Government. He held the appointment for life, and the office was not hereditary. In 1866 the then Kazi of Bombay died, but in consequence of the provisions of Act II of 1864 and Bombay Act IV of 1864 the Government made no new appointment, and the office lapsed. One Mahomed Husain Murgay, however, assumed the office and was generally accepted by the community as Kazi of Bombay. He died in 1878, and upon his death, rival claimants sought the office of Kazi of Bombay.

The Mushavirs were then advised that they could not select one of the rival Kazis to fill the office of Kazi of Bombay under the rules, and they, therefore, continued to manage the mosque without a Kazi in violation of the rules of 1834. Two of the Mushavirs (now relators) were of opinion that one of the rival applicants for the position should be appointed Kazi, and as their wishes were not acceded to, they ceased to attend the Board, and as far as possible, while retaining their offices, they thwarted the action of the other Mushavirs. Subsequently in 1878 other vacancies occurred in the Board. In 1888 the number of Mushavirs was reduced to six, and two of them (the relators) as above stated, took no part in the administration, so that the management was left in the hands of the first four defendants. In 1891 four new Mushavirs (defendants Nos. 6 to 9) were elected, and in that year the Advocate-General at the relation of the two dissatisfied Mushavirs filed this suit against the Mushavirs. The former Nazir of the Masjid was also made a defendant (No. 5). He had held the office of Nazir from 1879 to 1891 when he resigned. The plaint set forth the irregularities which had taken place in the management in 1879, and prayed for the removal of the defendants (other than defendant No. 5) from the position of directors or Mushavirs and for an account against all the defendants, and for a scheme, &c. The following were the principal charges made against the defendants in the plaint and at the hearing:—

1. The neglect to take steps to supply the place of the Kazi and the failure to keep up the proper number of the Mushavirs.

Held, as to this, that subsequently to 1878 the Mushavirs had no authority under the rules of 1834 to fill up vacancies as they occurred or to carry on the government of the masjid. Since that year the Mushavirs were a provisional committee of management kept up from time to time by co-operation tacitly permitted by the Jamat to manage the affairs of the masjid until the original constitution could be restored or legally changed, that original constitution being for the time in abeyance.

2. The improper appointment in 1879 of one Mahomed Cassum Curtay (defendant No. 5) as Nazir.

Held, that the Mushavirs incurred no liability and deserved no censure for so doing.

3. The neglect to call for an annual account of the income and expenditure of the mosque under r. 6.

Held, that this charge was not proved.

4. The neglect to purchase properties with the surplus income of the mosque as required by r. 4.

Mahomedan Law—3.—Wakf—(*Continued*). PAGE

Upon this point it was contended that the defendants should be charged with interest on the uninvested funds, so as to make up for the loss of rents which would have been recovered if properties had been purchased. In answer to this claim it was argued (1st) that, under the circumstances, the Mushavirs had no power to expend the funds of the mosque in purchasing property, and (2) that the claim was barred by limitation.

Held, that the claim fell within art. 120 of the schedule to the Limitation Act (XV of 1877), and was barred except as to six years prior to the filing of the suit, but even as to this period the Court refused to order accounts to be taken against the defendants. There had been no dishonesty or improper dealing with the funds of the mosque. The highest at which the case could be put was that there had been error of judgment. In this the community had acquiesced. Moreover, the position of the parties had changed. Some of the Mushavirs were dead, others had resigned and were not defendants to the suit, and it would be difficult to enforce contribution against them. The Court was further of opinion that, in any case, it was very doubtful whether a provisional committee like the Mushavirs would have been justified in assuming the power of purchasing property. Had the property fallen in value, the purchase might perhaps have been repudiated.

5. Their neglect in not detecting sums appropriated by the bill-collectors of the mosque and getting in the same.

Held, that as a provisional committee who had assumed the management of the masjid, the defendants were bound to protect its interests. Of the money which they actually received, or which was paid in to their account, they were actual trustees, but in addition to this they were officers of the masjid charged with the specific duty of superintending the Nazir and his accounts, and if the masjid had suffered loss by their neglect of duty, they were answerable for it. They neglected to examine the books, a cursory audit of which would have detected the defalcations of the bill-collectors. The Court, therefore, directed an account against them of the rents actually received, or which but for their wilful default or neglect they might have received from the bill-collectors.

6. Their neglect in allowing arrears of rent to accumulate and to be lost to the masjid.

Held, it was not the duty of the Mushavirs to look into the account of each individual tenant. Under the rules the Nazir, and not the Mushavirs, was entrusted with the collection of rents, and it was his duty to see that the rents were not allowed to fall unduly into arrear. It was not shown that, except at an exceptional time when the Nazir was ill, the rents were so much in arrear as to call for the active interference of the Mushavirs, or that the masjid had suffered undue loss under this head. The Court, therefore, refused relief on this charge.

7. The non-payment into the Bank of sums in the hands of the Nazir when they exceeded Rs. 500.

Held, that the spirit of the rules had been complied with and no loss had been shown.

Defendant No. 5, as above stated, had acted as Nazir of the masjid from 1879 to July, 1891, when he resigned. Under the rules (see rr. 2 and 7) he was appointed by the directors and was under their orders and was removable at their pleasure. it was contended at the hearing that he was not a proper party to the suit, being merely the agent or servant of the directors and not a trustee.

Held, that he was properly made a defendant. Both under Mahomedan law and under the rules the Nazir was a public officer in charge of the mosque, and as such liable to account to the community. ADVOCATE-GENERAL OF BOMBAY v. MOULVI ABDUL KADIR JITAKER, 18 B. 401... 776

(2) *Settlement—Will—Invalidity of attempted settlement purporting to constitute a* wakf—*Document not establishing a trust for a religious or charitable purpose, at some time, invalid as a* wakfnama.—A *wakfnama* to be valid must be a substantial dedication of property to a religious or charitable purpose at some time or other.

Mahomedan Law—3.—Wakf—(*Concluded*). PAGE

Where a *wakfnama* purported to make a settlement on heirs, the settlor's intention having been to make the whole estate devolve from one generation to another, without being alienable by them, and without being liable in execution against them.

Held, that the instrument could neither be maintained as establishing a *wakf*, nor as a settlement: also, that it could not be supported as a will, not having been validated by consent of heirs, as to two-thirds of the succession; and that, even if it could have been dealt with as a will, the above provision would have been void. ABDUL GAFUR v. NIZAMUDIN, 17 B. 1 (P.C.)=19 I.A. 170=6 Sar. P.C.J. 238 ... 1

———4.—Will.

Wakf—Settlement—Will—Invalidity of attempted settlement purporting to constitute a wakf—Document not establishing a trust for a religious or charitable purpose, at some time, invalid as a Wakfnama—See MAHOMEDAN LAW (WAKF), 17 B. 1.

Maintenance.

Illegitimate children—Right of a married woman to claim maintenance for her illegitimate children—Crim. Pro. Code (X of 1882), s. 488—See CRIM. PRO. CODE (ACT X OF 1882), 18 B. 468.

Mamlatdar.

(1) Jurisdiction—Decree in possessory suit in Mamlatdar's Court—Execution of decree stayed by proceedings in Subordinate Judge's Court—Suit in Subordinate Judge's Court ultimately dismissed—Subsequent application to Mamlatdar for execution of decree in possessory suit—Jurisdiction of Mamlatdar to grant order for execution—Limitation—Deduction of time spent on proceedings in second suit—Limitation Act (XV of 1877), s. 14—See LIMITATION, 18 B. 734.

(2) See ACT III OF 1876 (BOMBAY MAMLATDARS COURTS), 17 B. 645; 18 B. 449.

(3) See CRIM. PRO. CODE (ACT X OF 1882), 18 B. 380.

(4) See LAND ACQUISITION ACT (X OF 1870), 17 B. 299.

(5) See LANDLORD AND TENANT, 18 B. 348.

Manager.

(1) Decree against manager—Execution sale—Questions for Court to decide in determining the quantum of interest which passes to the auction-purchaser—Hindu Law—Joint Family—Family debt—Liability of family property—See HINDU LAW (JOINT FAMILY), 18 B. 147.

(2) Gift—Gift by manager of part of family property—Manager—Joint family—Hindu law—Illegitimate daughters—See HINDU LAW (JOINT FAMILY), 18 B. 177.

(3) Hindu law—Manager—Limitation Act (XV of 1877), s. 19—Acknowledgment—Manager of a joint Hindu family—His authority to acknowledge a family debt—See HINDU LAW (JOINT FAMILY), 17 B. 512.

(4) Liability of manager to account on occasion of partition—Right of members who were minors at time of management to an account from manager—Manager also guardian of minors—Nature of account to be rendered by a manager on partition—Family idol and property appertaining thereto goes on partition to senior member of family—Right of mother to a share of estate on partition—Hindu Law—Partition—See HINDU LAW (PARTITION), 17 B. 271.

(5) Loan to manager—Family purpose—Presumption—Evidence—Burden of proof—Hindu law—Joint family—See PRACTICE, 18 B. 520.

(6) Widow—Minor sons—Sale by widow of immoveable property left by husband—Family necessity—Minor sons bound by sale—Deed of sale—Effect of conveyance how ascertained—Hindu Law—Joint family—See HINDU LAW (WIDOW), 18 B. 631.

(7) See CIV. PRO. CODE (ACT XIV OF 1882), 18 B. 522.

(8) See LANDLORD AND TENANT, 18 B. 141.

(9) See MATH, 18 B. 507.

(10) See PARTIES, 17 B. 413.

Marriage.

PAGE

See HUSBAND AND WIFE, 17 B. 400.

Married Woman.

See CRIM. PRO. CODE (ACT X OF 1882), 18 B. 468.

Material Irregularity.

See PRACTICE, 18 B. 606.

Math.

Manager—Land appertaining to math—*Sale of* "miras malki" *(ownership of* miras *tenure)*—Miras *tenure—Mirasdar on inam estate, position of —Adverse possession—Limitation Act* (XV *of* 1877), *s.* 28—*Right to recover rent—Construction.*—In 1860, Krishnaji, the manager of a *math*, sold to Baxarbhai the "*miras malki*" (ownership of *miras* tenure) of certain lands appertaining to the *math*, subject to the payment of assessment. Krishnaji died in the same year and was succeeded by Ramkrishna as manager. In 1864 Ramkrishna sued Baxarbhai to set aside the sale. The suit was dismissed in 1865, and Baxarbhai's *miras* right was confirmed. In 1871 one Gopal obtained a decree declaring him to be the legal manager of the *math* and removing Ramkrishna, who was held to have had no title to the office.

In 1887 the plaintiff, who succeeded Gopal in the management of the *math*, brought the present suit against the defendant, who was the vendee of Baxarbhai, to recover possession of the lands or to recover assessment for three years previous to the suit. The defendant pleaded that the suit was barred by limitation.

The plaintiff contended that as there was no lawful manager between 1860 and 1875, that period ought to be omitted in computing the period of limitation, and that as under the deed of sale to Baxarbhai the vendee became a tenant, the possession of the vendee and of the defendant could not be adverse.

Held, that if defendant's possession was adverse to the ownership of the *math* during twelve years after Krishnaji's death, the operation of the law of limitation would not be affected by the fact that there was no legal manager during that time.

Held, further, that in the Bombay Presidency the mirasdar on *inam* estates is only "a tenant at quit-rent or at a reasonable rent not subject to ejectment so long as he pays it", and as there was nothing in the sale-deed passed by Krishnaji to Baxarbhai which required a different construction to be put on the *miras* tenure created by it, Baxarbhai's possession under it could not be adverse to the *math* until there was an assertion by the grantee of his claim to be a permanent tenant, up to which time he would, in the eye of the law, be regarded as a tenant-at-will. But the suit brought by Ramkrishna in 1864 showed that Baxarbhai was then asserting his *mirasi* right, and as more than twelve years had elapsed between that date and the bringing of the present suit, the plaintiff's right as representing the *math* to recover immediate possession was barred.

Held, further, that the plaintiff's right to recover three years' arrears of rent as reserved by the *mirasi* grant was not affected, as the effect of s. 28 of the Limitation Act (XV of 1877) was to extinguish the plaintiff's right as claimed by him to treat the grant as null and void. VITHALBOWA v. NARAYAN DAJI THITE, 18 B. 507 ... 847

Maxim.

Jus accres-cendi inter contractor's lo-cum non habet nisi aliter in contractu expressum—See PARTNERSHIP, 17 B. 6.

Memorandum of Association.

See COMPANY, 17 B. 472.

Mesne Profits.

(1) See EXECUTION OF DECREE, 17 B. 35.

(2) See STAMP, 17 B. 41.

Minor. PAGE

(1) Guardian—Appointment of guardian by will—Application for certificate of guardianship—Practice—Procedure—Guardian and Wards Act (VIII of 1890), ss. 7 (cl. 3), 13 and 48—See ACT VIII OF 1890 (GUARDIAN AND WARDS), 17 B. 560.

(2) Removal of guardian—"Instrument"—Construction—Act VIII of 1890—Guardian and Ward—See ACT VIII OF 1890 (GUARDIAN AND WARDS), 18 B. 375.

(3) See ADVERSE POSSESSION, 17 B. 755.

(4) See HINDU LAW (PARTITION), 18 B. 197.

(5) See HINDU LAW (WIDOW), 18 B. 631.

(6) See HUSBAND AND WIFE, 18 B. 366.

(7) See LAND ACQUISITION ACT (X OF 1870), 17 B. 299.

Miras Tenure.

(1) Math—Manager—Land appertaining to math—Sale of "miras malki" (ownership of miras tenure)—Mirasdar on inam estates, position of—Adverse possession—Limitation Act (XV of 1877), s. 28—Right to recover rent—Construction—See MATH, 18 B. 507.

(2) See LANDLORD AND TENANT, 18 B. 690.

Misconduct.

See ARBITRATION, 18 B. 299.

Money Bond.

See STAMP, 17 B. 687.

Money Decree.

See MORTGAGE (PRIORITY), 18 B. 684.

Mortgage.

1.—GENERAL.
2.—EQUITY OF REDEMPTION.
3.—FORECLOSURE.
4.—MARSHALLING.
5.—MERGER.
6.—PRIORITY.
7.—REDEMPTION.
8.—SALE.
9.—SIMPLE.
10.—SIMPLE MORTGAGE, USUFRUCTUARY.

——1.—General.

(1) Decree on mortgage—Sale in execution—Claim on property ordered to be sold under a mortgage decree—Civ. Pro. Code (Act XIV of 1882), ss. 278 and 287—Jurisdiction—See CIV. PRO. CODE (ACT XIV OF 1882), 18 B. 98.

(2) Mortgagee in possession—Adverse possession—Dispossession of mortgagee by trespasser—Adverse possession as against mortgagee when effectual also as against the mortgagor—Evidence—Burden of proof—Limitation Act (XV of 1877), sch. II of art. 144—See LIMITATION ACT (XV OF 1877), 18 B. 51.

(3) Sale in execution of decree on mortgage—Suit for possession by assignee of purchaser at such sale—Consent of khot to alienation—See KHOTI LANDS, 17 B. 677.

(4) *Sale of property subject to a mortgage in execution of a money decree obtained by plaintiff against mortgagor—Subsequent mortgage of same property by original mortgagor and first mortgagee paid off—Possession taken by new mortgagee—Suit for possession by plaintiff as purchaser in execution—Right of purchaser to recover—Right of second mortgagee to be repaid his advances by plaintiff keeping alive the first mortgage*—On the 10th June, 1885, Tikaram mortgaged the property in dispute to Ganpat along with some other property. In 1886 the plaintiff obtained a money decree against Tikaram, and in execution of his decree he sold the property in dispute and obtained a certificate of sale on the 1st November, 1886.

Mortgage—1.—General—(*Concluded*). PAGE

On the 13th February, 1888, Tikaram mortgaged the property in dispute along with other property to the defendant and paid off Ganpat's mortgage. Ganpat thereupon returned the mortgage-deed to Tikaram with a receipt for payment endorsed. After payment of Ganpat's mortgage the defendant took possession of the property. In July, 1888, Tikaram executed a further mortgage of the property to the defendant for Rs. 8,000.

On the 30th August, 1888, the plaintiff having attempted to take possession was obstructed by the defendant. Thereupon the plaintiff brought this suit for possession.

Held, that the plaintiff was entitled to possession. The mortgage to the defendant was subsequent to the plaintiff's purchase of the equity of redemption. The defendant did not know of that purchase. He took the mortgage from Tikaram, to whom he advanced the money to pay off the previous mortgage to Ganpat. There was nothing to show that there was any intention to keep Ganpat's mortgage alive in favour of the defendant.

Held, also, that as plaintiff was seeking to recover property which but for the defendant's payment to Ganpat would have been burdened with Ganpat's mortgage, and as the defendant when he advanced the money to Tikaram to pay off that mortgage did not know that Tikaram was no longer the owner of the equity of redemption, the plaintiff should give credit to the defendant for the sum paid by him; but as the defendant's mortgage comprised other properties besides the one in dispute, the plaintiff should recover possession on payment to the defendant of a proportionate part of Ganpat's mortgage-debt, having regard to the value of the property in dispute and that of the other mortgaged properties. LOMBA GOMAJI v. VISHVANATH AMRIT TILVANKAR, 18 B. 86 ... 566

(5) See BHAG, 18 B. 283.

(6) See CIV. PRO. CODE (ACT XIV OF 1882), 17 B. 570; 18 B. 522.

(7) See EASEMENT, 18 B. 382.

(8) See HINDU LAW (MAINTENANCE), 18 B. 679.

(9) See REGISTRATION, 17 B. 235.

(10) See RES JUDICATA, 17 B. 562.

(11) See STAMP, 18 B. 175.

(12) See WATAN, 18 B. 22.

———2.—Equity of Redemption.

(1) See ACT XVII OF 1879 (DEKKHAN AGRICULTURISTS' RELIEF), 18 B. 739.

(2) See LANDLORD AND TENANT, 18 B. 348.

(3) See MORTGAGE (REDEMPTION), 17 B. 365.

———3.—Foreclosure.

See STAMP, 18 B. 696.

——— 4.—Marshalling.

Marshalling of securities—Notice of prior mortgage to subsequent mortgagee—Doctrine of marshalling applicable to mortgages in the Mofussil.—Before the extension of the Transfer of Property Act, 1882, to the Bombay Presidency, where two properties had been mortgaged to one person, and one of them was subsequently mortgaged to another person with notice of the former mortgage.

Held, such subsequent mortgagee had an equity to call for a marshalling of the securities in his favour so as to require the first mortgagee to proceed to realise his security in the first instance out of the property not mortgaged to the second mortgagee. (*Jardine, J., Diss.*).

The English doctrine of marshalling of securities applies to mortgages in the Mofussil. CHUNILAL VITHALDAS v. FULCHAND, 18 B. 160 ... 615

———5.—Merger.

See LANDLORD AND TENANT, 18 B. 348.

———6.—Priority.

(1) *Registration—Notice—Possession of title-deeds—Mortgagor allowed by first mortgagee to retain title-deeds—Subsequent mortgage to second mortgagee*

Mortgage—6.—Priority—(*Concluded*). PAGE

and title-deeds transferred—Plea by second mortgagee of no notice of first mortgage—Registration of first mortgage equivalent to notice.—A mortgaged land to B by a mortgage duly registered. A subsequently got back the title-deeds and handed them to C, to whom he mortgaged the same property. B sued C (the second mortgagee) for a declaration of priority. The lower Court found that B had not been guilty of fraud or negligence in parting with the title-deeds.

Held, that B, as first mortgagee, was entitled to priority. The registration of his mortgage was notice to C, and there was no misrepresentation by B which would relieve C, as subsequent mortgagee, of the duty of inquiry, or destroy the effect of such constructive notice. BALMAKUNDAS ATMARAM v. MOTI NARAYAN, 18 B. 444 ... 805

(2) *Suit on registered mortgage—Execution—Sale—Proceeds of sale how applied—Priority—Unregistered mortgage—Money-decree—Priority of holder of unregistered mortgage to holder of money-decree—Incumbrances—Transfer of Property Act* (IV *of* 1882), *s.* 97.—The plaintiff Padmanabh held a mortgage of certain land belonging to the first defendant. The mortgage was not registered. The second defendant, Marpal, was a mortgagee of the same land under a mortgage which was subsequent in date but was duly registered. Marpal obtained a decree upon this latter mortgage and applied in execution for sale of the land. The plaintiff intervened, but his claim was rejected on the ground that Marpal's mortgage was registered and had priority to his mortgage, which was not registered. The land was sold by auction to Ramchandra (defendant No. 4) and the proceeds of the sale were partly applied in satisfaction of Marpal's claim, and a further sum of Rs. 164 was paid to one Santapa (defendant No. 3), who had obtained a money-decree against the mortgagor (defendant No. 1). A balance of Rs. 103-8-11 was paid into Court and subsequently returned to defendant No. 1 (the mortgagor). The plaintiff Padmanabh now sued for payment of his mortgage-debt out of the proceeds of sale or from the defendants. The lower Court held that defendant No. 3 (Santapa) could not be called upon to refund the money which had been paid to him out of the proceeds, and that the plaintiff had a cause of action only against the mortgagor (defendant No. 1) not merely for the balance of Rs. 103-8-11, but for the whole of his claim. On appeal to the High Court.

Held, that the claim of the plaintiff in virtue of his mortgage although unregistered was prior to that of the third defendant (Santapa) under his money-decree. The plaintiff's earlier mortgage was postponed to that of Marpal, because it was not registered, but the plaintiff had the right of a second mortgagee over the balance in virtue of his mortgage. The proceeds of the sale after satisfying the first incumbrancer (Marpal) became payable first to the other incumbrancers, if any, and then to the mortgagor (defendant No. 1). The judgment-creditor (defendant No. 3) could only take any balance that remained subject to the equitable right of the plaintiff. PADMANABH BOMESHENVI v. KHEMU KOMAR NAIK, 18 B. 684 ... 965

(3) See REGISTRATION, 18 B. 332.

——7.—Redemption.

(1) Jurisdiction—Revenue Jurisdiction Act (X of 1876), s. 4 (*c*)—Suit for redemption—Sale of mortgaged land by Native Chief for arrears of assessment—Purchaser at sale—Claim by purchaser against mortgagor and mortgagee—See JURISDICTION, 17 B. 681.

(2) *Mortgage to a firm—Subsequent mortgage to one member of the firm for personal loan, with stipulation for payment of new debt before prior mortgage-debt—Right to redeem first mortgage independently of later mortgage.*—On the 13th July, 1877, a firm, of which defendants Nos. 1 to 4 were members, lent money to Nathu Narbheram on mortgage of certain property. Subsequently defendant No. 2 personally made a further loan to Nathu, who executed two *san* mortgage-deeds to him of the same property containing stipulations that these bonds should be paid before the mortgage of July, 1877. Nathu died, and his widow and heir assigned the equity of redemption of the mortgage of July, 1877, to the plaintiff, who

Mortgage—7.—Redemption—(*Continued*). PAGE

sued the defendants to redeem. The defendants contended that the plaintiff was bound to pay off the two later bonds as well as the original mortgage-debt.

Held, that the later loan by defendant No. 2 being a personal loan by him, the firm, as such, had no equity to insist on its being paid before the mortgage was redeemed, whatever right defendant No. 2 in his personal capacity might have. But in this suit, which was one to redeem the mortgage, he was a party as member of the firm, and not in his individual capacity, and he could not, therefore, resist the plaintiff's right to redeem on any ground based on the promise of the two bonds executed to himself. CHHOTALAL GOVINDRAM v. MATHUR KEVALRAM, 18 B. 591 ... 903

(3) *Redemption suit—Costs due by mortgagee to mortgagor—Set-off against the mortgage-debt — Balance remaining due to mortgagor—Liability of mortgagee—Civ. Pro. Code* (XIV *of* 1882), s. 221.—The mortgagor is entitled to set-off or deduct the amount of costs payable to him under the decree against or from the mortgage debt payable by him. If the amount of the costs be larger than the mortgage-debt, the mortgagor is entitled to obtain possession at once of the mortgaged property and to recover the balance against the mortgagee. SIDU v. BALI, 17 B. 32 ... 21

(4) *Right to redeem made conditional on payment by mortgagor of another debt as well as mortgage-debt—Effect of that other debt becoming barred by limitation—Right to redeem mortgage still subject to condition.*—A mortgage bond contained a clause stipulating that the mortgagors were not to redeem the mortgaged property without paying not merely the amount of the mortgage-debt and interest, but also the amount due on a certain bond executed at the same time as the mortgage in respect of money due under a decree, and that "unless the whole was paid off, neither the mortgagor nor any one else should have a claim."

The mortgagee subsequently obtained a decree on the instalment bond and made several attempts to execute it, but failed, his *darkhast* being eventually rejected as time-barred.

Held, that the right of redemption was made conditional on the payment of what was due on the instalment bond—a condition which was unsatisfied as long as such sum remained unpaid, although in contemplation of law there might be no longer a bond debt stili in existence owing to a decree having been passed on the bond, and that decree having become barred by limitation. SUNDER MALHAR PATEL v. BAPUJI SRIDHAR, ... 1013
18 B. 755

(5) *Sale by mortgagee—Notice of sale—Subsequent mortgage of same property—Notice of sale to mortgagors—Notice of sale to subsequent mortgagees—Delay in selling—Rescission of notice of sale—Suit by second mortgagee to present sale—Offer to redeem joint mortgage—Right of mortgagee to sell mortgaged property.*—Certain property was mortgaged to the defendants in 1885 for Rs. 60,000, and the mortgage-deed contained the usual power of sale on notice to the mortgagors or their assigns. The debt was not paid, and the defendants on the 31st August, 1891, gave notice of sale to the mortgagors, but did not then proceed further in the matter. Three days after this notice, *viz.*, on the 3rd September, 1891, the mortgagors mortgaged the property to the plaintiffs for Rs. 10,000. On the 18th November, 1892, the plaintiffs by letter offered to transfer their mortgage to the defendants or to join with them in selling the property. In the event of their being unwilling to accept either of these proposals the plaintiffs requested the defendants to render an account of the sum due to them in order that they (the plaintiffs) might, if so advised, redeem the defendants' mortgage. On the 3rd December, 1892, the plaintiffs by letter enquired whether the defendants were willing to reconvey the mortgaged property on payment of a certain sum, which was less than the amount the defendants claimed, but they did not positively offer to pay the defendants either that amount or the amount which might be found to be due. In April, 1893 the defendants advertised the property for sale on the 27th of that month without giving notice of sale to the plaintiffs, and on that day the plaintiffs filed a suit and obtained a rule, restraining the defendants from proceeding with the sale. In the argument of the rule it was contended for the plaintiffs, first, that the defendants had no power to sell, because their mortgage-deed required previous notice of sale to be given to the

Mortgage—7.—Redemption—(*Concluded*). PAGE

mortgagors or their assigns, and no such notice had been given to the plaintiffs who, as subsequent mortgagees, were assigns of the equity of redemption; secondly that the notice of sale given to the mortgagors on the 31st August, 1891, had been rescinded and a fresh notice was, therefore, required; and thirdly that inasmuch as the plaintiffs were willing to redeem the defendants' mortgage, the sale should be restrained.

Held—(1) that notice to the plaintiffs was not necessary. Proper notice had been given to the mortgagors on the 31st August, 1891, three days before the plaintiffs had acquired any interest in the equity of redemption. No further notice was required to be given to any person who at that time was not an assign, in order to enable the defendants to sell under that notice. An assign must take things in the state in which he finds them, and cannot claim to alter rights which have accrued before he has any authority to interfere;

(2) that the notice of sale of the 31st August, 1891, had not been rescinded by the defendants, who were not bound to give a fresh notice before the sale advertised to be held on the 27th April, 1893. The mere fact of a long delay taking place between the maturing of the notice of sale and the actual sale does not make a fresh notice necessary;

(3) that on the evidence it did not appear that the plaintiffs were able and willing to redeem the defendants' mortgage. The plaintiffs admittedly had not the money in hand, and the Court would not interfere with a mortgagee's right to sell on the mere chance of the plaintiffs' being able to make arrangements to pay the amount due at some uncertain time.

Where a mortgage-deed which gave the mortgagee a power of sale contained also a proviso that the remedies of the mortgagors, their heirs, administrators, and assigns in respect of any breach of the clauses or provisions (relating to such sale) or of any impropriety or irregularity whatever in any such sale should be in damages.

Held, on the authority of *Prichard* v. *Wilson* (10 Jur. (N.S.) 330) that the Court would not grant an injunction to restrain the mortgagee from selling the mortgaged property. MUNCHERJI FURDOONJI v. NOOR MAHOMEDBHOY JAIRAJBHOY, 17 B. 711 ... 506

(6) Sub-mortgage—Limitation Act (XV of 1877), sch. II, art. 134—See LIMITATION ACT (XV OF 1877), 18 B. 387.

(7) *Suit for redemption by purchaser of equity of redemption—Evidence given by defendants of other mortgage than the mortgage in respect of which suit brought—Right of plaintiff to have the question of latter mortgage determined—Practice—Procedure.*—The plaintiff as purchaser of the equity of redemption sued for redemption. He alleged a mortgage, dated A.D. 1849 for Rs. 175. The defendants admitted a mortgage, but alleged that it was executed at a different time and for a larger sum. After the evidence was given, but before the judgment was delivered, the plaintiff applied to amend the plaint and to set up the mortgage admitted by the defendants. His application was refused, and the Court dismissed the suit on the ground that he had failed to prove the particular mortgage alleged in the plaint. The District Judge confirmed the decree, but observed that there probably was a mortgage for the larger sum as alleged by the defendants. On second appeal.

Held, reversing the decree and remanding the case, that the plaintiff was entitled to have the question of the mortgage for the larger sum inquired into. CHIMNAJI v. SAKHARAM, 17 B. 365 ... 238

(8) See ACT XVII OF 1879 (DEKKHAN AGRICULTURISTS' RELIEF), 18 B. 739.

(9) See HINDU LAW (GENERAL), 18 B. 227.

(10) See LIMITATION ACT (IX OF 1871), 17 B. 173.

———8.—Sale.

See MORTGAGE (REDEMPTION), 17 B. 711.

———9.—Simple.

See MORTGAGE (SIMPLE MORTGAGE, USUFRUCTUARY), 17 B. 425.

Mortgage—10.—Simple Mortgage, Usufructuary. PAGE

Simple mortgage, usufructuary—Right to have the property sold—Distinct covenant to pay the principal—Possession in lieu of interest—Sale to recover principal only—Construction.—A merely usufructuary mortgage will confer no right to have the mortgaged property sold. But where there is a distinct covenant to pay the principal, and the land is security for the same, the intention of the parties is that the property should be sold. Such a transaction is a simple mortgage usufructuary, and carries with it the right to have the property sold in default of payment of the principal.

A mortgagee, who is entitled to possession in lieu of interest and who does not take possession, loses his right to interest, and cannot ask that the property be sold for default in payment of interest, the property being security for the principal only. MAHADAJI v. JOTI, 17 B. 425 ... 277

Mosque.

Charity—Suit against directors or mushavirs of a mosque—Liability of directors—Board of directors not properly constituted under the rules of the mosque—Liability of directors for acts done by Board not properly constituted—Appointment of officers—Management of property—Liability of provisional committee assuming authority to act—Trustees—Limitation—Kazi—Act II of 1864 and Bombay Act IV of 1864—Nazir of mosque, liability of—Parties to suit against trustees of mosque—Practice—Mahomedan law—See MAHOMEDAN LAW (WAKF), 18 B. 401.

Mulgar.

See LANDLORD AND TENANT, 18 B. 603.

Mulgenidar.

See LANDLORD AND TENANT, 18 B. 603.

Mulgeni Lease.

Alienation by mulgenidar—Alienation contrary to the terms of the lease—Absence of any clause as to re-entry—Valid alienation—Suit by mulgar for possession—Landlord and tenant—See LANDLORD AND TENANT, 18 B. 603.

Municipality.

(1) Bombay District Municipal Act (VI of 1873), s. 84—Non-payment of taxes—Liability to penalty—Offence—Penal Code (XLV of 1860), s. 40—Penalty—Imprisonment in default of payment of penalty—See ACT VI OF 1873 (BOMBAY DISTRICT MUNICIPAL), 18 B. 400.

(2) *District Municipality—Bombay Act (VI of* 1873), *s.* 33—*Building—Damages.*—Plaintiff having built a new wall on the site of an old wall including the old foundations, the Municipality pulled the wall down. Plaintiff thereupon sued the Municipality for damages. The Judge rejected the claim for damages.

Held, that the building of a new wall on the site of the old wall including the old foundations was not an addition to the existing building within the meaning of s. 33 of the District Municipal Act (Bombay VI of 1873). The Municipality was, therefore, liable in damages for any expenses which the plaintiff was put to by their pulling down the wall. KRISHNAJI NARAYAN v. MUNICIPALITY OF TASGAON, 18 B. 547 ... 874

(3) *Municipal Act III (Bom.) of* 1888, *ss.* 298, 299 *and* 301—*Land Acquisition—Compulsory acquisition—Set back—Compensation paid to owner for land with buildings thereon taken—Basis of valuation of land—Act XII of* 1888, *s.* 3—*Practice—Appeal.*—Where in a case of set back, land with buildings thereon was taken up by the Municipal Commissioner from a private owner under Act III of 1888, ss. 298, 299 and 301.

Held, that the amount of compensation awarded to the owner should be calculated with regard to the price given within a few years previously for land of a similar character in the immediate neighbourhood of the land in question.

Held, also, that the addition of 15 per cent. could not be allowed.

An appeal lies to the High Court from a decision of the Chief Judge of the Small Cause Court of Bombay, granting compensation to the owner of land taken by the Municipality in case of a set back under the Municipal Act, III of 1888, ss. 298, 299, 301. THE MUNICIPAL COMMISSIONER FOR THE CITY OF BOMBAY v. SYED ABDUL HUK, 18 B. 184 .. 631

Municipality—(*Concluded*). PAGE

(4) *Suit against Municipality for ejectment—The Bombay District Municipal Act, Amendment Act (Bombay Act II of* 1884), *s.* 48—*The Bombay District Municipal Act (Bombay Act VI of* 1873), *s.* 86.—The words "in the case of any such action for damages" in s. 48 of the Bombay District Municipal Act, Amendment Act (Bombay Act II of 1884), clearly show that it was contemplated that there might be actions of another description to which the provisions in the former paragraph would be applicable. The section does not contemplate only "suits to recover monetary compensation for a wrongful act." A suit in ejectment—not being a suit brought to recover damages "for an act done or intended to be done"—was excluded under s. 86 of the Bombay District Municipal Act (Bombay Act VI of 1873), but being an "action for an act done," that act, being the dispossession by the Municipality with a view to being restored to possession, falls under the provisions of the first paragraph of s. 48 of the Bombay Act II of 1884. NAGUSHA v. MUNICIPALITY OF SHOLAPUR, 18 B. 19 ... 521

Municipal Offence.

See JUDGE, 18 B. 442.

Municipal Taxes.

See ACT VI OF 1873 (BOMBAY DISTRICT MUNICIPAL), 17 B. 731.

Munim.

See ACT XV OF 1882 (THE PRESIDENCY SMALL CAUSE COURT), 17 B. 662.

Mushavirs.

See MAHOMEDAN LAW (WAKF), 18 B. 401.

Native Chief.

See JURISDICTION, 17 B. 681.

Nazir.

See MAHOMEDAN LAW (WAKF), 18 B. 401.

Negligence.

(1) *Easement—Right of support of house by adjoining soil—Principal and agent or contractor—Liability of principal for acts of contractor—Bombay Municipal Act (III of* 1888), *s.* 527—*Notice of suit—What is sufficient notice.*—The plaintiffs were owners of a house consisting of a ground floor and upper storey and measuring 77 feet in length. On the south side of the house was a gully, 3 feet 6 inches wide, separating it from another upper-storied house. The plaintiffs in this suit complained that in January, 1891, the defendant by his servants dug a trench, 8 feet deep, along the whole length of the gully for the purpose of laying a drain pipe, and that the work was done so negligently that the plaintiffs' house was injured and became in such a dangerous condition that it had to be pulled down. The plaintiffs claimed Rs. 3,996 as damages. The defendant denied the negligence, and alleged that the work was not done by his servants or agents, but by a contractor.

Held, that the defendant was liable for the act of his contractor. The work was necessarily attended with risk, and the defendant could not free himself from liability by employing a contractor. The defendant, as well as the contractor, was liable to the plaintiffs.

For the defendant it was contended that the notice of action given by the plaintiffs under s. 527 of the Bombay Municipal Act (III of 1888) was insufficient. The notice stated "that one S. L., a contractor under you, and as such, being your agent and servant, excavated a trench, &c." It was argued that this was not a good notice, as it only alleged a cause of action arising out of the acts of the defendant's servants and agents, and not out of the acts of contractor.

Held, that the notice was sufficient. The section only required the notice to state with reasonable particularity the cause of action, and this was done. The individual by whom the damage was done was specified, and the acts which caused the damage were clearly set forth. DHONDIBA KRISHNAJI v. THE MUNICIPAL COMMISSIONER OF THE CITY OF BOMBAY, 17 B. 307 ... 200

Negligence—(*Concluded*). PAGE

(2) See ADMINISTRATOR, 17 B. 637.
(3) See PRACTICE, 18 B. 59.

Negotiable Instruments Act (XXVI of 1881).
S. 85—See HUNDI, 18 B. 570.

Non-delivery.
See ARBITRATION, 18 B. 299.

Non-joinder.
(1) See PARTIES, 17 B. 413.
(2) See PRACTICE, 17 B. 29.

Non-payment.
(1) See ACT VI OF 1873 (BOMBAY DISTRICT MUNICIPAL), 3 . . 1
(2) See LANDLORD AND TENANT, 18 B. 250.

Notice.
(1) See CIV. PRO. CODE (ACT XIV OF 1882), 18 B. 594.
(2) See COMPANY, 17 B. 672.
(3) See HINDU LAW (WIDOW), 17 B. 398.
(4) See LANDLORD AND TENANT, 17 B. 631; 18 B. 107, 110.
(5) See MORTGAGE (MARSHALLING), 18 B. 160.
(6) See MORTGAGE (PRIORITY), 18 B. 444.
(7) See MORTGAGE (REDEMPTION), 17 B. 711.
(8) See NEGLIGENCE, 17 B. 307.
(9) See PRACTICE, 18 B. 59.
(10) See REGISTRATION, 17 B. 741.

Nuisance.
Public nuisance—Right of suit—Cause of action—Religious procession—Public road—Suit to enforce a right to conduct a religious procession along a public road—Obstruction to a public road—Special damage—Injunction.
See CAUSE OF ACTION, 18 B. 693.

Objection.
(1) See COMPANY, 17 B. 197.
(2) See LAND ACQUISITION ACT (X OF 1870), 17 B. 299.

Obstruction.
(1) See CAUSE OF ACTION, 18 B. 693.
(2) See CRIM. PRO. CODE (ACT X OF 1882), 17 B. 293.
(3) See EASEMENT, 18 B. 474.
(4) See EXECUTION OF DECREE, 18 B. 37.

Officiator.
See INAM, 18 B. 319.

Ordinary Rules.
See SIRDAR, 17 B. 224.

Parsis.
(1) Husband and Wife—Parsi Matrimonial Court—Act XV of 1865—Suit by wife for judicial separation—Alimony—Alimony after decree dismissing wife's suit and pending appeal—Alimony pending petition for review of judgment—Practice in allotment of alimony—See HUSBAND AND WIFE, 17 B. 146.
(2) Parsi Marriage Act XV of 1865—Minority—Guardians—Practice—Procedure—Husband and wife—Divorce—See HUSBAND AND WIFE, 18 B. 366.
(3) See SUCCESSION ACT (X OF 1865), 17 B. 689.

Parties.
(1) Non-joinder of—Application to join necessary parties refused by Court of first instance—Appeal—Application granted by Court of appeal—Order to add

Parties—(*Concluded*). PAGE

parties operating *nunc pro tunc*—Delay the act of the Court—Limitation —Practice—See PRACTICE, 17 B. 29.

(2) *Partnership—Non joinder—Suit in name of a firm by its manager—Addition of name of other partner as co-plaintiff—Misdescription of plaintiff—Civ. Pro. Code* (*Act* XIV *of* 1882), *s.* 27—*Amendment of plaint—Limitation —Limitation Act* (XV *of* 1877), *s.* 22—*Practice—Procedure.*—This suit was brought to recover a debt due to the firm of Kondanmal Sagarmal. The plaintiff was described as "the firm of K. S. by its manager S. S." The defendants objected that one Malamchand was a partner in the firm and should be a party to the suit; he was accordingly joined as a co-plaintiff on the 27th January, 1888. The defendants then contended that the suit was time-barred under s. 22 of the Limitation Act (XV of 1877).

Held, that the case was one of misdescription and not of non-joinder, for the action was brought in the name of the firm by its manager. The order of the words in the vernacular plaint showed that Sagarmal, the manager, did not sue in his own name. The defendants were entitled to have the name of the other partner disclosed, but it being found as a fact that Sagarmal was entitled to sue for the firm, the addition of Malamchand's name on the record came within the provisions of s. 27 of the Civ. Pro. Code (Act XIV of 1882). KASTURCHAND v. SAGARMAL, 17 B. 413 ... 269

(3) See PARTNERSHIP, 17 B. 6.

(4) *Practice—Appeal—Appeal by some of the parties to a suit—Decree in appeal binding parties to the suit who were not parties to the appeal—Civ. Pro. Code* (*Act* XIV *of* 1882), s. 244, *cl.* (*c*)—*Decree—Execution.*—The plaintiffs filed a suit in ejectment against A. B and C. The Subordinate Judge decreed the claim. On appeal, the District Judge rejected it. The plaintiffs then preferred a second appeal to the High Court, which finally decided in plaintiffs' favour. To this second appeal the defendant A was not made a party. In execution of the High Court's decree, A was dispossessed, but was restored to possession by the Subordinate Judge under s. 332 of the Code of Civil Procedure (Act XIV of 1882). This order was reversed, on appeal, by the District Judge. A thereupon applied to the High Court, under s. 622 of the Code of Civil Procedure (Act XIV of 1882), to set aside the District Judge's order as *ultra vires*, on the ground that s. 244 of the Code was not applicable to the case, A not having been a party to the appeal in which the decree under execution was passed, and that, therefore, no appeal lay to the District Judge from the Subordinate Judge's order.

Held, that A being a party to the suit, though not to the appeal in which the final decree was passed, the District Judge had jurisdiction to hear the appeal under s. 244, cl. (*c*) of the Code of Civil Procedure. GOWRI v. VIGNESHVAR, 17 B. 49 ... 32

(5) Practice—Landlord and Tenant—Joint family—Manager—Lease granted by manager—Right to sue for rent under such lease—Co-sharers—See LANDLORD AND TENANT, 18 B. 141.

(6) See LANDLORD AND TENANT, 18 B. 110.

(7) See CIV. PRO. CODE (ACT XIV OF 1882), 17 B. 629; 18 B. 594, 699.

(8) See MAHOMEDAN LAW (WAKF), 18 B. 401.

Partition.

See KULKARNI VATAN, 18 B. 516.

Partner.

(1) See PARTNERSHIP, 17 B. 6.

(2) See REGISTRATION, 17 B. 235.

Partnership.

(1) *Death of partner—Suit by firm for a debt accrued due during his life—His representatives need not be parties—Practice—Parties—Indian Contract Act* (IX *of* 1872), *s.* 45.—The representatives of a deceased partner are not necessary parties to a suit for the recovery of a debt which accrued due to the partnership in the lifetime of the deceased partner. MOTILAL BECHARDASS v. GHELABHAI HARIRAM, 17 B. 6=Chitty's 8 O.C.R. 336. 4

Partnership—(*Concluded*). PAGE

(2) Mortgage of land to a firm—Dissolution of firm—Division of assets among partners—Letters of one partner to another transferring to the latter the share of the former in the assets of the firm including the mortgages, but not mentioning them—Necessity of registering such letters—Evidence—Registration Act (III of 1877), ss. 17 and 49—The words "document" and "instrument" in the Registration Act—Registration—See REGISTRATION, 17 B. 235.

(3) Non-joinder—Suit in name of a firm by its manager—Addition of name of other partner as co-plaintiff—Misdescription of plaintiff—Civ. Pro. Code (Act XIV of 1882), s. 27—Amendment of plaint—Limitation—Limitation Act (XV of 1887), s. 22—Practice—Procedure—Parties—See PARTIES, 17 B. 413.

Pauper.

(1) Civ. Pro. Code (XIV of 1882), ss. 412, 414—Costs—Appeal in *forma pauperis*—Withdrawal of appeal—Right of Government to costs—Agreement between the parties—See CIV. PRO. CODE (ACT XIV OF 1882), 18 B. 464. 819

(2) *Suit in* forma pauperis—*Costs of plaintiff—Court fees payable by plaintiff—Decree omitting to order plaintiff to pay Court fees when suit dismissed—Application by the Collector under the extraordinary jurisdiction of High Court—Practice—Procedure.*—The plaintiff's suit in *forma pauperis* was rejected by the Subordinate Judge. The decree, however, omitted to order the recovery from the plaintiff of the Court fees payable in the plaint. The Collector applied to the High Court under its extraordinary jurisdiction for the rectification of the decree. It was contended that, as the omission might have been remedied by an appeal or on review, the Collector could not apply under the extraordinary jurisdiction of the Court.

Held, on the authority of 6 B. 590 that no appeal by Government would lie in the case, and that in the exercise of its extraordinary jurisdiction the High Court would rectify the decree by directing the plaintiff to pay the costs of Government. COLLECTOR OF KANARA v. RAMBHAT, 18 B. 454 812

(3) Will—Executor—Probate—Application by executor for probate in *forma pauperis*—Civ. Pro. Code (XIV of 1882), ch. 26, s. 647—Practice—Procedure—See WILL, 18 B. 237.

Payment.

See HINDU LAW (JOINT FAMILY), 17 B. 718.

Pedhis.

See GAMBLING, 17 B. 184.

Penal Code (Act XLV of 1860).

(1) Ss. 40, 64—See ACT VI OF 1873 (BOMBAY DISTRICT MUNICIPAL), 18 B. 400.

(2) Ss. 63 to 67—See ACT IX OF 1890 (RAILWAYS), 18 B. 440.

(3) *Ss.* 71, 148, 149, 326—*Sentence—Separate sentences for rioting and grievous hurt.*—When a prisoner is convicted of rioting and of hurt and the conviction for hurt depends upon the application of s. 149 of the Indian Penal Code, it is illegal to pass two sentences, one for riot and one for hurt.

But in such a case the two sentences would be legal, provided the total punishment does not exceed the maximum which the Court might pass for any one of the offences.

When, however, the accused is guilty of rioting, and is also found to have himself caused the hurt, he may be punished both for rioting and for hurt.

In such a case the total punishment can legally exceed the maximum which the Court might pass for any one of the offences. QUEEN-EMPRESS v. BANA PUNJA, 17 B. 260 (F. B.) ... 170

(4) *S.* 81—*Act likely to cause harm done without a crimnal intent and to prevent other harm.*—The accused was a sepoy in a native infantry regiment. On the occasion of a fire in the city of Ahmednagar, he and the rest of his company turned out to assist in extinguishing it. He with other sepoys was stationed by their officer with orders to keep clear a space in front of the burning house, and not to allow any one not in uniform to intrude on that space. The police under the city chief constable were also engaged at the fire, and on some of them coming round from the rear they were

warned off by the sentries. A fracas between the soldiers and the police took place, and the chief constable was kicked by the accused. For this he was charged before the Magistrate and fined for voluntarily causing hurt under s. 323 of the Penal Code. In evidence it appeared that the police attempted to force the military guard, which had been posted as above stated, and it was further proved that the chief constable was not in uniform, and that the accused did not know who he was. It was not alleged that the kick was unnecessarily violent.

Held, that the conviction was bad. The Magistrate having found that the chief constable was not in uniform, and that the accused did not know who he was, the kick was justifiable as given in good faith for the purpose of preventing much greater harm under s. 81 of the Indian Penal Code, and as a means of acting up to the military order. QUEEN-EMPRESS v. BOSTAN, 17 B. 626 ... 410

(5) *Ss.* 153, 117—*Wantonly giving provocation with intent to cause riot—Abetment of riot by the public—Construction.*—In August, 1893, a riot took place in Bombay between Hindus and Mussalmans. The excitement caused by the riot had not entirely subsided, when the accused composed and published a poem, giving an account of the outbreak, and incidentally extolling certain classes of the Hindu community, namely the Ghatis and Kamatis, for the brave resistance which they had offered to the Mahomedan rioters. The poem extolled the Gatis and Kamatis and then followed these lines:—

"May God give glory to you, confer joy on you night and day.
Fight again for your country's good.
Brave, brave are the Kamatis,
Why fear for dying, brother, why fear for dying?
Sooner or later, but only once, a man has to die."

The poem was written in Gujarati, a language not ordinarily spoken by the Ghatis and Kamatis or even by the Mahomedans. It did not appear that any copies of the work were distributed among the people who had taken part in the riot. Nor did any fresh riot take place subsequently to the publication of the work.

The accused were prosecuted and convicted under ss. 117 and 153 of the Indian Penal Code (XLV of 1860) on the ground that the lines quoted above, especially the words "Fight again," were a direct instigation to the Ghatis and Kamatis to renew the disturbances.

Held, that the meaning of the passages complained of was to be gathered from the whole poem. The general spirit of the poem was clearly in favour of peace and reconciliation. It consisted from beginning to end of a lamentation over the riots, and the destruction and death they had caused, and of repeated counsel to peace and harmony between Hindus and Mahomedans. And there was nothing to indicate that the author's intention was to instigate the Hindus or provoke the Mahomedans to renew the disturbances. The words "Fight again" were, no doubt, objectionable, but it would not be a proper construction of the words to allow them to override the whole context of the work.

The composition could not be regarded as an "illegal act," and its publication was not "malignant" or "wanton" within the meaning of s. 153 of the Indian Penal Code. QUEEN-EMPRESS v. KAHANJI, 18 B. 758 ... 1015

(6) S. 174—See CRIM. PRO. CODE (ACT X OF 1882), 18 B. 380.

(7) *S.* 193—*Separate charges—Criminal procedure—Charge—Alternative charge—Contradictory statements—Statement made to a police officer during a police investigation—Contradictory statement made before a Magistrate holding a preliminary inquiry—Giving false evidence.*—Where a person has made two contradictory statements, one to a police officer making an investigation under chap. XIV of the Code of Criminal Procedure (Act X of 1882), and the other to a Magistrate holding a preliminary inquiry, he cannot be charged, and still less convicted, on an alternative charge.

In such a case, if there is no other evidence at the trial but the contradictory statements made by the accused, separate charges cannot be framed. QUEEN-EMPRESS v. MUGAPA, 18 B. 377 (F.B.) ... 759

Penal Code (Act XLV of 1860)—(*Concluded*). PAGE

(8) Ss. 354 and 457—See EVIDENCE ACT (I OF 1872), 17 B. 485.

(9) S. 398—See CRIM. PRO. CODE (ACT X OF 1882), 17 B. 369.

(10) *S.* 403 – *Criminal misappropriation of moveable property—Property found in an open plain.*—The accused, finding a gold mohur on an open plain, sold it the next day to a shroff for the full value, and appropriated the sale proceeds.

Held, that, in the absence of any information as to the circumstances under which the coin was lost, and as it was not improbable that the property in the coin had been abandoned by the original owner, the accused could not be convicted of criminal misappropriation under s. 403 of the Indian Penal Code. QUEEN-EMPRESS v. SITA, 18 B. 212 ... 649

(11) S. 499—See DEFAMATION, 17 B. 573.

(12) *Ss.* 499, 500—*Defamation—Sending a notice containing defamatory matter to the complainant—Publication.*—The mere sending a notice to a person albeit containing matter of a defamatory nature, cannot be held to be equivalent to making or publishing an imputation "intending to harm or knowing or having reason to believe that it will harm the reputation of the person to whom it is addressed."

When the accused sent by post a notice to the complainant, containing certain false imputations, and the complainant thereupon prosecuted the accused on a charge of defamation under s. 500 of the Indian Penal Code.

Held, that the accused was not guilty of defamation. QUEEN-EMPRESS v. SADASHIV ATMARAM, 18 B. 205 ... 644

(13) S. 500—Defamation—Statement by a witness—Privileged—See DEFAMATION, 17 B. 127.

Penalty.

(1) See ACT VI OF 1873 (BOMBAY DISTRICT MUNICIPAL), 18 B. 400.

(2) See INTEREST, 17 B. 106.

Perjury.

See CRIM. PRO. CODE (ACT X OF 1882), 18 B. 581.

Permanent Tenancy.

See LANDLORD AND TENANT, 18 B. 107, 110, 433.

Personal Interest.

See JUDGE, 18 B. 442.

Plaint.

(1) See FRAUD, 18 B. 144.

(2) See PARTIES, 17 B. 413.

(3) See PRACTICE, 18 B. 368.

Plea.

(1) See ACT XVII OF 1879 (DEKKHAN AGRICULTURISTS' RELIEF), 17 B. 227.

(2) See LANDLORD AND TENANT, 17 B. 475; 18 B. 107, 110.

(3) See MORTGAGE (PRIORITY), 18 B. 444.

Police Officer.

See EVIDENCE ACT (I OF 1872), 17 B. 485.

Police Patel.

See EVIDENCE ACT (I OF 1872), 17 B. 485.

Political Agent.

See RESUMPTION, 17 B. 431.

Political Agent's Court.

See CIV. PRO. CODE (ACT XIV OF 1882), 17 B. 162.

Port Trustees of Bombay.

See SALE OF GOODS, 17 B. 62.

Port Trust Rules.

No. 59—See SALE OF GOODS, 17 B. 62.

Possession. PAGE

(1) Adverse possession—Mortgage—Mortgagee in possession—Dispossession of mortgagee by trespasser—Adverse possession as against mortgagee when effectual also as against the mortgagor—Evidence—Burden of proof—Limitation Act (XV of 1877), sch. II, art. 144—See LIMITATION ACT (XV OF 1877), 18 B. 51.

(2) Gift—Hindu law—Verbal gift of immoveable property—Death of the donor—Possession given to the donee by the son of the donor—See HINDU LAW (GIFT), 17 B. 486.

(3) See HINDU LAW (GIFT), 18 B. 688.

(4) See ACT III OF 1876 (BOMBAY MAMLATDARS COURTS), 18 B. 46.

(5) See ADVERSE POSSESSION, 18 B. 513.

(6) See CIV. PRO. CODE (ACT XIV OF 1882), 17 B. 228.

(7) See EXECUTION OF DECREE, 18 B. 37.

(8) See FRAUD, 18 B. 372.

(9) See HINDU LAW (MAINTENANCE), 18 B. 679.

(10) See KHOTI LANDS, 17 B. 677.

(11) See LANDLORD AND TENANT, 17 B. 631; 18 B. 110, 250, 256, 348.

(12) See MORTGAGE (GENERAL), 18 B. 86.

(13) See MORTGAGE (SIMPLE MORTGAGE, USUFRUCTUARY), 17 B. 425.

(14) See PRACTICE, 17 B. 547.

(15) See REGISTRATION, 17 B. 741; 18 B. 332.

Power of Appointment.

(1) See ACT OF STATE, 17 B. 600.

(2) See WILL, 18 B. 1.

Practice.

(1) *Adding a defendant in a suit where leave to sue under cl. 12 of the Letters Patent, 1865, was necessary—Alternative liability—Order to add new defendant—Appeal against such order by original defendant.*—The plaintiff filed this suit against the defendant Foolibai, alleging that she had a firm and carried on business at Sihore in the territory of Bhopal. Before the suit was filed, leave was duly obtained under cl. 12 of the Letters Patent, 1865. In her written statement Foolibai denied that she was the owner of the Sihore firm, or that she was responsible for any of its dealings with the plaintiffs. She alleged that the Sihore firm had belonged to her son Poonamchand, who died in *Samvat* 1943, leaving a daughter named Goolibai, a minor, who was still living. The plaintiff then obtained a summons calling on the defendant Foolibai to show cause why the plaint and proceedings should not be amended by adding the name of Goolibai as a party-defendant. The summons was made absolute, and an order was made to add Goolibai as a defendant. The defendant Foolibai appealed, contending that the effect of adding a defendant would be to institute a new suit against Goolibai without obtaining the necessary leave under the Letters Patent. She relied on 15 B. 93.

Held, dismissing the appeal, that the defendant Foolibai could not appeal against the order making Goolibai a party. It might be that Goolibai might object to the order either before or at the hearing, but she only could take the objection. The defendant Foolibai could not take it for her. The case of 15 B. 93 did not apply. In that case the proposed amendment altered the cause of action. Here it was left unaffected. On the cause of action, as set forth in the plaint, leave had been given under cl. 12 of the Letters Patent to sue the defendant Foolibai, and so far as she was concerned, there was no objection to the form of the suit. If her allegation was true, Goolibai and not Foolibai was liable. That question would be decided at the trial. FOOLIBAI v. RAMPRATAB SAMRATRAI, 17 B. 466 ... 303

(2) Appeal—Appeal by some of the parties to a suit—Decree in appeal binding parties to the suit who were not parties to the appeal—Civ. Pro. Code (Act XIV of 1882), s. 244, cl. (*c*)—Decree—Execution—Parties—See PARTIES, 17 B. 49.

Practice—(*Continued*).

PAGE

(3) *Appeal—Decree—Amendment of decree—Civ. Pro. Code* (*Act* XIV *of* 1882), *s.* 206.—In the lower appeal Court the plaintiff obtained a decree which directed parties to bear their own costs in proportion in both the Courts, while the judgment directed that the parties should bear each other's costs in proportion in both the Courts. The decree was confirmed by the High Court in cross second appeals without writing a judgment. There was no point taken in either of the appeals as to costs. The plaintiff subsequently applied to the High Court for the amendment of the decree under s. 206 of the Civ. Pro. Code (Act XIV of 1882). It was contended for the defendant that the application should have been made to the lower appeal Court.

Held, that the only decree which existed for the purposes of execution after the High Court confirmed the decree of the Court below was the decree of the High Court into which that of the lower Court became incorporated. The application was, therefore, properly made to the High Court.

Held, further, that that being so, and there having been no appeal by either party against the order as to costs, the Court might properly look at the judgment of the Court below with a view to making the decree as to costs agree with it. SHIVLAL KALIDAS v. JUMAKLAL, 18 B. 542 ... 870

(4) Appeal—Order rejecting plaint as insufficiently stamped—See COURT FEES ACT (VII OF 1870), 17 B. 56.

(5) Appeal—Regulation VIII of 1827—Order refusing certificate of heirship appealable—Succession Certificate Act (VII of 1889), s. 28—See APPEAL (GENERAL), 18 B. 748.

(6) Civ. Pro. Code (Act XIV of 1882), s. 622—Review of order made by High Court—See CIV. PRO. CODE (ACT XIV OF 1882), 17 B. 514.

(7) See CIV. PRO. CODE (ACT XIV OF 1882), 17 B. 733.

(8) Different rulings of different High Courts—Judge to follow the ruling of the High Court to which he is subordinate—Procedure—See INSTALMENTS, 17 B. 555.

(9) Evidence—Hundis inadmissible under Stamp Act, but admitted by defendant—Admission—Stamp Act (I of 1879), s. 34—See STAMP ACT (I OF 1879), 18 B. 369.

(10) Finding of fact not accepted in second appeal—Inam land—Sub-alienee—Wrongful surrender by the village Inamdar to Government—Khalsat—Landlord and tenant—Non-payment of rent by tenant to landlord—Acquiescence of landlord—Effect of acquiescence—Subsequent suit by landlord for possession—See LANDLORD AND TENANT, 18 B. 250.

(11) See LANDLORD AND TENANT, 17 B. 475.

(12) *Inspection—Discovery—Production—Co-defendants—Inspection granted to defendant against co-defendant—Civ. Pro. Code* (XIV *of* 1882), *ss.* 129 *and* 131.—A defendant may obtain discovery or inspection as against a co-defendant if the latter can be regarded as an opposite party.

The plaintiff sued to set aside a mortgage made by his uncle (defendant No. 3) to defendants Nos. 1 and 2 alleging that shortly after he (the plaintiff) had attained his majority he had been induced to join in the mortgage by the undue influence and threats of his uncle (defendant No. 3) who represented that the money to be raised by the mortgage was required to pay off the debts of the plaintiff's father. The plaintiff further alleged that he had received none of the money and that no money had been paid by defendants Nos. 1 and 2 to the third defendant in his presence. Defendants Nos. 1 and 2 took out a summons against the third defendant for inspection of certain account books and documents. It was objected that no question was raised in the suit between the third defendant and defendants Nos. 1 and 2, and that consequently under s. 131 of the Civ. Pro. Code (XIV of 1882), the latter were not entitled to inspection.

Held, that inspection must be given. It was possible that not being able to set aside the mortgage as regarded himself, the third defendant was colluding with the plaintiff. Under the circumstances he might be considered a "party opposite" to the first two defendants, although eventually the Court might not be able to make any order between him and them. ANANDRAO VITHAL v. BUDRA MALLA, 17 B. 384 ... 250

PAGE

Practice –(*Continued*).

(13) *Inspection—Discovery—Production—Documents of title—Refusal to produce —Ejectment.*—The plaintiff sued to eject the defendant from certain pieces of land belonging to him, being portions of a passage upon which the defendant had encroached. In his written statement the defendant denied the plaintiff's title and stated that he would rely on certain deeds set forth in a schedule annexed thereto. In his affidavit of documents subsequently filed he objected to produce the deeds for the plaintiff's inspection on the ground that they related solely to his own title to the land in dispute, and did not in any way tend to prove or support the title of the plaintiff thereto.

Held, that the defendant was entitled to refuse production of the deeds. The Court could not go behind the defendant's affidavit of documents. VINAYAKRAO DHUNDIRAJ v. NAROTAM ANANDJI, 17 B. 581 ... 380

(14) *Inspection—Parties—Defendant's right to inspection of documents referred to in plaint before written statement filed.*—A defendant is entitled to have inspection of documents referred to in the plaint, although he has not filed his written statement. RAM DYAL SALIGRAM v. NURHURRY BALKRISHNA, 18 B. 368 ... 753

(15) Landlord and tenant—Joint family—Manager—Lease granted by manager —Right to sue for rent under such lease—Co-sharers—See LANDLORD AND TENANT, 18 B. 141.

(16) Parties—Indian Contract Act (IX of 1872), s. 45—Partnership—Death of partner—Suit by firm for a debt accrued during his life—His representatives need not be parties—See PARTNERSHIP, 17 B. 6

(17) *Parties - Non-joinder of parties—Application to join necessary parties refused by Court of first instance—Appeal—Application granted by Court of appeal—Order to add parties operating* nunc pro tunc—*Delay the act of the Court—Limitation.*—The plaintiffs, as sharers in certain rent alleged to be due by the defendants, sued to recover their share. The defendants contended that all the co-sharers were necessary parties. At the hearing on the 24th January, 1889, the plaintiffs' co-sharers applied to be made co-plaintiffs and to be allowed to adopt what the plaintiffs had done in the suit. The application was rejected, and the suit was dismissed for want of parties. On appeal, the District Court in July, 1890, holding that the lower Court ought to have joined the co-sharers, passed an order making them co-plaintiffs, and then confirmed the lower Court's decree on the ground that at the time (3rd July, 1890) the co-sharers were made plaintiffs the suit was barred by limitation. On appeal to the High Court,

Held, remanding the case, that the order of the lower appeal Court of the 3rd July, 1890, allowing the co sharers' application, which had been made on the 24th January, 1889, but had been refused by the Court of first instance, should be treated as operating *nunc pro tunc*, and that the co-sharers should be regarded as having been made parties to the suit when their application was made. The delay was attributable to the act of the Court, and the plaintiffs should not suffer from it. RAMKRISHNA MORESHWAR v. RAMABAI, 17 B. 29 ... 19

(18) Party for purpose of discovery—Limitation—Application of s. 18, Act XV, 1877—Knowledge kept from the Official Assignee (XI and XII Vic., c. 21) of his right to sue for an account of assets fraudulently transferred by an insolvent—Burden of proving when first the plaintiff had clear and definite knowledge—Sections 13 and 43, Civ. Pro. Code (XIV of 1882)—Account—See LIMITATION ACT (XV OF 1877), 17 B. 341.

(19) Point taken by appellant on second appeal not raised by him in his first appeal—See HINDU LAW (INHERITANCE), 17 B 100.

(20) *Procedure—Appeal—Appeal between co-defendants — Hindu Law—Joint Family—Manager—Loan to manager—Family purpose—Presumption—Evidence—Burden of proof.*—Where a Subordinate Judge dealt with a case at the hearing as raising not only a question between the plaintiff and defendants, but also as between the defendants.

Held, that one of the defendants could appeal against the decree as between himself and the other defendant.

There is no presumption that a loan contracted by the manager of a joint Hindu family has been contracted for a family purpose. SOIRU PADMANABH RANGAPPA v. NARAYANARAO BIN VITHALRAO, 18 B. 520 ... 855

Practice—(*Continued*).

PAGE

(21) *Procedure—Civ. Pro. Code* (XIV *of* 1882), *ss.* 100, 647—*Dismissal of suit for default—Application to restore suit—Notice of application— Service of notice—Negligence—Second application for issue of notice—Costs.*—A suit having been dismissed for plaintiff's default, he applied for the restoration of the suit to the file, and a notice was issued to the defendant to show cause why the suit should not be restored. The notice was returned unserved, owing to plaintiff's neglect to point out the defendant to the serving officer. The plaintiff having applied for a fresh notice, the Subordinate Judge rejected the application.

Held, that the Subordinate Judge had no power to reject plaintiff's application for a fresh notice. Section 100 of the Civ. Pro. Code (XIV of 1882), which by s. 647 is made applicable to such a proceeding, only enabled him to order a fresh notice to issue, and, if he thought proper, to order plaintiff to pay the costs occasioned by the necessary postponement. LALUBHAI VAJERAM v. BAI MAGANGAVRI, 18 B. 59 ... 548

(22) Procedure—Civ. Pro. Code (XIV of 1882), s. 244—Decree—Execution—Decree incapable of execution by reason of events subsequent to decree—Decree giving an option to the parties—Questions arising in execution between the parties—See CIV. PRO. CODE (ACT XIV OF 1882), 18 B. 495.

(23) *Procedure—Decree—Appeal—Execution—Death of judgment-debtor after appellate decree—Representatives of judgment-debtor—Civ. Pro. Code* (*Act* XIV *of* 1882), *ss.* 234, 248, 361 *to* 372, 583.—The Civ. Pro. Code (Act XIV of 1882) does not contemplate the representatives of the judgment-debtor being placed on the record after the appellate decree has been passed. There is no express provision for it in the sections relating to execution. Sections 361 to 372 relate to changes during suit, and speak only of plaintiffs and defendants—terms which seem to show that they were only intended to apply to proceedings up to final determination by the appellate decree and not to proceedings in execution between the judgment-creditor and judgment-debtor.

A Court of appeal having confirmed the decree of a Second Class Subordinate Judge, the decree was transferred for execution to the First Class Subordinate Judge. After the transfer the judgment-debtor died. The judgment-creditor then applied to the First Class Subordinate Judge to substitute on the record the name of the representative of the deceased. The First Class Subordinate Judge rejected the application and referred the judgment-creditor to the Second Class Subordinate Judge, who also rejected the application on the ground that the decree which was being executed was the appellate decree in which his decree was merged, and, therefore, he had no jurisdiction to entertain the application.

Held, that the course open to the judgment-creditor was by way of application to execute the decree against the legal representative of the deceased as provided by s. 234 of the Civ. Pro. Code (Act XIV of 1882), in which case the application to execute the decree, having regard to s. 583, would be to the Second Class Subordinate Judge, although by s. 248 the notice to the party against whom execution was applied for, would be issued by the First Class Subordinate Judge to whom the decree was transferred for execution. HIRACHAND HARJIVANDAS v. KASTURCHAND KASIDAS, 18 B. 224 ... 657

(24) *Procedure—Decree—Execution—Execution pending appeal—Landlord and tenant—Enhancement of rent—Decree for enhanced rent, and in default possession to be given—Appeal by defendants—Execution of decree by plaintiffs—Possession taken pending appeal—Decree confirmed on appeal—Time for complying with decree not enlarged by filing appeal—Application by defendants to be restored to possession on payment of amount ordered by appellate decree.*—On the 13th February, 1839, the plaintiffs obtained in the District Court of Satara a decree, on appeal, against the defendants who were their tenants, ordering them to pay Rs. 34 as the rent of certain land for the year 1882-83, and Rs. 50 a year as rent from the 5th April, 1883, on which date the plaintiffs had given them notice of enhancement. In default of payment by the defendants the plaintiffs were to take possession of the land. The plaintiffs were to give the defendants credit for any sums which they had paid as rent since the year 1882-83.

Practice—(*Continued*).

Both parties appealed to the High Court from this decree. While these appeals were still pending, the plaintiffs, on the 13th February, 1890, applied for execution of the decree. They prayed for immediate possession and for Rs. 334, alleged to be the rent due under the decree, *viz.*, Rs. 34 for 1882-83 and Rs. 50 for each of the six years from 1883-84 to 1888-89 inclusive. The application was granted by the Subordinate Judge, and the plaintiffs obtained possession on the 19th February, 1890.

On the 20th March, 1890, the defendants applied to be restored to possession, stating that they had appealed to the High Court against the decree of the District Court, which had fixed their rent at the enhanced rate of Rs. 50, and that their appeal was still pending ; that the sum of Rs. 334 was not due to the plaintiffs, inasmuch as they (the defendants) had continued to pay the rent at the old rate (*viz.*, Rs. 34) to the village officers together with the local fund cess Rs. 2-2-0, being a total of Rs. 36-2-0 for each of the six years. They contended that the plaintiffs were thus entitled only to Rs. 83-4-0 and not Rs. 334, and they claimed to get back the land on the ground that the plaintiffs had obtained possession on an illegal application.

While this application of the 20th March, 1890, was still pending, the appeals against the District Court's decree of the 13th February, 1889, came on for hearing before the High Court, which confirmed that decree on the 17th July, 1890. Thereupon the defendants, on the 1st August, 1890, brought into Court Rs. 98 (being the difference between the old rent which they had paid and the enhanced rent payable under the confirmed decree), and applied to be restored to possession. On the 6th February, 1891, the defendants' application of the 20th March, 1890, came on for hearing, and was rejected by the Subordinate Judge on the ground that the defendants had not obeyed the District Court's decree. The defendants thereupon appealed to the District Court, which reversed that decision, and ordered that possession should be given to the defendants on the ground that the time for payment of the amount due under the decree should be reckoned from the date of the confirmation of the decree by the High Court, *viz.* 17th July, 1890, and that by their payments made to the village officers and their payment into Court on the 1st August, 1890, the defendants had obeyed the decree, and were entitled to be put back into possession. The plaintiffs appealed to the High Court.

Held, (reversing the order of the District Court and restoring that of the Subordinate Judge) that the defendants could not recover possession. The fact that they had appealed to the High Court could not prevent the decree of the District Court from being executed, or enlarge the time for payment of the rent as decreed by that Court. No stay of execution was asked for, and all that the Subordinate Judge had to see in February, 1890, was whether payment of rent had been made in accordance with the terms of the decree of the District Court made on the 13th February, 1889. The defendants had not paid that rent when the plaintiffs executed the decree on the 19th February, 1890. The decree was legally executed before the High Court's decree was passed on the 17th July, 1890, and that execution could not be afterwards cancelled, because of the High Court's decree. When the decree of the District Court was passed, the defendants should at once have paid to the village officers the balance of the rent due according to that decree, or on the second appeal to the High Court being made, they should have applied for stay of execution. They followed neither course, and the decree was legally executed. The claim in the plaintiffs' application for execution may have been excessive, but the defendants had never attempted to pay anything beyond the old rent. AMINABI v. SIDU, 17 B. 547 ... 358

(25) Procedure—Decree for maintenance obtained by wife against her husband —Appeal by husband against decree—Death of wife pending appeal—Daughter to be legal representative of the deceased for the purpose of the appeal.—See HINDU LAW (INHERITANCE), 17 B. 758.

(26) Procedure—Dekkhan Agriculturists' Relief Act (Bom. Act XVII of 1879)—Special Judge—Finding of fact—Civ. Pro. Code (XIV of 1882), s. 622—See ACT XVII OF 1879 (DEKKHAN AGRICULTURISTS' RELIEF), 18 B. 347.

Practice—(*Continued*).

PAGE

(27) Procedure—Evidence—Landlord and tenant—Terms of tenancy proved orally although contained in a document—Compensation for buildings erected by tenant—Estoppel—See LANDLORD AND TENANT, 18 B. 66.

(28) *Procedure*—Ex-parte *decree—Co-defendants—Small Cause suit*—Ex-parte *decree against one defendant—Application by co-defendant to set aside decree—Case re opened with respect to the applicant only Civ. Pro. Code* (*Act* XIV *of* 1882), *ss.* 106, 108.—Where a decree is set aside on the application of a defendant against whom it was passed *ex-parte*, the case is not re-opened as against a co-defendant who had appeared and defended the suit. MANAKU v. SITARAM ATMARAM VAGH, 18 B. 142 603

(29) Procedure—Fraud—Plaint—Form of plaint—Charges of fraud—Amendment of plaint—See FRAUD, 18 B. 144.

(30) Procedure—Husband and wife—Divorce—Parsis—Parsi Marriage Act (XV of 1865)—Minority—Guardians—See HUSBAND AND WIFE, 18 B. 366.

(31) See HUSBAND AND WIFE, 17 B. 624.

(32) Procedure—Mortgagee—Redemption—Suit for redemption by purchaser of equity of redemption—Evidence given by defendants of other mortgage than the mortgage in respect of which suit brought—Right of plaintiff to have the question of latter mortgage determined—See MORTGAGE (REDEMPTION), 17 B. 365.

(33) Procedure—Objection taken for first time in appeal—See COMPANY, 17 B.197.

(34) Procedure—Parties—Partnership—Non-joinder—Suit in name of a firm by its manager—Addition of name of other partner as co-plaintiff—Misdescription of plaintiff—Civ. Pro. Code (Act XIV of 1882), s. 27—Amendment of plaint—Limitation Act (XV of 1877), s. 22--See PARTIES, 17 B. 413.

(35) Procedure—Point of law raised for first time in second appeal—See HINDU LAW (MAINTENANCE), 18 B. 679.

(36) Procedure—Second appeal—Point taken for first time on second appeal—Specific performance, suit for—Parties made defendants who were not parties to the agreement—Landlord and tenant—Suit for possession—Denial of landlord's title—Plea of permanent tenancy—Notice to quit—Yearly tenant.—See LANDLORD AND TENANT, 18 B. 110.

(37) *Procedure—Service of summons—Service by post—Return through the post of packet containing the summons endorsed "refused"—Evidence—Civ. Pro. Code* (*Act* XIV *of* 1882), *ss.* 82 *and* 622—*Material irregularity.*—A Small Cause Court having forwarded the summons to the defendant in a registered packet through the Post Office, the packet was returned endorsed 'refused,' the Small Cause Court held the service of the summons to be good service and passed an *ex-parte* decree against the defendant.

Held, that the delivery of the summons by the post to a person who was not shown to be the defendant, was not good service. JAGANNATH BRAKBHAU v. J. E. SASSOON, 18 B. 606 ... 913

(38) *Procedure—Several persons tried jointly—Right of reply where one of several accused calls witnesses and the others do not—Crim. Pro. Code* (X *of* 1882), *ss.* 289, 292.—Where one of several accused persons tried jointly calls witnesses at the trial, but the other accused call no witnesses, they must all follow in their defence, and the prosecution has the right of reply on the whole case. QUEEN-EMPRESS v. SADANAND NARAYAN, 18 B. 364 ... 750

(39) *Procedure—Stamp—Evidence—Document not sufficiently stamped admitted in evidence by lower Court—Appeal Court cannot exclude it—Stamp Act* (I *of* 1879), *s.* 4, *cl.* 3.—A Court of first instance having admitted in evidence a document improperly stamped, the appellate Court cannot question its admissibility. SHIDDAPA v. IRAVA, 18 B. 737 ... 1000

(40) *Procedure—Suit by decree-holder to declare a house subject to attachment in execution as being the property of the judgment-debtor—Decree for plaintiff on ground that judgment-debtor, though not the owner of the house had an attachable interest in it as permanent tenant—Court cannot make out a new case for plaintiff.*—The plaintiff's case being that a certain house was the absolute property of his judgment-debtor, and that, therefore, he (the plaintiff) was entitled to attach it in execution of his decree, the Subordinate Judge found that the judgment-debtor was not the owner of the

Practice—(*Concluded*). PAGE

house, and rejected the plaintiff's claim. The appellate Court held that (though the judgment-debtor was not the owner) he had an attachable interest in the house as permanent tenant and allowed the plaintiff's claim. On appeal to the High Court by the defendant,

Held, that the order of the appellate Court made out an entirely new case for the plaintiff which he had not made himself at any period of the trial, and that the decree of the lower appellate Court should be reversed. IRANGOWDA v. SESHAPA, 17 B. 772 ... 507

(41) Procedure—Summary suit—Civ. Pro. Code (XIV of 1882), ss. 491, 532, 533—Claim made by defendant for compensation for arrest—Claim for compensation made by defendant in a summary suit when defendant has not got leave to appear and defend—Cross-claim when allowed—Set-off—See CIV. PRO. CODE (ACT XIV OF 1882), 18 B. 717.

(42) Procedure—Variance between pleading and evidence—See ENCROACHMENT, 17 B. 648.

(43) Procedure—Will—Executor—Probate—Application by executor for probate in *forma pauperis*—Civ. Pro. Code (XIV of 1882), Ch. 26, s. 647—See WILL, 18 B. 237.

(44) *Receiver—Receiver in testamentary suit—Succession Act* (X *of* 1865), s. 239, —The High Court has power to appoint a receiver in a testamentary suit. YESHWANT BHAGWANT v. SHANKAR RAMCHANDRA, 17 B. 388.

(45) Second appeal—New point raised in second appeal—See HINDU LAW (INHERITANCE), 17 B. 303.

(46) See ACT XXIII OF 1871 (PENSIONS), 17 B. 169.

(47) See ACT III OF 1876 (BOMBAY MAMLATDARS' COURTS), 17 B. 645.

(48) See EXECUTION OF DECREE, 17 B. 657 ; 18 B. 458.

(49) See HINDU LAW (WILL), 17 B. 686.

(50) See MAHOMEDAN LAW (WAKF), 18 B. 401.

(51) See MUNICIPALITY, 18 B. 184.

(52) See PAUPER, 18 B. 454.

Preamble.

See SUCCESSION CERTIFICATE ACT (VII OF 1889), 18 B. 315.

Preferential Dividend.

See COMPANY, 17 B. 197.

Prescription.

See EASEMENT, 17 B. 745.

Presumption.

(1) See CRIM. PRO. CODE (ACT X OF 1882), 18 B. 468.

(2) See PRACTICE, 18 B. 520.

Principal and Agent.

(1) Joint Managers—Mortgage by one of such managers—Sale by mortgagee in execution of decree on mortgage and dispossession of the other manager—Application for restoration of possession by other joint manager—Civ. Pro. Code (XIV of 1882), s. 335—See CIV. PRO. CODE (ACT XIV OF 1882), 18 B. 522.

(2) *Principal and factor—Consignment for sale—Advances by factor on consignment—Right of factor to sell goods consigned to him for sale below the limit of price prescribed by consignor.*—In January, 1889, an agreement was made between the plaintiffs and the defendant which provided that the defendant in Bombay was to act for the plaintiffs "in influencing consignments of produce" to the care of the plaintiffs in London. Such produce was to be sold by the plaintiffs in London for a certain commission and brokerage. One of the terms of the agreement was that the business in England was to be worked entirely in the defendant's name and the defendant was to "undertake to guarantee the plaintiffs free of all loss in connection with the said consignments and to guarantee the payment of re-drafts, &c."

Principal and Agent—(*Concluded*). PAGE

On the 25th January, 1889, the defendant consigned 435 packages of cloves to the plaintiffs in London and drew against the consignment a draft for £ 2,100 on the plaintiffs. In his consignment letter the defendant stated that the consignment was from his constituent Chatturbhuj Khimji, but that as Rs. 30,000 had been advanced to him, the consignment was shipped in the defendant's name. The letter continued : "The cost is 9½*d.* per pound, but he expects more, and *not to be sold under the above rate.*"

The sum drawn against the cloves (£ 2,100) was £ 400 in excess of their value, and on receipt of the consignment letter on the 11th February, 1889, the plaintiffs at once telegraphed to the defendant to remit by cable £ 400 against over draft against cloves. On the next day the defendant replied by telegraph: "I will remit you by outgoing mail." The plaintiffs accepted and paid the draft for £ 2,100 drawn against the cloves.

The price of cloves in the London market fell rapidly. The defendant from time to time lowered the limit of price, but not to such an extent as to allow of a sale being effected. The lowest limit named by him was 6*d.* per pound on the 31st October, 1889. In December, 1889, the market price was only 5*d.* per pound, and the deficit owing to the plaintiffs was £ 1,300. The plaintiffs presented bills to the defendant for this balance, but they were refused.

On the 5th February, 1890, after due notice to the defendant, the 435 bales of cloves were sold, 20 of them at 4¾ *d.* per pound and 415 at 4⅝*d.* The balance due to the plaintiffs in respect of this consignment after allowing for the proceeds of sale were £ 1,432-15 0. This sum was part of the amount for which the present suit was brought. The defendant contended that the plaintiffs were not justified in selling the cloves below the price limited, *viz.*, 6*d.* per pound, and claimed to be credited with £ 329-1-8, which was the difference between the amount actually realized by the sale and the amount which would have been obtained if the cloves had been sold at the prescribed price.

Held, by Farran, J., and by the Court of Appeal on the evidence,

(1) that the plaintiffs had accepted the consignment and had advanced money against it on condition of being kept in funds in case a deficit should arise, owing to a falling market, and that the defendant acquiesced in that condition ;

(2) that the plaintiffs had throughout claimed right to sell if the condition was not observed, and that the defendant inferentially admitted the right claimed by the plaintiffs. The conclusion to be drawn was that the business was conducted on that basis, and that when the condition was broken the plaintiffs' right to sell arose according to the course of business, notwithstanding the limit of price imposed by the defendant.

Per SARGENT, C. J.—The result of the authorities is to show that where a factor for sale, who has made advances, claims the right to sell, *invito domino*, the question is whether there was an agreement between the parties, either express or to be inferred, from the general course of business or from the circumstances, attending the particular consignment, that the factor should under any and what circumstance have the power to sell against the wish of the owner of the goods. The *onus* of proving such agreement lies on the factor who has made the advances.

Per FARRAN, J.—On the whole, the authorities warrant the inference that where goods are consigned to a foreign merchant as security for an advance, albeit he may be a factor entrusted with the sale of goods on commission, and where by reason of the fall in the market or other causes his security is declining in value, and becoming insufficient, such foreign merchant is invested with a power of sale over the goods after due notice to his principal, although the latter may place a limit on their sale, and desire to hold them on if the principal do not put his factor in funds to make up the deficit so caused. JAFFERBHOY LUDHABHOY CHATTO v. T. D. CHARLESWORTH, 17 B. 520 ... 338

(3) See NEGLIGENCE, 17 B. 307.

Priority.

(1) See CIV. PRO. CODE (ACT XIV OF 1882), 17 B. 375.

(2) See REGISTRATION, 17 B. 741 ; 18 B. 355.

Privilege. PAGE

(1) See ATTORNEY AND CLIENT, 18 B. 263.

(2) See DEFAMATION, 17 B. 127, 573.

Probate.

(1) Will—Application for probate refused by District Court on ground that will not proved—On appeal, finding by High Court that the will was proved—Subsequent application for probate to be made to District Court and not to High Court—Procedure—See HINDU LAW (WILL), 17 B. 686.

(2) *Will—Will by a Hindu widow in respect of property inherited from her deceased husband—Invalid will.*—A Court is not justified in refusing to grant probate of a will because the testator had no power to dispose of some or even all of the property he purported to deal with. BAROT PARSHOTAM KALU v. BAIMULI, 18 B. 749 ... 1009

(3) See WILL, 18 B. 237.

Procedure.

(1) Execution—Death of judgment-debtor after appellate decree—Representative of judgment-debtor—Civ. Pro. Code (XIV of 1882), ss. 234, 248, 361 to 372 and 583—Practice—Procedure—Decree—Appeal—See PRACTICE, 18 B. 224.

(2) Execution—Decree—Decree incapable of execution by reason of events subsequent to decree—Decree giving an option to the parties—Questions arising in execution between the parties—Civ. Pro. Code (XIV of 1882), s. 244—Practice—Procedure—See CIV. PRO. CODE (ACT XIV OF 1882), 18 B. 495.

(3) See ACT XXIII OF 1871 (PENSIONS), 17 B. 169.

(4) See ACT III OF 1876 (BOMBAY MAMLATDARS COURTS), 17 B. 645.

(5) See ACT XVII OF 1879 (DEKKHAN AGRICULTURISTS' RELIEF), 18 B. 347.

(6) See CIV. PRO. CODE (ACT XIV OF 1882), 17 B. 733; 18 B. 594, 717.

(7) See COMPANY, 17 B. 197.

(8) See EXECUTION OF DECREE, 18 B. 458.

(9) See FRAUD, 18 B. 144.

(10) See HABEAS CORPUS, 18 B. 636.

(11) See HINDU LAW (INHERITANCE), 17 B. 758.

(12) See HINDU LAW (MAINTENANCE), 18 B. 679.

(13) See HINDU LAW (WILL), 17 B. 686.

(14) See HUSBAND AND WIFE, 17 B. 624; 18 B. 366.

(15) See INSTALMENTS, 17 B. 555.

(16) See LANDLORD AND TENANT, 18 B. 66, 110.

(17) See MORTGAGE (REDEMPTION), 17 B. 365.

(18) See PARTIES, 17 B. 413.

(19) See PAUPER, 18 B. 454.

(20) See PRACTICE, 17 B. 547, 772; 18 B. 364, 520, 606, 737.

(21) See WILL, 18 B. 237.

Proclamation.

See ACT VII OF 1878 (INDIAN FOREST), 18 B. 670.

Professional Communication.

See ATTORNEY AND CLIENT, 18 B. 263.

Publication.

See PENAL CODE (ACT XLV OF 1860), 18 B. 205.

Public Health Act, 1875.

See JUDGE, 18 B. 442.

Public Road.

See CAUSE OF ACTION, 18 B. 693.

Quit-rent.

See LAND REVENUE, 17 B. 407.

Railway Company.

PAGE

(1) *Exemption from liability—Special contract—Risk note—Railways Act* (IX *of* 1890), *ss.* 54, *cl.* (1), *s.* 72, *cls.* (*a*), (*b*), *sub-cls.* (2) *and* (3)—*Carriers' Act*, 1865.—The plaintiff sued the defendants (a Railway Company) for damages for short delivery of goods consigned to him. The defendants pleaded a special contract signed by the consignor, which, in consideration of their carrying the goods at a special reduced rate instead of the ordinary tariff rate, exempted them from liability for loss or damage to the goods from any cause whatever, before, during and after transit over the railway or other railways working in connection therewith.

Held, that under the contract the defendants were not liable to the plaintiff. TIPPANNA v. THE SOUTHERN MARATHA RAILWAY COMPANY, 17 B. 417 ... 272

(2) *Indian Railways Act* (IV *of* 1879), *s.* 11—*Loss of goods—Liability of Company—Carrier—Bailment—Declaration of nature and value of goods and payment of increased charge, effect of—Contract Act* (IX *of* 1872), *s.* 151—*Limitation Act* (XV *of* 1877), *sch.* II, *art.* 30.—In respect of goods for which, under s. 11 of the Indian Railways Act (IV of 1879), a railway company is under no liability unless "an increased charge" is paid, the payment of an increased charge puts them under the same liability as they are under with respect to goods not specially provided for by that section, *viz.*, the liability of ordinary bailees. The payment of "an increased charge" is not equivalent to insurance.

In January, 1890, a box containing silver specie was delivered by the plaintiffs to the defendant-company in Bombay to be carried to Saugor. At the time of such delivery the contents of the box were declared, and an increased charge above the charge for ordinary parcels was paid. The box was lost during its transmission to Saugor, but no evidence was called by the defendants to show what was done with the box between Itarsi and Saugor. In 1893 the plaintiffs sued the defendants to recover its value.

Held, that the defendants had not discharged the *onus* which lay upon them of showing that they had fulfilled the duties of a bailee as laid down in s. 151 of the Contract Act (IX of 1872), and that they were liable for the amount claimed.

Held, also, that the suit was not barred by limitation, and that art. 30 of sch. II of the Limitation Act (XV of 1877), did not, as was contended, apply to the case. RAISETT CHANDMULL v. G.I.P. RAILWAY COMPANY, 17 B. 723 ... 474

Rain-betting.

See GAMBLING, 17 B. 184.

Rateable Contribution.

See CIV. PRO. CODE (ACT XIV OF 1882), 18 B. 61.

Rateable Distribution.

See EXECUTION OF DECREE, 18 B. 456.

Receiver.

Receiver in testamentary suit—Succession Act (X of 1865), s. 239—Practice—See PRACTICE, 17 B. 388.

Reduction of Capital.

See COMPANY, 18 B. 152.

Refund.

See LAND REVENUE, 17 B. 407.

Registration.

(1) *Evidence—Act* III *of* 1877, *s.* 17—*Retrospective operation of section—Document not registrable under Act in force* (XX *of* 1866) *when executed, but requiring registration under Act* III *of* 1877—*Immoveable property, what is—Hereditary allowance attached to office of desai not immoveable property under Act* XX *of* 1866—*Deed of gift of such property originally not registrable—Hereditary office when immoveable property by Hindu law—Desaigiri sukhdi.*—Section 17 of the Registration Act (III of 1877) should not be construed as requiring a document to be registered which would not have required registration when it was executed.

PAGE

Registration—(*Continued*).

An instrument which did not require registration under Act XX of 1866 is not inadmissible in evidence by reason of Act III of 1877.

Dues incidental to an office such as that of a desai, which is capable of being held by a person other than a Hindu, were not immoveable property when Registration Act XX of 1866 was enacted. DESAI MOTILAL MANGALJI v. DESAI PARASHOTAM NANDLAL, 18 B. 92 ... 570

(2) *Evidence—Lease—Agreement to indemnify contained in lease—Suit for indemnity.*—A lease of land for nine years contained a clause by which the lessor agreed to indemnify the lessee in case he should incur any loss in consequence of disputes which might arise as to the land between the lessor and his kinsmen. The lease was not registered. After the lessee had held the land under the lease for two years, a suit for possession was brought against him, and the lessor and he were dispossessed and obliged to pay mesne profits. He then brought this suit against the lessor under the above clause in the lease.

Held, that the lease being unregistered was not admissible in evidence and could not be looked at. The clause on which the plaintiff sued could not be separated from the lease itself, and the plaintiff's claim must, therefore, be rejected. GURUNATH SHRINIVAS v. CHENBASAPPA, 18 B. 745 ... 1006

(3) *Indian Registration Act* (III *of* 1877), *ss* 17 *and* 49—*Decree—Attachment—Execution—Unregistered contract for sale of land subsequently attached in execution.*—In execution of a decree against S and P property was attached on the 11th February, 1891, and sold by auction to the plaintiff in July, 1892. The defendants, however, alleged that at the date of attachment the property did not belong to S and P, as they had sold it to them (the defendants) on the 22nd January, 1891, under a contract of sale of that date. Their contract had not been registered.

Held, that by cl. (*b*) of s. 17 of the Indian Registration Act (III of 1877) the contract needed registration if it was intended that it should affect the land (s. 49). Not being registered it did not operate to transfer the ownership, and could not be received in evidence of any transaction affecting the land, *i. e.*, it could not be used to show that the ownership had passed from the vendor to the purchaser. The property in question was, therefore, at the date of attachment the property of S and P, and under the attachment and sale in execution it passed to the plaintiff.

A contract for the sale of immoveable property recited that, on the date thereof Rs. 100 had been received as earnest-money, and provided that within two months the vendor would execute a proper conveyance, and thereupon receive the balance of the purchase-money and give up possession.

Held, that the document did not pass any right, title or interest in the property to the purchaser, but merely gave him a right against the vendor personally to call for a conveyance and possession on paying the balance of the purchase-money. HORMASJI MANEKJI DADACHANJI v. KESHAV PURSHOTAM, 18 B. 13 ... 518

(4) *Mortgage — Priority— Unregistered mortgage with possession and without notice not entitled to priority as against a mortgage earlier in date, but subsequently registered—Bombay Regulation* IX *of* 1827—*Act* XIX *of* 1843—*Possession—Hindu law.*—The plaintiff sued to enforce a mortgage dated 8th June, 1863, which was registered on 15th September, 1864, but was unaccompanied with possession. The defendant relied on a mortgage of the same property dated 9th May, 1864. This mortgage was unregistered, but was accompanied with possession.

Held, that, apart from any special peculiarities of Hindu law, the plaintiff's mortgage of the 8th June, 1863, which was registered on the 15th September, 1864, was entitled to priority over the unregistered mortgage of the 9th May, 1864, although the latter was without notice of the earlier mortgage and was accompanied with possession.

Held, also, that plaintiff's mortgage was not invalid under Hindu law owing to its not being accompanied with possession. TRIKAM MADHAV SHET v. HIRJI HARJIVAN SHET, 18 B 332 ... 729

(5) See MORTGAGE (PRIORITY), 18 B. 444, 684.

(6) *Partnership—Mortgage of land to a firm—Dissolution of firm—Division of assets among partners—Letters of one partner to another transferring to the*

Registration—(*Continued*). PAGE

latter the share of the former in the assets of the firm, including the mortgages, but not mentioning them—Necessity of registering such letters—Evidence—Registration Act III *of* 1877, *ss.* 17 *and* 49—*The words "document" and "instrument" in the Registration Act*—By two mortgage-bonds, dated, respectively, 25th July, 1866, and 19th September, 1870, certain lands were mortgaged to a firm of money-lenders at Khadkala, carrying on business under the style of Gangaram and Mayaram. There were four partners in the firm, *viz*, Gangaram, Mayaram, Panji and Sadaram. In 1874 Gangaram retired from the firm, and wrote three letters, the effect of which was to transfer his share in the partnership to Panji and Sadaram. In 1878 the shop was closed, and the partners divided the assets of the firm. The two mortgages fell to the share of Sadaram. Subsequently Sadaram died, and the plaintiff, his son, inherited his property and took possession of the mortgaged lands. These lands were afterwards attached in execution of a money decree against one of the mortgagors (defendant No. 1). The plaintiff objected to the attachment, but his objection was disallowed, and the property was sold in execution and purchased by defendants Nos. 2 and 3. The plaintiff then filed this suit to establish his right under the two mortgage-bonds. The defendants contended that the plaintiff had no interest in the mortgages, and was not entitled to sue. The plaintiff relied (*inter alia*) in support of his title upon the letters (A, B and C), whereby Gangaram had transferred his share in the assets of the firm to his (the plaintiff's) father Sadaram. These letters were objected to as inadmissible in evidence, not having been registered.

Held, that, independently of the letters, there was evidence to show that the plaintiff's father Sadaram was a partner in the firm, and that as such partner the mortgages in question fell to his share at the final division of assets. The position of Sadaram as a partner being once established, his right to the property followed by operation of law, and no other proof of title was required.

Per JARDINE, J.—"To lay down that the three letters in question, which deal generally with the assets, moveable and immoveable, without specifying any particular mortgage or other interest in real property, required registration, would, I incline to think, in the present state of the authorities, go too far. It may be argued that such letters are not 'instruments of gift of immoveable property,' but rather disposals of a share in a partnership of which the business is money-lending, and the mortgage securities merely incidental thereto."

Per TELANG, J.—"Although a partner's share does not include any specific part of any specific item of the partnership property, still where the partnership is entitled to immoveable property, such share does include an interest in immoveable property, and, therefore, every instrument operating to create or transfer a right to such share requires to be registered under our Registration Act (III of 1877). It is true that the authorities referred to apply, in terms, only to immoveable property owned by a partnership. But I am, on the whole, disposed to hold that the principle of those authorities applies to cases where immoveable property is held by a firm not in full proprietorship, but only by right of mortgage. . . Upon the whole I should, if necessary, have been disposed to hold that the letters in question not being registered were rightly treated by the Court below as being inadmissible in evidence to prove directly a transfer of the share of Gangaram in the partnership to Sadaram"

Per TELANG, J.—A perusal of various sections of the Registration Act seems to show that the Legislature has used the words "document" and "instrument" interchangeably. JOHARMAL v. TEJRAM JAGRUP, 17 B. 235 ... 154

(7) *Registration Act* (III *of* 1877), *s.* 17 (*d*)—*Lease—Lease for life of the lessee.*—A lease of immoveable property for the life of the lessee is a lease for a term exceeding one year. It, therefore, requires registration. PARSHOTAM VISHNU v. NANA PRAYAG, 18 B. 109 ... 581

(8) *Registration Act* (III *of* 1877), *s.* 17, *cl.* (*h*)—*Sale—Construction—Document creating a right to obtain another document.*—By an unregistered writing, dated 17th April 1889, A. agreed to sell to B. certain landed property on his (B.'s) paying off the mortgage-debt due upon it and a further sum of

Registration—*(Concluded)*. PAGE

Rs. 1,500. The agreement also stated that B. had on that day paid A. the Rs. 1,500and might pay off the mortgage-debt at any time he liked, and that A. would execute a valid deed of sale. In a suit brought by A. upon the agreement the lower Court held that the agreement was an agreement of the equity of redemption and required registration, and that being unregistered, the plaintiff's claim based on it could not be maintained. On second appeal,

Held, following (7 B. 310) that the agreement did not require registration. SHRIDHAR BALLAL KELKAR v. CHINTAMAN SADASHIV MEHENDALE, 18 B. 396 ... 772

(9) Registration Act (III of 1877), ss. 21 and 60—Description of property not contained in the body of the deed of conveyance, but inserted as a footnote—See CIV. PRO. CODE (ACT XIV OF 1882), 17 B. 94.

(10) *Registration Act* (III *of* 1877), *s.* 50—*Priority—Purchaser under an unregistered deed—Lease of the land by purchaser to the vendor—Decree for rent obtained by the purchaser against the vendor—Effect of such decree on purchaser's title in competition with the title of subsequent purchaser under a registered deed.*—On the 7th August, 1876, the defendant purchased the property in dispute under an unregistered sale-deed. On the same day he leased it to his vendor. In 1878 he obtained a decree for rent against his vendor. On the 23rd May, 1881, the plaintiff purchased the same property from the same vendor under a registered deed of sale. In 1888 the plaintiff sued the defendant to establish his right to the property and to recover possession.

Held, that the plaintiff was entitled to a decree, his registered deed taking priority to the prior unregistered deed of the defendant.

S. 50 of the Registration Act (III of 1877) did not give the defendant priority in virtue of the decree which he obtained in the rent suit, for, in that suit the defendant's ownership was not in dispute, and the decree merely adjudicated as to the relationship between the defendant and his vendors created subsequently to the sale. The defendant's title as owner was not merged in the decree, but still rested exclusively on his deed of sale. KESHAV PANDURANG v. VINAYAK HARI, 18 B. 355 (**F. B.**) ... 745

(11) *Vendor and purchaser—Priority—Notice—Possession—Subsequent purchaser with notice obtaining possession and paying off mortgage—Right to recover sum applied in paying off mortgage.*—The plaintiff sued to recover land purchased by him in 1886 from the first defendant, and which was in possession of defendants Nos. 2, 3 and 4. The conveyance to the plaintiff was duly registered. The third defendant claimed part of the land under a previous sale to him in 1885 by the first defendant, the conveyance to him being also duly registered. The fourth defendant claimed the rest of the land under a sale to him by the first defendant subsequent to the sale to the plaintiff of which he had no notice. He relied upon the fact of his having got possession, and he alleged that the purchase-money which he had paid for the land had been applied by the first defendant in paying off a mortgagee who at the date of his purchase was in possession. He claimed, at all events, the re-payment of this sum.

Held, (1) that the plaintiff was not entitled to the lands in the hands of the third defendant, the latter being a prior purchaser with a deed of conveyance duly registered.

(2) That the plaintiff was entitled to the land in the possession of the fourth defendant, who must be taken to have purchased with notice of the plaintiff's prior purchase, inasmuch as the deed of conveyance to the latter was registered.

(3) That, if the fourth defendant's purchase-money was applied to pay off a mortgage which plaintiff would otherwise have had to pay, the plaintiff could not equitably recover the land without paying the fourth defendant so much of the purchase-money as was so applied. NARAYAN LAKSHMAN v. BAPU VALAD HAIBATRAV, 17 B. 741 ... 487

(12) See VENDOR AND PURCHASER, 18 B. 48.

Registration Act (XIX of 1843).

S. 2—See REGISTRATION, 18 B. 332.

Registration Act (XVI of 1864).

(1) See LANDLORD AND TENANT, 18 B. 66.

(2) See REGISTRATION, 18 B. 92.

Registration Act (XX of 1866).

(1) See MORTGAGE (MARSHALLING), 18 B. 160.

(2) See REGISTRATION, 18 B. 92.

(3) S. 21—See CIV. PRO. CODE (ACT XIV OF 1882), 17 B. 94.

Registration Act (VIII of 1871).

S. 17—See REGISTRATION, 17 B. 235.

Registration Act (III of 1877).

(1) S. 17—See REGISTRATION, 18 B. 92.

(2) S. 17 (*d*)—Lease—See REGISTRATION, 18 B. 109.

(3) S 17 (*h*)—See REGISTRATION, 18 B. 396.

(4) Ss. 17 and 49—See REGISTRATION, 17 B. 235 ; 18 B. 13.

(5) Ss. 21 and 60—See CIV. PRO. CODE (ACT XIV OF 1882), 17 B. 94.

(6) S. 50—See REGISTRATION, 18 B. 355.

Regulation III of 1818 (Bengal State Prisoners).

See HABEAS CORPUS, 18 B. 636.

Regulation II of 1819 (Madras State Prisoners).

See HABEAS CORPUS, 18 B. 636.

Regulation II of 1827 (Bombay, Caste Questions Pleaders).

(1) Will—Bequest to dharmada—Dharmada—Dharma—Hindu law—See HINDU LAW (WILL), 18 B. 136.

(2) See SIRDAR, 17 B. 224.

(3) S. 21—See HINDU LAW (CASTE), 18 B. 115.

Regulation VIII of 1827 (Bombay Administration of Estates).

(1) See APPEAL (GENERAL), 18 B. 748.

(2) S. 2—See JURISDICTION, 17 B. 230.

Regulation IX of 1827 (Bombay, Registration).

S. 6—See REGISTRATION, 18 B. 332.

Regulation XVII of 1827 (Bombay Land Revenue).

See ACT III OF 1869 (BOMBAY LOCAL FUNDS), 17 B. 54, 422.

Regulation XXV of 1827 (Bombay State Prisoners).

See HABEAS CORPUS, 18 B. 636.

Regulation XXIX of 1827 (Bombay, Dekkhan and Khandesh, Puna, Ahmadnagar and Khandesh Districts).

(1) See RESUMPTION, 17 B. 431.

(2) Ss. 4 and 6—See SIRDAR, 17 B. 224.

Re-hearing.

See SMALL CAUSE COURT, 17 B. 14.

Religious Procession.

Religious procession—Public road—Suit to enforce a right to conduct a religious procession along a public road—Obstruction to a public road—Public nuisance—Special damage—Injunction—Right of suit—Cause of action—See CAUSE OF ACTION, 18 B. 693.

Remand.

See CIV. PRO. CODE (ACT XIV OF 1882), 17 B. 733.

Rent.

(1) Succession Certificate Act (VII of 1889)—Landlord and tenant—Suit for rent—See SUCCESSION CERTIFICATE ACT (VII OF 1889), 18 B. 394.

(2) See LANDLORD AND TENANT, 17 B. 475 ; 18 B. 141, 250, 690.

PAGE

Rent—(*Concluded*).

(3) See PRACTICE, 17 B. 547.

(4) See REGISTRATION, 18 B. 355.

Rescission.

See MORTGAGE (REDEMPTION), 17 B. 711.

Reservation.

See EASEMENT, 18 B. 616.

Residence.

Right of—Hindu law—Widow—Widow's right of residence in her husband's house after his death—House mortgaged by plaintiff's husband in his lifetime and sold in execution—Auction-purchaser—Notice of widow's claim to reside—See HINDU LAW (WIDOW), 17 B. 398.

Res Judicata.

(1) Agreement not to execute regarded as satisfaction of decree—Civ. Pro. Code (Act XIV of 1882), ss. 257-*a*, 258, 373—Decree—Execution—Agreement not to execute a decree—Suit to restrain execution—Civ. Pro. Code (Act XIV of 1882), s. 244—See EXECUTION OF DECREE, 17 B. 23.

(2) See EXECUTION OF DECREE, 17 B. 35.

(3) Cause of action—Civ. Pro. Code (XIV of 1882), ss. 13 and 244—Husband and wife—Restitution of conjugal rights—Decree—Decree not executed—Subsequent voluntary cohabitation followed again by desertion—Satisfaction of decree—Second suit for restitution of conjugal rights—See HUSBAND AND WIFE, 18 B. 327.

(4) *Issue in previous suit—Unnecessary issue—Finding on an unnecessary issue inserted in decree—Appeal—Civ. Pro. Code* (XIV *of* 1882), *s.* 13.—The plaintiff attached certain property in execution of a decree obtained by him against one Jamna, the widow of one Raichand. The defendant Ghela intervened and claimed the house as having been purchased by him from one Samal Nathu, to whom, he alleged, Jamna had sold it before the date of the decree against her. The plaintiff's attachment was removed, and the plaintiff thereupon brought a suit (No. 670 of 1886) to establish his right to sell the house in execution. The Court found that the house was not Jamna's, and dismissed the suit on that ground, but it also recorded a finding that the sales set up by the defendant were fraudulent and collusive. Subsequently the plaintiff obtained a decree against Mulji, the son of Raichand, and in execution again attached the house. The defendant again intervened, alleging that the house was his, and the attachment was removed. Thereupon the plaintiff filed this suit to establish his right to sell in execution. The defendant again pleaded that he was owner of the house by reason of the sales set up by him in the former suit. It was argued that these sales had been proved to be collusive and fraudulent in an issue raised in that suit, and that the defence in the present suit was, therefore, *res judicata*.

Held, that the defence was not *res judicata*. The former suit had been decided on the finding that the property in question was not Jamna's. The finding in that suit on the issue as to the sales to the defendant was not necessary for the determination of the suit.

Where an issue is not necessary for the decision of the suit in which it is raised, the decree couched in general terms does not cover the finding on that issue, nor can the insertion of such finding in the decree give it the force of *res judicata*. The Civ. Pro. Code does not contemplate findings on issues being inserted in it (see ss. 2 and 6 and sch. IV), and there is no section in the Code which makes it necessary to appeal from the decree, because such finding has been inserted in it. GHELA ICHHARAM v. SANKALCHAND JETHA, 18 B. 597 ... 907

(5) *Suit on a mortgage against several defendants—Dismissal of suit as against some of the defendants for want of jurisdiction—Subsequent suit on the mortgage against same defendants in another Court—Civ. Pro. Code* (XIV *of* 1882), *ss.* 42, 43.—The plaintiff brought a suit in the High Court of Bombay (No. 169 of 1887) against three defendants on a mortgage executed at Surat of certain property situated there. The covenant for repayment was joint and several. The second and third defendants in that suit (the

Res Judicata—*(Concluded)*. PAG

defendants in the present suit), who were inhabitants of Surat, pleaded that as against them the Court had no jurisdiction. The suit was accordingly dismissed as against them for want of jurisdiction, but as against the first defendant, who resided in Bombay, the Court passed a decree for the plaintiff. The plaintiff then brought the present suit against the defendants in the Surat Court to enforce their liability under the mortgage. The defendants pleaded that the claim against them was barred by the dismissal of the former suit.

Held, that the suit was not barred. In the former suit there had been as against these defendants no decision on the merits, and the proceedings against them were a nullity. BHUKHANDAS VIJBHUKANDAS v. LALLUBHAI KASHIDAS, 17 B. 562 ... 36

(6) See CIV. PRO. CODE (ACT XIV OF 1882), 18 B. 495.

Restitution of Conjugal Rights.

(1) Decree—Decree not executed—Subsequent voluntary cohabitation followed again by desertion—Satisfaction of decree—Second suit for restitution of conjugal rights—Res judicata—Cause of action—Civ. Pro. Code (Act XIV of 1882), ss. 13 and 244, Husband and Wife—See HUSBAND AND WIFE, 18 B. 327.

(2) Husband and wife—Suit for restitution of conjugal rights—Cause of action—Jurisdiction—See HUSBAND AND WIFE, 18 B. 316.

(3) See HUSBAND AND WIFE, 17 B. 400.

Resumption.

Resumption by the Government of estates held on political tenure—Mixed estate of saranjam and inam so held—Non-jurisdiction of Civil Courts.—The engagements entered into by treaty between the British Government and the Raja of Satara in 1819, and the terms fixed separately with the several Satara jaghirdars in 1820, did not impart any greater fixity of tenure than had previously belonged to the latter under Maratha rule; and their jaghirs remained liable to resumption at the will of the Government.

The question to whom a saranjam, or jaghir, shall be granted, upon the death of its holder, is one which belongs exclusively to the Government to be determined upon political considerations; and it is not within the competency of any legal tribunal to review the decision.

Inam villages and lands, with the mokasa, included originally in one saranjam granted under the Maratha rule for the support of troops, remained after 1820, when the rule of the Peshwa had ceased, a personal and military jaghir, forming a mixed estate of saranjam and inam. The tenure remained, under British rule, political; and no distinction could be drawn in this respect between the inam lands and the saranjam. The whole estate passed to the person whom the Government at its discretion, for political reasons, recognized as the grantee, without its being competent to any Court of law to question the decision of the executive authority in the matter. SHEKH SULTAN SANI v. SHEKH AJMODIN, 17 B. 431 (P.C.) =20 I.A. 50=6 Sar. P.C.J. 52=17 Ind. Jur. 100 ... 281

Retrospective Operation.

(1) See CIV. PRO. CODE (ACT XIV OF 1882), 18 B. 429.

(2) See REGISTRATION, 18 B. 92.

Reversionary Interest.

See SPECIFIC PERFORMANCE, 17 B. 232.

Review.

(1) Civ. Pro. Code (XIV of 1882), s. 622—Order made by a Judge in chamber on client to pay taxed costs of his attorney—Application under s. 622, Civ. Pro. Code (XIV of 1882), to review such order—See CIV. PRO. CODE (ACT XIV OF 1882), 17 B. 514.

(2) See LIMITATION, 18 B. 84.

Revision.

See CIV. PRO. CODE (ACT XIV OF 1882), 18 B. 35.

Right of Reply.

See PRACTICE, 18 B. 364.

Right of Suit.

See CAUSE OF ACTION, 18 B. 693.

Right to sue.

(1) See LANDLORD AND TENANT, 18 B. 141.

(2) See LIMITATION ACT (XV OF 1877), 17 B. 341.

Riot.

See PENAL CODE (ACT XLV OF 1860), 18 B. 758

Risk-note.

See RAILWAY COMPANY, 17 B. 417.

Sale of Goods.

(1) *Appropriation to vendee—Passing property to vendee—Bankruptcy of agents for purchase—Unpaid vendor—Stoppage in transit—Termination of transit—Goods landed in Dock and held by Dock authorities—Bombay Act* VI *of* 1879, *ss.* 43 *and* 62—*Port-Trustees of Bombay—Bye-laws of Port—Trust*, *r.* 59.—In August, 1890, the plaintiffs, through Benn, Ashley and Co., of Bombay, ordered from Bevis, Russell and Co., in London, 100 bales of grey shirtings at 7*s.* 10*d.* per piece *f.o.b.*, November-December shipment. In order to carry out this order, Bevis, Russell and Co. purchased goods of the required description from Messrs. Dewhurst and Co., of Manchester. The heading of the invoice of the goods supplied by Dewhurst and Co., contained these words: "Proceeds to be remitted to Messrs, Bevis, Russell and Co., London, specifically for the protection of their acceptances, of Geo. and R. Dewhurst's draft against this or any of these shipments," and the letter addressed by Dewhurst and Co. to Bevis, Russell and Co., forwarding draft contained the following clause:—"It is understood that the proceeds of the goods are to be remitted to be held by you specifically for the protection of the enclosed bill, or any other of your acceptances of our drafts against such shipments, which please confirm." To this letter Bevis, Russell and Co., replied: "We confirm the arrangements between us as to the disposal of remittances and against the shipments." The bales were duly marked with the plaintiffs' mark by direction of Bevis, Russell and Co., and were to be delivered *f. o. b* at Liverpool. Dewhurst and Co., accordingly despatched the 100 bales to Liverpool, and there Bevis, Russell and Co., had them shipped in eight different vessels, *viz.*, 13 bales in each of the four steamers "Nubia," "Clan Drummond," "Inchulva" and "Roumania," and 12 bales in each of the ships "Hispania," "Eden Hall," "City of Edinburgh" and "Wistow Hall." The 100 bales were consigned to Bombay by Bevis, Russell and Co., in their own name, the bills of lading being made out to "their order or to his or their assigns." Bevis, Russell and Co., paid the freight at Liverpool, and effected insurance on the plaintiffs' behalf. All the shipments were made before the 1st December, 1890, except the twelve bales by the "Wistow Hall," which were shipped on that day. On the several shipments being effected, Bevis, Russell and Co., accepted bills of Dewhurst and Co., payable three months after date. The bills of lading of the bales shipped in the "Nubia," "Clan Drummond" and "Hispania" were endorsed, in blank, by Bevis, Russell and Co., and sent by post to Benn, Ashley and Co., of Bombay. The "Nubia" arrived at Bombay in November, and the plaintiffs received the 13 bales shipped by her, Benn, Ashley and Co., having endorsed the bill of lading to the plaintiffs. No specific payment was made by the plaintiffs in respect of these bales, but at that time they had a sum standing to their credit in the books of Benn, Ashley and Co. The invoices of 25 more bales, *viz.*, 13 bales *ex* "Clan Drummond" and 12 bales *ex* "Hispania," arrived in Bombay later in November, and were handed to the plaintiffs. On the first December, 1890, the plaintiffs paid Rs. 25,000 to Benn, Ashley and Co. Neither the "Clan Drummond" nor the "Hispania" had then arrived in Bombay.

On the 4th December, 1890, Bevis, Russell and Co., suspended payment, and on that day a receiving order was made vesting their assets in the first defendant, Wreford; and on the next day Pixley was appointed special manager of the estate under s. 12 of the English Bankruptcy Act

Sale of Goods—(*Continued*).

PAGE

(Stat. 46 and 47 Vic., c. 52). At that time the bills of lading for the remaining 62 bales were still with Bevis, Russell and Co., who then handed them over to Pixley. On the same 5th December, 1890, Benn, Ashley and Co. suspended payment in Bombay. On the 13th December, 1890, Dewhurst and Co. telegraphed to their agents in Bombay, Messrs. Ritchie, Steuart and Co. directing them to stop the goods in transit, including the 25 bales *ex* "Clan Drummond" and "Hispania." On the 15th December, Ritchie, Steuart and Co. on behalf of Dewhurst and Co., gave notice to the agents of the "Hispania" to stop the 12 bales on board that vessel. Previously to that notice, however, the bales had been landed in the Dock at Bombay. They then gave the Dock authorities notices, but at that time the ships' agents had already given the plaintiffs a delivery order for the goods. On the same day, *viz.*, the 15th December, Ritchie, Steuart and Co. gave notice to the agents of the "Clan Drummond" to stop the 13 bales on board. These bales had not then been landed, and were then still on board.

The other five steamers with the remaining 62 bales duly arrived in Bombay and went into Dock. On the 2nd January, 1891, the "Roumania," the "City of Edinburgh" and the "Wistow Hall" had landed all the bales which they had on board. The "Eden Hall" had landed 9 out of the 12 which she had brought, leaving 3 still to be discharged, and the "Inchulva" had not landed any of her bales, the whole 13 being still on board. On that day (2nd January, 1891) Ritchie, Steuart and Co, on behalf of Dewhurst and Co., wrote to the several agents of the above steamers notices of stoppage in transit of the above bales, except in the case of the "Wistow Hall," in respect of which no notice was sent. These notices were all delivered on the 3rd January, 1891.

Held—

(1) On the evidence, that the payment of the Rs. 25,000 by the plaintiffs, to Benn, Ashley and Co., in Bombay was a payment for and on account of the 100 bales. In respect of transactions before bankruptcy, a payment to Benn, Ashley and Co. was a payment to Bevis, Russell and Co.; but, if that were not so, Benn, Ashley and Co. were agents to receive payment.

(2) That on the goods being shipped at Liverpool, if not at an earlier date, the property in them passed from Dewhurst and Co., to Bevis, Russell and Co., and from the latter, by reason of the plaintiff's contract with Bevis, Russell and Co., to the plaintiffs,—Bevis, Russel and Co. having, by holding the bills of lading, the constructive possession of the goods, and the legal right to their actual possession, and to retain the same until their price was paid by the plaintiffs with the charges.

(3) That the plaintiffs were entitled, as against the representatives of Bevis, Russell and Co., and Benn, Ashley and Co., in bankruptcy, to the bills of lading and the goods represented by them without further payment. Ritchie, Steuart and Co., as agents of the Official Receiver had not, therefore, the right to withhold the bills of lading of any of these bales from the plaintiffs.

(4) On the evidence, that when Dewhurst and Co. forwarded the goods to Bewis, Russell and Co. at Liverpool they really started the goods on their voyage to Bombay, and that the transit lasted until the bales were "at home" in Bombay. Until then the right of Dewhurst and Co. to stop the goods in transit lasted.

(5) That effectual notice on behalf of Dewhurst and Co. to stop in transit was given in respect of the 13 bales *ex* "Roumania" by the notice sent by Ritchie, Steuart and Co., on the 15th December, 1890. The general notice given on that day to the agents of the "Roumania" not only as to specific bales, but as to any other bales shipped on account of Geo. and R. Dewhurst to Messrs. Benn, Ashley and Co.," although indefinite, covered the shipment by the "Roumania," and was given in time to prevent the bales on board that ship from reaching "home."

(6) That effectual notice by Ritchie, Steuart and Co., on behalf of Dewhurst and Co., to stop in transit was given in respect of the 13 bales *ex* "Inchulva" and the 3 bales (out of the 12) *ex* "Eden Hall," which were still in board and undischarged at the date the notice of the 2nd January, 1891.

PAGE

Sale of Goods—(*Concluded*).

(7) As to the 12 bales *ex* "Hispania" landed prior to the notice of the 15th December and as to the 12 bales *ex* "City of Edinburgh" and the 9 (out of the 12) *ex* "Eden Hall" landed before the notice of the 2nd January, 1891, and as to the 12 *ex* "Wistow Hall" in respect of which no notice at all was given, that the plaintiffs were entitled to them.

(8) That the goods ceased to be in transit when landed in dock in Bombay. LILLADHAR JAIRAM NARRANJI v. GEORGE WREFORD, 17 B. 62 ... 41

(2) Principal and Agent—Principal and factor—Consignment for sale—Advances by factor on consignment—Right of factor to sell goods consigned to him for sale below the limit of price prescribed by consignor—See PRINCIPAL AND AGENT, 17 B. 520.

Salt-pans.

See STAMP, 18 B. 546.

Sapindas.

See HINDU LAW (INHERITANCE), 17 B. 114, 303.

Saranjam.

And Inam—Resumption by the Government of estates held on political tenure —Mixed estate of saranjam and inam so held—Non-jurisdiction of the Civil Court—See RESUMPTION, 17 B. 431.

Search-warrant.

See CRIM. PRO. CODE (ACT X OF 1882), 17 B. 748.

Sentence.

(1) See CRIM. PRO. CODE (ACT X OF 1882), 18 B. 751.

(2) See PENAL CODE (ACT XLV OF 1860), 17 B. 260.

Service.

See PRACTICE, 18 B. 606.

Service Inam.

See INAM, 18 B. 319.

Set-off.

(1) Equitable defence—Suit by trustees to eject a trespasser from trust property —Civ. Pro. Code (Act XIV of 1882), s. 539—Compromise—See COMPROMISE, 18 B. 721.

(2) See CIV. PRO. CODE (ACT XIV OF 1882), 18 B. 717.

(3) See MORTGAGE (REDEMPTION), 17 B. 32.

Settlement.

(1) See LAND REVENUE, 17 B. 407.

(2) See MAHOMEDAN LAW (WAKF), 17 B. 1.

Settlement Officer.

See ACT I OF 1880 (BOMBAY KHOTI SETTLEMENT), 18 B. 244.

Shah Jog Hundi.

See HUNDI, 18 B. 570.

Sham Transaction.

See FRAUD, 18 B. 372.

Shareholder.

(1) Specific Relief Act I of 1877, s. 42—Declaratory decree—Objection taken for first time in appeal—Practice—Procedure—Company—Shareholder —Executor or administrator of a shareholder—"Holding a share," meaning of—Agreement—Construction—See COMPANY, 17 B. 197.

(2) See COMPANY, 17 B. 472.

Shares.

See COMPANY, 17 B. 197, 472; 18 B. 152.

Sheri and Khata Lands.

See LANDLORD AND TENANT, 17 B. 475.

Shipment. PAGE

See CONTRACT, 17 B. 129.

Signature.

See COMPANY, 17 B. 472.

Sirdars.

(1) *Court of Agent for Sirdars in the Deccan—Suit in that Court—Pensions Act* (XXIII *of* 1871), *s.* 4, *applies to such suit—Collector's certificate—Reg.* XXXIX *of* 1827, *ss.* 4 *and* 6—*Ordinary Rules—Reg.* II *of* 1827—*Jurisdiction.*—A suit brought against a *sirdar* in the Court of the Agent for Sirdars in the Deccan, of the class specified in s. 4 of the Pensions Act (XXIII of 1871), requires a Collector's certificate as provided by s. 6 of that Act. DAJI NILKANTH v. GANPATRAO NILKANTH, 17 B. 224 ... 146

(2) Decree against a sirdar—Political Agent's Court—Death of the sirdar—Application for execution against the heirs—Change of status—Jurisdiction—Civil Court—Section 649, para. 2 of the Civ. Pro. Code (Act XIV of 1882) —See CIV. PRO. CODE (ACT XIV OF 1882), 17 B. 162.

Small Cause Court.

(1) *Presidency Small Cause Courts Act* (XV *of* 1882), *ss.* 38 *and* 69—*Rehearing—Miscarriage or failure of justice—Case stated for the opinion of the High Court.*—In a suit in the Court of Small Causes, in which questions of law and fact were raised, the plaintiffs at first asked the Judge to state a case for the opinion of the High Court under s. 69 of Act XV of 1882. The Judge was willing to do so, but the plaintiffs withdrew their request. The Judge thereupon delivered his judgment and dismissed the suit. The plaintiffs then applied to the High Court for a rehearing under s. 38 of Act XV of 1882. It was contended that the Judge was wrong in his view of the law as applicable to the facts.

Held, that, event if that were the case, there was no "miscarriage or failure of justice" within the meaning of s. 38, and that the plaintiffs were not entitled to a rehearing. VASSONJI TRICUMJI v. THE SOUTHERN MARATHA RAILWAY CO., 17 B. 14 ... 10

(2) *Provincial Small Cause Courts Act* (IX *of* 1877), *sch.* II, *cls.* (4) *and* (31); *s.* 23, *cl.* (1)—*Jurisdiction—Suit to recover share of profits of inam villages—Money had and received for plaintiff's use.*—In a suit for the recovery of a certain share in the profits of *inam* villages, of which the defendant was the manager, the only relief claimed by the plaintiffs being payment of money, namely, Rs. 130.

Held, that the suit was for money had and received for plaintiff's use, and was cognizable by the Court of Small Causes. It did not fall under cl. (4) of sch. II of the Provincial Small Cause Courts Act (IX of 1887), as it was not a suit for the possession of immoveable property, or for recovery of an interest in such a property. If the plaintiffs had alleged that the defendant had "wrongfully received" the plaintiffs' share of profits, then the suit would have fallen under cl. (31), sch. II of the Act. DAMODAR GOPAL DIKSHIT v. CHINTAMAN BALKRISHNA KARVE, 17 B. 42 ... 28

Small Cause Suit.

See PRACTICE, 18 B. 142.

Solicitor.

See ATTORNEY AND CLIENT, 18 B. 263.

Special Contract.

See RAILWAY COMPANY, 17 B. 417.

Special Damage.

See CAUSE OF ACTION, 18 B. 693..

Special Judge.

See ACT XVII OF 1879 (DEKKHAN AGRICULTURISTS' RELIEF), 18 B. 347.

Specific Performance.

(1) *Agreement to sell—Reversionary interest, sale of—Purchase-money less than market value of reversion—Stat.* 31 *Vic.*, *c.* 4—*Inadequate consideration.*—The rule observed in England until the passing of Stat. 31 Vic., c. 4,

PAGE

Specific Performance—(*Concluded*).

that specific performance of an agreement to sell a reversionary interest should not be decreed where the purchase-money was less than the market value of the reversion,

Held, not to be the rule in India. GITABAI v. BALAJI KESHAV SHASTRI, ... 152
17 B. 232

(2) *Injunction—Negative agreement—Discretion of Court—Agreement not to work for a rival tradesman—Specific Relief Act* (I *of* 1877), *ss.* 22, 56 *and* 57.—The plaintiff was a milliner carrying on business in Bombay and the defendant was in his employment up to the year 1890. In that year he left the plaintiff's service, and the plaintiff alleged that at the time he left it he was indebted to the plaintiff for moneys not accounted for and also in respect of loans made to him. The plaintiff instituted criminal proceedings in the Police Court against the defendant for criminal breach of trust, and procured a warrant for his arrest. The defendant surrendered, and at the time of the agreement hereafter mentioned the proceedings in this matter were going on. The defendant was out on bail, and was then in the service of a rival milliner named Bhimji Jivan. On the 1st February, 1893, an agreement, in writing, was made between the plaintiff and the defendant, whereby the defendant agreed as follows:—(1) to pay the plaintiff Rs. 1,950 in full settlement of the plaintiff's claim; (2) to enter plaintiff's service as cutter and to serve him for ten years from the date of agreement; (3) to serve plaintiff honestly. (4) In case plaintiff was obliged to dismiss him for some "fault," then until the expiration of the said period of ten years the defendant should not carry on the business of a cutter or tailor, either directly or indirectly, on his own account or as partner or servant of another, and in case he should do so, the plaintiff should be at liberty to stop him.

On the 15th February, 1893, the charge of criminal breach of trust against the defendant was dismissed, the plaintiff offering no evidence in support of it. The plaintiff subsequently called upon the defendant, to enter his employment in accordance with the agreement, but the defendant refused, and remained in the service of Bhimji Jivan. The plaintiff, therefore, filed this suit praying for an injunction restraining the defendant from carrying on business as a cutter or tailor for ten years from the date of the agreement.

Held, dismissing the suit, that the parties were not really on equal terms, and that in the exercise of the discretion permitted to the Court by s. 22 of the Specific Relief Act (I of 1877) the injunction should be refused. CALLIANGI HARJIVAN v. NARSI TRICUM, 18 B. 702 ... 977

(3) See CIV. PRO. CODE (ACT XIV OF 1882), 18 B. 537.

(4) See HINDU LAW (JOINT FAMILY), 17 B. 718.

(5) See LANDLORD AND TENANT, 18 B. 110.

Specific Relief Act (I of 1877).

(1) See PRACTICE, 17 B. 388.

(2) Ss. 22, 56 and 57—See SPECIFIC PERFORMANCE, 18 B. 702.

(3) S. 28—See SPECIFIC PERFORMANCE, 17 B. 232.

(4) S. 35—See CONTRACT, 18 B. 342.

(5) S. 42—See COMPANY, 17 B. 197.

(6) S. 42—Crim. Pro. Code (Act X of 1882), s. 133—Order for removal of an obstruction standing upon certain land—Effect of Magistrate's order under s. 133—Ownership of such land—Jurisdiction of Civil Court after order made—Declaratory decree—Declaration of title to land—See CRIM. PRO. CODE (ACT X OF 1882), 17 B. 293.

(7) S. 42—Declaration of title—See CRIM. PRO. CODE (ACT X OF 1882), 17 B. 293.

(8) S. 54—See EASEMENT, 18 B. 474.

Stale Demand.

See COMPANY, 18 B. 119.

Stamp. PAGE

(1) *Claim for interest from institution of suit until payment—Future mesne profits —Court Fees Act* (VII *of* 1870), *s.* 7.—No additional stamp is required on account of the claim for interest from institution of the suit until payment. It stands on the same footing as future mesne profits, which do not fall under s. 7 of the Court Fees Act (VII of 1870). VITHAL HARI ATHAVLE v. GOVIND VASUDEO THOSAR, 17 B. 41 ... 27

(2) Court Fees Act (VII of 1870), s. 7, cl. 4, sub-cls. (*c*) and (*d*)—Valuation of suit—Valuation of a suit for injunction—Injunction—Appeal—Order rejecting plaint as insufficiently stamped—See COURT FEES ACT (VII OF 1870), 17 B. 56.

(3) *Court fees—Valuation of suit—Suit for partition.*—The stamp on a suit for partition and possession of the plaintiff's share of joint family property must be an *ad valorem* one on the value of the share. BALVANT GANESH v. NANA CHINTAMON, 18 B. 209 ... 647

(4) Evidence—Document not sufficiently stamped admitted in evidence by lower Court—Appeal Court cannot exclude it—Stamp Act (I of 1879), s. 4, cl. 3 —Practice—Procedure—See PRACTICE, 18 B. 737.

(5) Limitation—Acknowledgment—Unstamped balance of account—Evidence —Stamp Act, I of 1879, s. 34—See LIMITATION, 18 B. 614.

(6) *Money-bond—Endorsement of transfer—Ss.* 13, 14 *and* 34 *of the Indian Stamp Act* (I *of* 1879).—The endorsement of transfer written on a simple money bond duly stamped requires a stamp, and can be stamped under s. 34 of the Indian Stamp Act (I of 1879). PRALHAD LAKSHMANRAV v. VITHU, 17 B. 687 (**F B**) ... 451

(7) *Order for payment of money on a person not a banker.*—The plaintiff agreed to lend money to the defendant for payment of his trade debts, &c. In pursuance of the agreement the defendant gave his creditors "*chits*" for certain sums. These "*chits*" were addressed to the plaintiff, and requested him to pay the amounts mentioned therein. He did so, and now sued for the amount advanced. It was contended by the defendant that the "*chits*" being cheques or bills of exchange were inadmissible in evidence, because unstamped. The Court found that by the agreement the plaintiff was not constituted the defendant's banker within the meaning of cl. (6), s. 3 of the Stamp Act, 1879.

Held, that the *chits* did not require a stamp. RATULAL RANGILDAS v. VRIJBHUKHAN PARABHURAM, 17 B. 684 (**F B**) ... 44

(8) *Stamp Act*, I *of* 1879, *sch.* II, *art.* 13, *cl.* (*c*)—*Salt-pans—Lease.*—A counterpart of a lease of salt-pans held not to be exempt from stamp duty, as it did not purport to be a counterpart of a lease granted to a cultivator. MANJUNATH MANGESHAYA BAINDUR v. MANGESH SHESHAGIRIAPA GOKARNKAR, 18 B. 546 (**F B**) ... 873

(9) *Stamp Act*, I *of* 1879, *sch.* I, *arts.* 16, 21—*Decree—Execution—Sale of property subject to mortgage—Valuation of property sold—Computation of purchase-money—Certificate of sale—Proclamation of sale—Mortgages noted in proclamation of sale—Civ. Pro. Code* (*Act* XIV *of* 1882), *ss.* 282-287.—Mortgages noted in the proclamation of sale as claims upon the property sold, should not be entered in the certificate of sale, or be computed as part of the purchase-money, unless they have been admitted by the parties, or established by decree, or unless they have been declared, under s. 282 of the Civ. Pro. Code (Act XIV of 1882), to be charges on the property, and the Court has seen fit to sell it subject to them, but they should be entered in the certificate and computed as part of the purchase-money if they have been thus admitted or established, or if they have been declared under s. 282 of the Civ. Pro. Code (Act XIV of 1882), and the sale has been held subject to them.

Claims admitted by parties or established by the decree of a Court should be entered in the proclamation of sale as charges upon the property, though they have come to the knowledge of the Court in an enquiry under s. 287 only, and have not been made the subject of an order under s. 287 of the Civ. Pro. Code (Act XIV of 1882). SHANTAPPA CHEDAMBARAYA v. SUBRAO RAMCHANDRA YELLAPUR, 18 B. 175 (**F B**) ... 625

PAGE

Stamp—(*Concluded*).

(10) *Suits Valuation Act* (VII *of* 1887), *s.* 8—*Court Fees Act* (VII *of* 1870)—*Valuation of suits—Appellate Courts—Jurisdiction—Valuation for purposes of jurisdiction—Appeal.*—The provisions of s. 8 of Act VII of 1887 apply to appellate Courts as well as to Courts of first instance, and the value of the subject-matter of suits for the purposes of jurisdiction must be determined by the provisions of that section.

In a suit of the description mentioned in s. 8 of Act VII of 1887, the plaintiff valued his claim at Rs. 664 for the computation of Court fees, and at Rs. 14,000 for purposes of jurisdiction.

Held, that the appeal from the decree of the Court of first instance lay to the District Court, and not to the High Court. BAI VARUNDA LAKSHMI v. BAI MANEGAVRI, 18 B. 207 ... 646

(11) *Valuation—Court Fees Act* (VII *of* 1870), *s.* 7, *cls.* 1—9—*Foreclosure suit—Suit by the mortgagee against the heir of the mortgagor for recovery of the mortgage-debt by sale of mortgaged and other property—Valuation for the purpose of Court-fees.*—A suit instituted by the mortgagee against the heir of the original mortgagor, to have the mortgage-debt paid by sale not exclusively of the mortgaged property, but also out of all the other property in the hands of such heir liable for the debts of the original mortgagor, is virtually a suit for money, and should be valued, not at the principle debt, but the entire amount including interest. KASHINATH BALLAL v. GANPATRAO AMRITESHWAR JOSHI, 18 B. 696 ... 973

(12) See COURT FEES ACT (VII OF 1870), 18 B. 100.

Stamp Act (XVIII of 1869).

Sch. I, art. 13—See REGISTRATION, 17 B. 235.

Stamp Act (I of 1879).

(1) S. 3, cl. (6)—See STAMP, 17 B. 684.

(2) S. 4, cl. (3)—See PRACTICE, 18 B. 737.

(3) Ss. 13, 14 and 34—See STAMP, 17 B. 687.

(4) S. 34—See LIMITATION, 18 B. 614.

(5) S. 34—*Evidence*—Hundis *inadmissible under Stamp Act, but admitted by defendant—Admission.*—In a suit brought upon two *hundis*, which were inadmissible in evidence for want of impressed stamps, the Judge allowed the claim, holding that the defendants' admissions in their written statement rendered it unnecessary to put the *hundis* in evidence.

Held, reversing the decree, that a *hundi* is "acted upon" where a decree is passed on it whether proved or admitted, and that the Court cannot give effect to it in either case. CHENBASAPA v. LAKSHMAN RAMCHANDRA, 18 B. 369 ... 754

(6) Sch. I, arts. 16 and 21—See STAMP, 18 B. 175.

(7) Sch. II, art. 13, cl. (c)—See STAMP, 18 B. 546.

(8) Sch. II, arts. 21, 60—See REGISTRATION, 17 B. 235.

State.

Act of—Deposition of owner from his position by an act of State of foreign power—Effect of deposition on right to property in Bombay—Trustee—Will—Power of appointment—Idol—Property bequeathed to an idol—Owner of shrine—See ACT OF STATE, 17 B. 600.

Statute 4 and 5 William and Mary, C. 18.

See INSOLVENCY, 17 B. 334.

Statute 9, Geo. II, C. 36.

See REGISTRATION, 17 B. 235.

Statute 9, Geo. IV, C. 73.

Ss. 3 and 4—See INSOLVENCY, 17 B. 334.

Statute 3 and 4 William IV, C. 27.

S. 28—See LIMITATION ACT (IX OF 1871), 17 B. 173.

Statute 3 and 4 William IV, C. 85.

S. 43—See HABEAS CORPUS, 18 B. 636.

PAGE

Statute 11 and 12 Vic., C. 21.

(1) See LIMITATION ACT (XV OF 1877), 17 B. 341.

(2) S. 50—See INSOLVENCY, 17 B. 334.

(3) Ss. 50, 51—See INSOLVENCY, 17 B. 313.

Statute 24 and 25 Vict., C. 67.

S. 22—See HABEAS CORPUS. 18 B. 636.

Statute 31 Vic., C. 4.

See SPECIFIC PERFORMANCE, 17 B. 232.

Statute 46 and 47 Vic., C. 52.

S. 12—See SALE OF GOODS, 17 B. 62.

Statutes

Construction of—See CIV. PRO. CODE (ACT XIV OF 1882), 18 B. 429.

Stay of Criminal Proceedings.

See CRIM. PRO. CODE (ACT X OF 1882), 18 B. 581.

Stay of Proceedings.

See COMPANY, 18 B. 65.

Stoppage in transit.

See SALE OF GOODS, 17 B. 62.

Succession Act (X of 1865).

(1) *Ss.* 190, 266 — *Executor de son tort—Suit by one executor de son tort against another—Letters of administration—Administration suit.*—D., a Parsi, died intestate in 1877, leaving him surviving a widow, three daughters and two sons and A and F. On D's death his sons without taking out administration assumed the management of the estate. and each received sums of money on account of it. The widow and daughters of the deceased obtained letters of administration, but limited to the extent of their interest in the estate. In 1888 A brought a suit against his brother F and the other members of the family to recover out of the estate a certain sum of money advanced by him to D.

Held, that the estate being unrepresented, the suit could not be maintained (s. 190 of Act X of 1865). The letters of administration issued to the widow and daughters of the deceased being limited only to the extent of their shares in the estate, were not letters of administration such as are meant by s. 190 of the Indian Succession Act (X of 1865).

Held, also, that the only course open to the plaintiff was to take proceedings for the appointment of an administrator of the estate who would either administer it by the payments of the debts and the distribution of the surplus (if any) amongst the heirs after taking an account of all property already received out of it by the creditors or heirs, or who could be compelled to do so by an administration suit. FRAMJI DORABJI GHASWALA v. ADARJI DORABJI GHASWALA, 18 B. 337 ... 733

(2) Ss. 238, 261—See WILL, 18 B. 237.

(3) S. 239—See PRACTICE, 17 B. 388.

(4) *S.* 240—*Letters of administration—Grant of letters of administration—Deceased having no property and fixed place of abode within district—Jurisdiction of the District Judge.*—A District Judge cannot grant letters of administration to a Parsi if the deceased had not at the time of his death a fixed place of abode or any property within his district—See s. 240 of the Indian Succession Act (X of 1865). FARDUNJI ASPANDIARJI v. NAVAJBAI, 17 B. 689 ... 452

(5) Ss. 280 and 328—See ADMINISTRATOR, 17 B. 637.

Succession Certificate Act (VII of 1889).

(1) *Landlord and tenant—Suit for rent.*—A certain firm mortgaged with possession its immoveable property to two other firms trading jointly, who let out the property to the mortgagor firm. Afterwards some of the partners of the mortgagee firms having died, the surviving partners and the sons of the deceased brought a suit against the mortgagor firm to recover rent

Succession Certificate Act (XIII of 1889)—(*Concluded*). PAGE

which accrued due after the deaths of the deceased partners. The Judge held that the plaintiffs could not proceed with the suit without a certificate under the Succession Certificate Act (VII of 1889).

Held, reversing the order, that as the rent sued upon became due after the deaths of the deceased partners, it formed no part of their estates at the time of their respective deaths, and no certificate was, therefore, necessary under the Succession Certificate Act (VII of 1889). RANCHORDAS NATHUBHAI v. BHAGUBHAI PARMANANDAS, 18 B. 394 ... 771

(2) *Ss.* 1 (4), 6 (*d*) and 7 (1)—*Will, application for a certificate under—Validity of will—Hindu Wills Act* (XXI *of* 1870).—Clause 4 of s. 1 of the Succession Certificate Act (VII of 1889) does not preclude an application from obtaining a certificate under the will of the deceased.

A will having been held to be genuine in a contest between the parties, and there being no suggestion that the will was one to which the Hindu Wills Act (XXI of 1870) applied. *Held*, that the Court could not refuse to grant the certificate. DAVE LILADHAR KASHIRAM v. BAI PARVATI, 18 B. 608 ... 914

(3) *S.* 4 (*a*)—*Preamble—Representative of a deceased person—Person claiming to be entitled to the effects of the deceased—Purchaser at sale in execution of a decree against a deceased person.*—A certain debt due to P (deceased) was sold in execution of a decree against him and was purchased by M. In order to enable him to recover the said debt, M applied to the District Judge for a certificate under the Succession Certificate Act (VII of 1889). The Judge rejected the application on the ground that the applicant was not a representative of the deceased.

Held, reversing the decree, that the applicant having purchased at the auction-sale the debt as part of the deceased's effects, which was sold as such by the Court, was entitled to a certificate under s. 4 (*a*) of the Succession Certificate Act (VII of 1889). MANCHARAM v. BAI MAHALI, 18 B. 315 ... 718

(4) S. 26—See JURISDICTION, 17 B. 230.

(5) S. 28—Practice—Appeal—Reg. VIII of 1827—Order refusing certificate of heirship appealable—See APPEAL (GENERAL), 18 B. 748.

Summary Suit.

Civ. Pro. Code (XIV of 1882), ss. 491, 532 and 533—Claim made by defendant for compensation for arrest—Claim for compensation when defendant has not got leave to appear and defend—Cross-claim when allowed—Set-off—Practice—Procedure—See CIV. PRO. CODE (ACT XIV OF 1882), 18 B. 717.

Summary Trial.

See CRIM. PRO. CODE (ACT X OF 1882), 18 B. 97.

Supreme Court Charter.

Cl. 29—See HINDU LAW (GENERAL), 18 B. 227.

Survey.

See INAMDAR, 18 B. 525.

Talukdari Settlement Officer.

See COURT FEES ACT (VII OF 1870), 17 B. 56.

Tax.

(1) Payment of a tax for one year without protest—Payment of the tax in a subsequent year under protest—Suit to recover money so paid—Cause of action—Estoppel—See ESTOPPEL, 17 B. 510.

(2) See ACT VI OF 1873 (BOMBAY DISTRICT MUNICIPAL), 18 B. 400.

(3) See ACT III OF 1888 (BOMBAY, CITY OF BOMBAY MUNICIPAL), 17 B. 394.

Taxation.

Attorney and client—Trustees—Bills of costs paid by majority of trustees—Right of dissenting trustee to have the bill taxed even after payment—Costs—See COSTS, 18 B. 189.

PAGE

Tenancy.

(1) See ACT V OF 1879 (BOMBAY LAND REVENUE CODE), 18 B. 221.

(2) See LANDLORD AND TENANT. 18 B. 256.

Tenements.

See EASEMENT, 18 B. 616.

Testamentary Suit.

See PRACTICE, 17 B. 388.

Title.

(1) See ACT OF STATE, 17 B. 620-N.

(2) See CIV. PRO. CODE (ACT XIV OF 1882), 17 B. 34, 375.

(3) See CRIM. PRO. CODE (ACT X OF 1882), 17 B. 293.

(4) See INAM, 18 B. 319.

(5) See LANDLORD AND TENANT, 17 B. 631 ; 18 B. 110.

(6) See PRACTICE, 17 B. 581.

Trade-mark.

Infringement—Label—Details different, but general similarity likely to deceive—Injunction.—The plaintiffs sued the defendant for an infringement of their label used on tins of aniline dye, which they imported into Bombay. The label covered the top of the tin, and bore upon it the picture of an elephant in the centre of a curved band ; the rest of the label being a combination in green, red and gold, representations, for the most part, of coins, medals and tracing. The defendant was the agent in Bombay of Cassella & Co., of Frankfort. Prior to 1892, Cassella & Co. had imported aniline dye into Bombay in tins bearing a label, the chief feature of which was an elephant. Of that label, however, the plaintiffs did not complain. But in January, 1892, Cassella & Co. adopted a new label, also bearing the picture of an elephant, different in some respects from the picture on the plaintiff's label and with new surroundings, to none of which, taken separately, did the plaintiffs object, but they complained that in its general effect this new label was so similar to their trade-mark as to amount to a colourable imitation thereof, and to be likely to deceive purchasers.

Held, that the plaintiffs were entitled to an injunction against the defendant.

Per SARGENT, C. J.—The question in a case of this description is not what would be the effect on brokers or even dealers in Bombay, but how the label would be likely to strike incautious or unwary purchasers, such as are to be found more particularly in the Mofussil. After a careful examination I cannot feel any doubt that the attention of such purchasers would be arrested by the general effect of the label, and that notwithstanding such differences, as undoubtedly exist in respect to the colour and size of the elephant and in some other respects, they would regard the labels as symbolical of the plaintiffs' goods.

The remarks of Lord Selborne in *Johnston* v. *Orr Ewing* (7 Ap. Ca., 219), relied on.

Per STARLING, J.—It is quite possible for a label no part of which is a copy of another label to be a colourable imitation of that other label, and to be so like it in general appearance as to be likely to deceive purchasers. BADISCHE ANILINE, &C., FABRIK v. MANECKJI SHAPURJI KATRAK, ... 382
17 B. 584.

Trader.

See ACT XVII OF 1879 (DEKKHAN AGRICULTURISTS' RELIEF), 17 B. 227.

Transfer.

(1) See CIV. PRO. CODE (ACT XIV OF 1882), 18 B. 61.

(2) See STAMP, 17 B. 687.

Transfer of Property Act (IV of 1882).

(1) S. 81—Marshalling of securities—Notice of prior mortgage to subsequent mortgagee—Doctrine of marshalling applicable to mortgages in the Mofussil—Mortgage—See MORTGAGE (MARSHALLING), 18 B. 160.

Transfer of Property Act (IV of 1882)—(*Concluded*). PAGE

(2) S. 97—See MORTGAGE (PRIORITY), 18 B. 684.

(3) S. 123—See HINDU LAW (GIFT), 17 B. 486.

Trees.

See ACT VII OF 1878 (INDIAN FOREST), 18 B. 670.

Trespasser.

(1) See COMPROMISE, 18 B. 721.

(2) See WATAN, 18 B. 22.

Trust.

(1) Will—Deeds not carrying out will—Misapplication of funds—Mistake—Liability of trustee—Limitation—Fraud—Accounts when directed—Discretion of Court to order accounts—Jurisdiction of Court where charity established by will is outside the jurisdiction—Advocate-General, right of—Advocate-General barred by decree in prior suit brought by trustees of charity—Civ. Pro. Code (XIV of 1882), s. 43—Charity—See CHARITY, 18 B. 551.

(2) See MAHOMEDAN LAW (WAKF), 17 B. 1.

Trustees.

(1) Costs—Taxation—Attorney and client—Bills of costs paid by majority of trustees—Right of dissenting trustee to have the bill taxed even after payment—See COSTS, 18 B. 189.

(2) See ACT OF STATE, 17 B. 600.

(3) See CHARITY, 18 B. 551.

(4) See COMPROMISE, 18 B. 721.

(5) See MAHOMEDAN LAW (WAKF), 18 B. 401.

Umpire.

See CONTRACT, 17 B. 129.

Unlawful Consideration.

See CONTRACT, 18 B. 342.

Unnecessary Issue.

See RES JUDICATA, 18 B. 597.

Usage.

See CONTRACT, 17 B. 129.

Valuation.

(1) Court Fees Act (VII of 1870), s. 7, cls. 1-9—Foreclosure suit—Suit by the mortgagee against the heir of the mortgagor for recovery of the mortgage-debt by sale of mortgaged and other property—Valuation for the purpose of Court fees—Stamp—See STAMP, 18 B. 696.

(2) Court Fees—Valuation of suit—Suit for partition—Stamp—See STAMP, 18 B. 209.

(3) Suits Valuation Act (VII of 1887), s. 8--Court Fees Act (VII of 1870)—Valuation of suits—Appellate Courts—Jurisdiction—Valuation for purposes of jurisdiction—Appeal—Stamp—See STAMP, 18 B. 207.

(4) See STAMP, 18 B. 775.

(5) *Valuation of suit—Suits Valuation Act* (VII *of* 1887), s. 8—*Valuation for purposes of Court fees and for purposes of jurisdiction—Jurisdiction—Appeal.*—In a suit for an account the valuation for purposes of Court fees determines the question of jurisdiction, the valuation for both purposes being the same under s. 8 of Act VII of 1887.

The plaintiff sued for an account, and valued the relief sought at Rs. 130. The suit was filed in the Court of a Subordinate Judge of the First Class. The Subordinate Judge rejected the claim. Thereupon the plaintiff appealed to the High Court, valuing his claim in appeal at Rs. 10,505.

Held that the appeal lay to the District Court, and not to the High Court. BHAGVANTRAI MUNSHI v. MEHTA BAJURAO, 18 B. 40 ... 536

(6) See COURT FEES ACT (VII OF 1870), 17 B. 56 ; 18 B. 100.

Variance. PAGE

Between pleading and evidence—See ENCROACHMENT, 17 B. 648.

Vendor and Purchaser.

(1) Bhag—Bhagdari Act (Bombay) V of 1862, s. 3—Mortgage—Alienation of a portion of bhag—Deed—Property comprised in deed—Construction—General words—Particulars of property stated in deed—Leading description—*Falsa demonstratio*—See BHAG, 18 B. 283.

(2) Priority—Notice—Possession—Subsequent purchaser with notice obtaining possession and paying off mortgage—Right to recover sum applied in paying off mortgagee—Registration—See REGISTRATION, 17 B. 741.

(3) Specific performance—Agreement to sell—Reversionary interest, sale of—Purchase-money less than market value of reversion—Stat. 31 Vic., c. 4—Inadequate consideration—See SPECIFIC PERFORMANCE, 17 B. 232.

(4) *Unpaid purchase money, suit by vendor to recover—Evidence—Registration of bonds given for purchase-money—Limitation—Limitation Act* (XV *of* 1877), *sch.* II, *art.* 132.—The defendants purchased land from the plaintiff, and gave bonds for the purchase-money. These bonds were not registered, and were, therefore, not admissible in evidence.

Held, that the plaintiff, as vendor, was under no necessity to rely on the bonds in order to establish a charge on the property sold in respect of the unpaid purchase-money.

Unpaid purchase-money is a charge on the property in the hands of the vendee, and the claim to enforce it falls under art. 132, sch. II of the Limitation Act (XV of 1877). VIRCHAND LALCHAND v. KUMAJI, 18 B. 48 ... 540

(5) See EASEMENT, 18 B. 382.

(6) See REGISTRATION, 18 B. 355.

(7) See SALE OF GOODS, 17 B. 62.

Waiver.

(1) See INSTALMENTS, 17 B. 555.

(2) See LAND ACQUISITION ACT (X OF 1870), 17 B. 299.

Wakfnama.

See MAHOMEDAN LAW (WAKF), 17 B. 1.

Watan Lands.

See LAND REVENUE, 17 B. 407.

Warrant.

See HABEAS CORPUS, 18 B. 636.

Watan.

(1) Watandar—*Mortgage of* watan *property—Adverse possession of watan property—Limitation—Succession—Entry of* watan *in name of trespasser—Effect of Gordon Settlement effected with trespasser.*—Bhujangrav Desai died in 1847, leaving his two widows Kalova and Ramova. The plaintiff Padapa was born to Ramova in 1848, *i.e.*, the year after his death. Bhujangrav Desai's *watan* had been attached by Government in 1844, but in 1848 or 1849 Government restored a small portion of it, entering it in the name of Kalova and refusing to recognise the infant Padapa. In 1865, the Government restored the rest of the *watan*, again acknowledging Kalova as the holder, the agreement with her being under "the Gordon Settlement." In 1865 Kalova mortgaged two villages (part of the *watan*) to one Shrinivas (father of the defendants), who was the *watani karkun*, for Rs. 9,900, which had been advanced by him to Kalova while the *watan* was under sequestration. Possession was given to Shrinivas, and the village officers were directed to pay him the revenues. Subsequently Kalova repented for her bargain, and directed the village officers not to pay the revenues to Shrinivas. He accordingly brought a suit against her for the revenues of 1869-70 and obtained a decree, in execution of which he sold the villages and bought them at the sale. In 1878, however, the Collector cancelled the sale under the Watan Act (III of 1874).

Watan—(*Concluded*).

PAGE

In 1873 Shrinivas obtained a further decree against Kalova for the revenue of two years (1870-72) and for possession as mortgagee. He got possession through the Court in 1875.

Kalova and Padapa, who had been on good terms, quarrelled, and on 16th March, 1872, Kalova adopted one Balapa as a son to her deceased husband Bhujangrav. In December, 1872, Padapa sued Kalova and Balapa, praying that he might be declared the son of Bhujangrav, and that the adoption of Balapa might be cancelled. In 1879 the High Court held that Padapa was the legitimate son of Bhujangrav, and that Balapa's adoption was invalid. The legitimacy of Padapa being thus established, the Collector, in 1878, entered the *watan* in his name. At that time and until 1880 Padapa and Shrinivas were on friendly terms, the two having joint possession of the mortgaged villages, Padapa being subsequently to October 1878, the recognised occupant, and Shrinivas taking some, if not all, of the revenues of the two villages. In 1880 Shrinivas died, and his sons, the defendants, quarrelled with Padapa, who in 1881 obtained an order from the Collector directing the village officers to pay the revenues of the two villages to him and not to the defendants. This order was subsequently set aside, and thereupon Padapa in August, 1887, filed the present suit to have the mortgage executed by Kalova to Shrinivas on 15th September, 1865, declared null and void, and to recover possession of the two villages. In the alternative, he prayed for redemption of the mortgage. The defendants pleaded (*inter alia*) that the villages were not *watan* ; that they were entitled to the villages by reason of adverse possession ; that the suit was barred by limitation, and that the plaintiff was estopped from disputing the mortgage, &c.

Held, (1), on the evidence, that the property in question was part of a *desai watan* and as such was held on service tenure.

(2) That the property in question was subject to the rule which was in force in 1865 when the mortgage to Shrinivas was executed, *viz.*, that alienation by way of mortgage of any portion of *watan* property had no force beyond the life of the *watandar* who mortgages it.

(3) That the plaintiff having been declared to be the legitimate son of Bhujangrav he was, from the date of his birth in 1848, the rightful *watandar*, and Kalova, unless she was manager acting on his behalf, was a trespasser. The fact that Government had entered the *watan* in her name, and that the " Gordon Settlement " was effected with her, would not make her *watandar* as long as Bhujangrav's son (the plaintiff) was alive.

(4) That if Kalova was a mere trespasser, then the plaintiff's right to recover the lands free from incumbrance, on the ground that he was the *watandar*, had been lost by limitation, and the property had become Kalova's by adverse possession. The plaintiff, however, as her step-son, was her heir. The mortgage was proved and was binding on him as heir, and as such he had a right to redeem it. SWAMIRAO v. PADAPA BIN BHUJANGRAV, 18 B. 22 ... 523

(2) See KAZI, 18 B. 103.

(3) See KULKARNI VATAN, 18 B. 516.

Watandar.

(1) *Watandar and deputy—Agreement for payment by deputy to the watandar out of the cash allowance for procuring the deputy's nomination—Watandar's Act* (*Bom. Act* III *of* 1874), *ss.* 7 *and* 23.—An agreement between the watandar and a deputy nominated by him for the payment by the latter to the former, in consideration of procuring such nomination, of a sum of money out of the cash allowance received by the deputy as remuneration assigned to his office is not legal, being contrary to the spirit of s. 7 read with s. 23 of the Watandars' Act (Bombay Act III of 1874). APPA v. SADU, 18 B. 752 ... 1011

(2) See ACT III OF 1874 (BOMBAY HEREDITARY OFFICES), 17 B. 362.

(3) See ACT VII OF 1878 (INDIAN FOREST), 18 B. 670.

(4) See WATAN, 18 B. 22.

Way.

PAGE.

(1) **Right of**—See EASEMENT, 17 B. 745; 18 B. 382.

(2) **Right of**—Encroachment—Injunction—Highway—Place dedicated by owner of land for convenience of occupiers of adjoining houses—User of such open space—Covenant or grant presumed—Easement—Right of way—Landlord and tenant—Variance between pleading and evidence—Practice—Procedure—See ENCROACHMENT, 17 B. 648.

Will.

(1) Act VII of 1889, ss. 1 (4), 6 (*d*; and 7 (1)—Will, application for a certificate under—Validity of will—Hindu Wills Act (XXI of 1870)—See SUCCESSION CERTIFICATE ACT (VII OF 1889), 18 B. 608.

(2) Civ. Pro. Code (Act XIV of 1882), s. 43—Advocate-General, right of—Advocate General barred by decree in prior suit brought by trustees of charity—See CHARITY, 18 B. 551.

(3) *Construction—Gift of income for life with power to appoint—Power of appointment—Invalid power of appointment—Gift over in default of appointment—Gift of residue equally between two sons and then to next of kin*—A Parsi by his will devised a certain house to his executors on trust after payment of repairs, &c., out of the income thereof to pay the balance of such income to his daughters Cuverbai and Jerbai in equal moieties and after their death "to the use of such of the issues only of the said Cuverbai and Jerbai as they should respectively appoint, such appointment to affect their own respective moiety only and not that of the other of them," and in default of appointment on trust to sell the house and divide the proceeds as directed in the will.

Held, that each daughter took half the house in question for her life with power to appoint it among her children as she thought fit. Even if the power to appoint had been invalid, the gift over on default should be upheld, on the authority of *Peacock* v. *Frigout* (L.R. (1893), 1 Ch. 54).

A Parsi testator by his will bequeathed residue of his moveable property to his executors in trust out of the income thereof to apply the sum of Rs. 50 for the maintenance of his son Ratnagar until he should attain 21 years of age and to invest the surplus of such income in Government securities, which should be added to the original *corpus* of his moveable property for the benefits of his said son Ratnagar and upon his attaining the age of 21 to pay over to him "the whole of the interest, dividends and produce only of the *corpus* of the whole of the moveable property" and after the death of Ratnagar in trust to divide the said *corpus* of the moveable property with all its additions and accumulations among the next of kin of the said Ratnagar. By a codicil subsequently executed the testator directed that the above bequest should extend and be applicable to his son Nusserwanji, and that the executors should divide the income of the moveable property between Ratnagar and Nusserwanji instead of giving the whole to Ratnagar. The Court was of opinion that under the will and codicil Ratnagar and Nusserwanji were each to have a moiety of the income for their respective lives, and that on their death one moiety of the *corpus* was to go to their next of kin. The Court, however, declined to make a declaration to that effect, as Ratnagar, who at the date of suit was unmarried, might afterwards marry and have children, who would not be bound by a declaration made in this suit. BYRAMJI JEHANGIR LAMNA v. RATNAGAR JAMSETJI RATNAGAR, 18 B. 1 ... 509

(4) *Construction—Gift to a class—One member of such class in existence at date of gift—Will directing deed to be executed—Date of deed is date of gift.*—One Ruttonji Rupji Mody died in 1856 leaving a will whereby he directed his widow and executrix Ladcore to purchase an estate worth Rs. 20,000 for his grandson Tricumji, and that this estate should be conveyed to trustees, to be held by them in trust for Tricumji for his life or until his insolvency, and after his death for his son or other male heir. At the time of the testator's death Tricumji had no son. The executrix purchased the estate, but no trust-deed was executed. Tricumji, therefore, brought a suit in 1871 to have the will carried out and trust-deed executed. Tribhuvandas Ruttonji (the plaintiff herein), who was Tricumji's uncle, was made a party to that suit and a consent decree was

Will—(*Concluded*). PAGE

passed which ordered that the executrix Ladcore and Tribhuvands should execute a trust-deed in accordance with the direction in the will. A deed was accordingly executed in 1876 whereby the property was conveyed to trustees on the trust declared in the will. At the time of the testator's death Tricumji had no son, but at the date of the deed in 1876 he had one son Chunilal; and in 1883 another son Gangadas (the defendant) was born to him. Tricumji died in 1890. Chunilal died childless in 1891. The plaintiffs, who were the son and grandson of the testator, now claimed the property. They contended that as neither of Tricumji's sons were in existence at the date of the testator's death they could not take under his will or under the deed which was afterwards executed to carry out the will; that although at the date of the deed in 1876 one of the sons (Chunilal) was in existence, nevertheless he could only claim as one of a class, and that class was not ascertained or ascertainable at the date of the testator's death, nor at the date of the deed, Gangadas not having been born until 1883. The whole class was, therefore, excluded, and the property after Tricumji's death was undisposed of.

Held, that, in view of the direction of the will that a deed was to be executed which should declare the trusts of the property, it was the date of the deed subsequently executed which should be regarded in order to determine the validity of the limitations of the property bequeathed and not the date of the testator's death, and that under the deed on the death of Tricumji his son Chunilal became entitled to the property.

In the case of a gift to a class, if there is a person in existence at the time of the gift capable of taking and whom undoubtedly the donor intends to benefit, he is entitled to take, although others of the same class subsequently come into existence whom the donor meant the gift also to benefit, but who cannot take because of their non-existence at the date of the gift. TRIBHUVANDAS RUTTONJI v. GANGADAS TRICUMJI, 18 B. 7 ... 513

(5) *Executor—Probate—Application by executor for probate in* forma pauperis—*Civ. Pro. Code* (XIV *of* 1882), *ch.* 26, *s.* 647—*Practice—Procedure.*—Where an executor is not in possession of the property of his testator and cannot get possession of it, and where he has not himself the means of paying the necessary fees, he may be allowed to petition for, and, if entitled thereto, to obtain probate in *forma pauperis*. *In the matter of The will of* DAWUBAI, 18 B. 237 ... 666

(6) See ACT VIII OF 1890 (GUARDIAN AND WARDS), 17 B. 560.

Winding-up.

See COMPANY, 18 B. 65.

Witness.

(1) See CRIM. PRO. CODE (ACT X OF 1882), 18 B. 581.
(2) See DEFAMATION, 17 B. 127, 573.
(3) See LAND ACQUISITION ACT (X OF 1870), 17 B. 299.

Words and Phrases.

(1) "Acted upon"—See LIMITATION, 18 B. 614.
(2) "Acted upon"—See STAMP ACT (I OF 1879), 18 B. 369.
(3) "Adequate relief"—See EASEMENT, 18 B. 474.
(4) "Any offence referred to in s. 195"—See CRIM. PRO. CODE (ACT X OF 1882), 18 B. 581.
(5) "Any other party"—See PRACTICE, 17 B. 384.
(6) "As between him and them"—See PARTNERSHIP, 17 B. 6.
(7) "As such Judge or Magistrate"—See CRIM. PRO. CODE (ACT X OF 1882), 18 B. 380.
(8) "Carrying on business"—See JURISDICTION, 18 B. 290, 294.
(9) "Case"—See CIV. PRO. CODE (ACT XIV OF 1882), 18 B. 35.
(10) "Common gaming-house"—See GAMBLING, 17 B. 164.
(11) "Dasiputra"—See HINDU LAW (JOINT FAMILY), 18 B. 177.
(12) "Defendants"—See ACT XV OF 1882 (THE PRESIDENCY SMALL CAUSE COURTS), 17 B. 662.

Words and Phrases—(*Continued*).

PAGE

(13) "Dharma"—See HINDU LAW (WILL), 18 B. 136.
(14) "Document"—See REGISTRATION, 17 B. 235.
(15) "During the suit"—See HUSBAND AND WIFE, 17 B. 146.
(16) "Dwell"—See JURISDICTION, 18 B. 290, 294.
(17) "Final decree herein"—See HUSBAND AND WIFE, 17 B. 146.
(18) "Guardian"—See ACT VIII OF 1890 (GUARDIAN AND WARDS), 17 B. 566.
(19) "Guru samarth"—See LIMITATION ACT (XV OF 1877), 18 B. 586.
(20) "Has been granted"—See CIV. PRO. CODE (ACT XIV OF 1882), 17 B. 228.
(21) "Holder of the village"—See INAMDAR, 18 B. 525.
(22) "Holding a share"—See COMPANY, 17 B. 197.
(23) "Inam"—See RESUMPTION, 17 B. 431.
(24) "Inamdar"—See ACT III OF 1869 (BOMBAY LOCAL FUNDS), 17 B. 422.
(25) "Instrument"—See ACT VIII OF 1890 (GUARDIAN AND WARDS), 18 B 375.
(26) "Instrument"—See GAMBLING, 17 B. 184.
(27) "Instrument"—See REGISTRATION, 17 B. 235.
(28) "Instrument of gaming"—See GAMBLING, 17 B. 184.
(29) "In the case of any such action for damages"—See MUNICIPALITY, 18 B. 19.
(30) "Kalave, bahut kay lihine, lobh karava hi vinanti"—See LIMITATION ACT (XV OF 1877), 18 B. 586.
(31) "Khoka"—See HUNDI, 18 B. 570.
(32) "Liable to be seized"—See CIV. PRO. CODE (ACT XIV OF 1882), 17 B. 514.
(33) "Manager"—See LANDLORD AND TENANT, 17 B. 736.
(34) "Manufacturing liquor"—See ACT V OF 1878 (BOMBAY ABKARI), 18 B 428.
(35) "Mercantile usage"—See CONTRACT, 17 B. 129.
(36) "Miras malki"—See MATH, 18 B. 507.
(37) "Mokasa"—See RESUMPTION, 17 B. 431.
(38) "Money grant"—See KULKARNI VATAN, 18 B. 516.
(39) "Mulgenidar"—See LANDLORD AND TENANT, 18 B. 603.
(40) "Opposite party"—See PRACTICE, 17 B. 384.
(41) "Or"—See ACT V OF 1878 (BOMBAY ABKARI), 17 B. 154.
(42) "Ordinary rules"—See SIRDAR, 17 B. 224.
(43) "Or upwards"—See MAHOMEDAN LAW (WAKF), 18 B. 401.
(44) "Penalty"—See ACT VI OF 1873 (BOMBAY DISTRICT MUNICIPAL), 18 B. 400.
(45) "Personally working for gain"—See JURISDICTION, 18 B. 290.
(46) "Petha"—See HUNDI, 18 B. 570.
(47) "Police officer"—See EVIDENCE ACT (I OF 1872), 17 B. 485.
(48) "Punishment"—See PENAL CODE (ACT XLV OF 1860), 17 B. 260.
(49) "Rajseva"—See HINDU LAW (PARTITION), 17 B. 271.
(50) "Realize"—See EXECUTION OF DECREE, 18 B. 458.
(51) "Recoverable as a fine"—See ACT IX OF 1890 (RAILWAYS), 18 B. 440.
(52) "Relating to execution"—See EXECUTION OF DECREE, 17 B. 23.
(53) "Reply"—See PRACTICE, 18 B. 364.
(54) "Sanad"—See LAND REVENUE, 17 B. 407.
(55) "Saranjam"—See RESUMPTION, 17 B. 431.
(56) "Shah Jog"—See HUNDI, 18 B. 570.
(57) "Shall purchase"—See MAHOMEDAN LAW (WAKF), 18 B. 401.
(58) "Shipment"—See CONTRACT, 17 B. 129.
(59) "Signing"—See LIMITATION ACT (XV OF 1877), 18 B. 586.
(60) "Some person claiming under him"—See LIMITATION ACT (IX OF 1871), 17 B. 173.
(61) "Sons and other heirs"—See HINDU LAW (INHERITANCE), 17 B. 758.
(62) "Sons and the rest"—See HINDU LAW (INHERITANCE), 17 B. 758.

Words and Phrases—(*Concluded*). PAGE

(63) "Sue"—See HUSBAND AND WIFE, 17 B. 146.

(64) "Suit"—See HUSBAND AND WIFE, 17 B. 146.

(65) "Summary proceeding"—See ACT VI OF 1873 (BOMBAY DISTRICT MUNICIPAL), 17 B. 731.

(66) "The mortgagee"—See LIMITATION ACT (IX OF 1871), 17 B. 173.

(67) "The title to the property sold"—See CIV. PRO. CODE (ACT XIV OF 1882), 17 B. 375.

(68) "Used"—See GAMBLING, 17 B. 184.

(69) "Working for a rise in exchange"—See INSOLVENCY, 17 B. 313.

(70) "You are to have the use of the drain for passing water as it has continued from old times"—See EASEMENT, 18 B. 382.

Yearly Tenant.

See LANDLORD AND TENANT, 18 B. 110.

177833
16.1.81

PRINTED AT THE LAW PRINTING HOUSE, MOUNT ROAD, MADRAS.

JAMMU & KASHMIR UNIVERSITY
LIBRARY.

DATE LOAND

Class No. _____ Book No _____

Vol. _____ Copy _____

Accession No. _____

JAMMU & KASHMIR UNIVERSITY
LIBRARY.

DATE LOAND

Class No. _____ Book No_____

Vol. _____ Copy_____

Accession No. _____

THE JAMMU & KASHMIR UNIVERSITY
LIBRARY.

DATE LOANED

Class No. [redacted] Book No. [redacted]

Vol. _____ Copy _____

Accession No. [redacted]